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How Critical Is "Critical"?: Holding CFIUS Accountable Under FIRRMA's Expansion

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HOW CRITICAL IS "CRITICAL"?: HOLDING CFIUS ACCOUNTABLE UNDER FIRRMA'S EXPANSION

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INTRODUCTION

In a globalized world where cross-border economic cooperation – and competition – is vital to a nation's strength and prestige, national security threats increasingly have the potential to emerge faster than they can be anticipated or countered. With over $250 billion invested by foreign entities in the United States in 2019,[1] foreign direct investment ("FDI") spurs innovation, creates jobs, and draws talent from around the world to the United States, enabling American industry to remain on the technological cutting edge.[2] FDI also gives investors, from the smallest private investment firms to the largest sovereign wealth funds, access to sensitive intellectual property, trade secrets, and control of companies producing products with dual military and civilian applications.[3]

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1. The United States attracted $251 billion in foreign direct investment in 2019. U.N. CONF. ON TRADE AND DEV., GLOBAL INVESTMENT FLOWS FLAT IN 2019, MODERATE INCREASE EXPECTED IN 2020 (Jan. 20, 2020), https://unctad.org/news/global-investment-flows-flat-2019-moderate-increase-expected-2020.

2. *See* Foreign Investment Risk Review Modernization Act of 2018, H.R. 5515, § 1702(a)(1), 115th Cong. (2018) [hereinafter FIRRMA] (finding that eight and a half percent of United States jobs result from FDI). Moreover, FDI "provides substantial economic benefits to the United States, including the promotion of economic growth, productivity, competitiveness, and job creation, thereby enhancing national security." *Id.* at § 1702(b)(1).

3. *See* JIM MATTIS, DEPT. OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF

The United States has struggled to balance an "open door" policy with respect to FDI, predicated on the belief that the "investment process [functions] most efficiently in the absence of government intervention" and the fear that overly restrictive policies would be met with retaliatory measures from foreign governments,[4] with attendant national security concerns. These competing interests led President Ford to establish the Committee on Foreign Investment in the United States ("CFIUS" and the "Committee") through Executive Order in 1975.[5] In the fifty years since its inception, CFIUS has evolved into a potent interagency committee providing the Executive with a flexible means to confront national security threats arising out of FDI.[6]

Despite its significant power to block foreign-backed mergers, acquisitions, and other transactions,[7] CFIUS has been party to only a single lawsuit.[8] The highly sensitive nature of its proceedings and fact that most of the information surrounding its decisions is classified shrouds the Committee in mystery.[9] The Foreign Risk Review and Modernization Act ("FIRRMA")[10] overhauled CFIUS in 2018 and represents the largest expansion yet of its mandate. However, FIRRMA left key definitions of critical infrastructure and national security nebulous and propagated an investment review process that grants immense discretionary power to the Executive, subject to little meaningful oversight. This Paper urges that firmer definitions of national security and critical infrastructure, along with a more robust judicial review process for disputed CFIUS reviews, are needed to ensure accountability throughout the CFIUS review process and to avoid subjecting industries, companies, and economic actors not within the Committee's purview to review for political purposes.

Part I explores the Committee's evolution and emphasizes the changing conception of national security and critical infrastructure with each legislative development. This Part highlights that CFIUS evolved in a linear fashion in response to contentious proposed transactions connected to politically sensitive countries, with each development leaving the

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THE UNITED STATES OF AMERICA, 3 (2018) (illustrating how commercial technological innovations necessarily alter "the character of war."). "The fact that many technological developments will come from the commercial sector means that state competitors and non-state actors will also have access to them, a fact that risks eroding the conventional overmatch to which our Nation has grown accustomed." *Id*.

4. *See* Robert H. Mundheim & David W. Heleniak, *American Attitudes Toward Foreign Direct Investment in the United States*, 2 U. PA. J. OF INT'L. L. 221, 221 (1979).

5. *See* Foreign Investment in the United States, Exec. Order No. 11,858, 3 C.F.R. § 586 (1971-1975), *reprinted as amended in* 40 Fed. Reg. 20263 [hereinafter Exec. Order No. 11,858].

6. National security is a notoriously difficult to define term. *See* Margaret L. Merrill, *Overcoming CFIUS Jitters: A Practical Guide for Understanding the Committee on Foreign Investment in the United States*, 30 QUIN. L. REV. 1, 4 (2011) (stating that CFIUS' "national security standard" is "vague"). *See also* JAMES K. JACKSON, CONG. RES. SERV., RL33312, THE EXON-FLORIO NATIONAL SECURITY TEST FOR FOREIGN INVESTMENT 7 (2010) [hereinafter Jackson 2010] ("Neither Congress nor the Administration have attempted to define the term national security as it appears in the Exon-Florio statute.").

7. *See* FIRRMA, *supra* note 2, at § 1703.

8. Ralls Corp. v. Comm. on Foreign Inv. in the United States, 758 F.3d 296 (D.C. Cir. 2014).

9. CFIUS has played a role in several high-profile transactions but the existence and function of the Committee remains little-known to the general public. *See, e.g.*, Paul Rosenzweig, *Unpacking Uranium One: Hype and Law*, LAWFARE (Oct. 27, 2017, 9:00 AM), https://www.lawfareblog.com/unpacking-uranium-one-hype-and-law (detailing the participation of CFIUS in the controversial 2017 transfer of American uranium mining operations to a Russian company).

10. FIRRMA, *supra* note 2.

Committee more powerful.

Part II examines FIRRMA's content and explores the implications its major changes pose to future FDI in the United States. FIRRMA expands CFIUS' scope, mandate, and authority in distinct ways and simultaneously leaves the Committee vulnerable to politicization and deepens the ambiguity surrounding national security and critical infrastructure.

In light of FIRRMA's expansion of the Executive's ability to act through CFIUS, Part III argues that a standard of judicial review of Executive action is needed to ensure the Committee's focus does not needlessly stray from the national security realm to the political domain. Through analysis of *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, this Part demonstrates that the *Ralls* court's failure to extend its holding[11] to the President itself compounds FIRRMA's perpetuation of definitional ambiguities and enables the Executive to use CFIUS to achieve political aims by encroaching on transactions not properly under the Committee's purview.

Finally, Part IV shows that the trifecta of ill-defined concepts of national security and critical infrastructure, FIRRMA's inclusion of transactions not previously subject to CFIUS review, and inadequate judicial review have already had tangible, deleterious effects on the bio-pharmaceutical industry. As an industry where international research teams and investment syndicates are crucial to the production of vaccines and other vital technologies, CFIUS' increasingly political focus threatens to interfere with public health.[12]

This Paper concludes by reaffirming the importance of flexible tools that provide the Executive with a means to respond to complex and sophisticated national security threats. However, the exercise of that power must necessarily be guided by clear understandings of key terms and limited by prudent judicial review, lest an expansive view of national security draw ever broader swathes of the economy under CFIUS' umbrella and set a precedent for continued politicization of the Committee.

PART I: CFIUS EVOLVES FROM NOTIFICATION SERVICE TO DEFENSIVE LINEMAN

President Ford established CFIUS through Executive Order in 1975[13] with a mandate to "[r]review investments in the United States which, in the judgment of the Committee, might have major implications for United States national interests."[14] CFIUS would be comprised of the Secretaries of State, the Treasury (who would serve as Chair), Defense, Commerce, the United States Trade Representative, the Chairman of the Council of Economic Advisors, the Attorney General, and the Director of the Office of Management and Budget.[15] The Committee was intended to serve an

11. *See* FIRRMA, *supra* note 2, § 1715. Congress subsequently codified the *Ralls* court's holding that judicial review of CFIUS reviews was permissible when the claim involved allegations of constitutional Due Process violations. *See*

12. The industry is susceptible to politicization. *See Covid-19: Trump Sought to Buy Vaccine Developer Exclusively for U.S., Say German Officials*, THEBMJ (Mar. 17, 2020, https://www.bmj.com/content/368/bmj.m1100).

13. *See* Exec. Order No. 11,858, *supra* note 5.

14. *Id.*

15. *Id.*

advisory and review function without legal authority to block transactions.[16] While CFIUS' gaze appeared cast generally outward, it in fact had a primary focus that the rather vague language of its origins belied. The 1973 Oil Embargo left Congress deeply concerned about the susceptibility of American industry to foreign influence, and CFIUS was in part a response to an influx of capital from the Organization of the Petroleum Exporting Countries.[17] Interestingly, then, two characteristics that continue to shape the conversation around CFIUS were with it from the beginning: the possibility of politicization and a tension between liberal economic policies and meaningful abilities to restrict FDI.[18]

Throughout its early years, CFIUS mostly compiled reports and studies on foreign investment trends, with little available to ascertain what, if anything, of importance the Committee accomplished during that time.[19] By the mid-1980's, anxiety over foreign financial control of American industry had shifted from the Middle East to the Far East, with Japanese investments facing particular scrutiny.[20] The 1988 proposed acquisition of Fairchild Technologies by Fujitsu, a Japanese conglomerate, was the straw that broke the camel's back:[21] Fairchild was an early Silicon Valley pioneer and manufactured components for essential, and obvious, national security tools such as missile guidance systems. The proposed acquisition was set against a backdrop of seemingly endless Japanese investment in the United States, from supercomputers to skyscrapers,[22] and was considered to be the "'opening gun' of a broader Japanese assault on American technological

16. Mundheim & Heleniak, *supra* note 4, at 225 ("The Committee's objectives are limited in accordance with the general American policy of avoiding governmental involvement in particular transactions.").

17. "As America was coming out of the oil embargo, there was Congressional concern "regarding the 'return in the form of direct investment of a portion of [OPEC's] huge petrodollar surplus, gained just after a politically motivated oil embargo on the United States." C.S. Eliot Kang, *U.S. Politics and Greater Regulation of Inward Foreign Direct Investment*, 51 INT'L. ORG. 301, 302–03 (1997).

18. CFIUS was seen as a compromise between legislation restricting FDI and an untamed investment landscape, as well as a step that conferred first-mover advantages on the Executive in shaping the nascent conversation around FDI. *See* David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 92–93 (2009) (discussing President Ford's concern that lingering scars from the 1973 Oil Embargo would lead Congress limit investment from OPEC).

19. By 1980, Congress raised concerns that CFIUS wasn't fulfilling its purpose, with complaints abounding that the Committee only met ten times between 1975 and 1980. JAMES K. JACKSON, CONG. RES. SERV. RL 33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES 6 (Feb. 26, 2020) [hereinafter Jackson 2020].

20. *See* George S. Georgiev, *The Reformed CFIUS Regulatory Framework: Mediating Between Continued Openness to Foreign Investment and National Security*, 25 YALE J. ON REG. 125, 126–27 (2007) (indicating that growing concern over Asian foreign investment prompted Congress to see a renewed purpose for CFIUS).

21. Timothy Webster, *Why Does The United States Oppose Asian Investment*?, 37 N.W. J. INT'L. L. & BUS. 213, 228, 231 (2017). Contemporary commentary compared the proposed acquisition 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, https://www.latimes.com/archives/la-xpm-1987-11-30-mn-16900-story.html).

22. *See* Evan J. Zimmerman, Note, *The Foreign Risk Review Modernization Act: How CFIUS Became a Tech Office*, 34 BERK. TECH. L. J. 1267, 1271 (2019).

supremacy."[23]

Congress responded to the perceived threat with the Exon-Florio Amendment to the Defense Production Act (the "DPA") as part of the Omnibus Trade and Competitiveness Act of 1988,[24] which empowered the President and its designees to review and suspend or prohibit any and all mergers and acquisitions that might result in foreign control of "persons engaged in interstate commerce" for the purpose of national security.[25] Congress stipulated, however, that the President act only after it "concluded that other laws were inadequate or inappropriate to protect the national security" and "'credible evidence' existed that the foreign interest exercising control might take action that threatened to impair U.S. national security."[26] President Reagan delegated his authority under the Amendment to CFIUS,[27] cementing the Committee as an important player in United States foreign investment policy with the power to recommend that some transactions be blocked, despite Exon-Florio's text making no reference to CFIUS.[28]

However, the Reagan Administration vetoed the first version of Exon-Florio, persuaded by objections from Treasury Secretary James Baker that Exon-Florio's language pertaining to "national security and essential commerce" would "broaden the definition of national security beyond the traditional concept of military/defense to one which included an . . . economic component."[29] Congress relented and removed "essential commerce" from the final bill, although what was meant by national security remained unclear. Some commentators noted that Exon-Florio's place among the statutes of Title VII of the DPA was calculated to signal that Exon-Florio should be interpreted as only dealing with the broad, industrial-based issues addressed by the DPA and not more far afield national security concerns addressed by export control measures.[30] Opposing that view was the contention that the standard of review of transactions under Exon-Florio was "national security," and although it was not intended to authorize investigations of foreign acquisitions "outside the realm of national

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23. *Id.* at 1272–73.

24. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418 § 502, 1102 Stat. 1107, 1425 (codified as amended at 50 U.S.C. app. §§ 2158–2170 (2018)) [hereinafter Exon-Florio].

25. *Id.* at § 5021(a).

26. Jackson 2020, *supra* note 19, at 7. "This same standard was maintained in . . . [2007's] Foreign Investment and National Security Act, and in FIRRMA." *Id.*

27. *See* Implementing the Omnibus Trade and Competitiveness Act of 1988 and Related International Trade Matters, EXEC. ORDER 12,661, 3 C.F.R., 54 F.R. 779 (1988) [hereinafter Exec. Order 16,661]. The Executive Order principally granted CFIUS authority to "conduct reviews, to undertake investigations, and to make recommendations" to the President. Jackson 2010, *supra* note 6, at 4.

28. *See* Georgiev, *supra* note 20, at 127. Exon-Florio instituted a four-step, largely voluntary review process, by which a domestic target company of a foreign merger, acquisition, or takeover would voluntarily notify CFIUS. Following receipt of the notice, CFIUS had a thirty-day window to decide whether to investigate; if it chose to do so, the investigation had to be completed within forty-five days. Finally, the President had fifteen days to block the transaction if CFIUS recommended such action.

29. Jackson 2010, *supra* note 6, at 4.

30. *See* MICHAEL V. SEITZINGER, CONG. RES. SERV. RL33103, Foreign Investment in the United States: Major Federal Statutory Restrictions 14 (June 17, 2013) (expressing the view that Congress intended a limited understanding of national security to apply under the Exon-Florio Amendment).

security," the national security standard should be "interpreted broadly without limit to particular industries."[31]

While the definition of national security may have intentionally been left vague to accord greater discretion to the President,[32] Exon-Florio provided a list of twelve factors to be considered by the President, acting through CFIUS,[33] when deciding whether a foreign acquisition posed a national security threat.[34] Among those were directives to consider the:

> (1) domestic production needed for projected national defense requirements;
> (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services; and
> (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security.[35]

Despite the more complete attempt at regulatory guidance, and despite a sharp increase in CFIUS activity starting in 1989, critics maintained that CFIUS was impotent under the new legislative regime. Some felt Exon-Florio was too lenient and permitted an environment where the "President appear[ed] to be out of the loop on what are increasingly regarded as important national security questions."[36] Exon-Florio also did little to assuage those who feared that economic concerns would prevail over national security concerns in determining which foreign acquisitions were targeted for scrutiny.[37] Although CFIUS was more active in the three year period following the adoption of Exon-Florio,[38] few of the investigations undertaken led to CFIUS recommending the President take action to block a proposed acquisition.[39]

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31. H.R. REP. NO. 100-576, at 926 (1988) (Conf. Rep.). The Conference Report further recognized that the term "'national security' is not a defined term in the Defense Production Act" and it was not intended to imply any limitation on the term "national defense" as used elsewhere in the DPA. *Id.*

32. *See id.*

33. *See* Exec. Order 12,661, *supra* note 27 (delegating the President's powers under Exon-Florio to CFIUS).

34. *See* Exon-Florio, *supra* note 24, § 2170(e).

35. *Id.*

36. Alan P. Larson & David M. Marchick, Council on Foreign Relations, Foreign Investment and National Security: Getting the Balance Right 17 (2006).

37. *See* Georgiev, *supra* note 20, at 129 (noting that definition of national security was interpreted too narrowly, partly as a result of the list of twelve factors under Exon-Florio being too vague to sufficiently evaluate national security threats). This critique again reflects the lingering tension between an open, liberal economic system and an effective means to police harmful foreign investment.

38. EDWARD GRAHAM & DAVID M. MARCHICK, U.S. NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 57 (2006) (noting that CFIUS reviews peaked in 1990 with nearly 300 transactions reviewed, a far cry from the do-nothing Committee of the 1975-1980 era).

39. CFIUS conducted fifteen forty-five day reviews of transactions between 1988 and 1994, in which the President took action in only one case. *See* U.S. Gen. Accounting Office, GAO-96-12: *Report to Congressional Requesters: Foreign Investment Implementation of Exon-Florio and Related*

These concerns and criticisms resonated with Congress and engendered a belief that Exon-Florio insufficiently advanced the interests of national security and needed to be revisited.[40] In 1992, Congress amended Exon-Florio through § 837(a) of the National Defense Authorization Act for Fiscal Year 1993,[41] commonly referred to as the "Byrd Amendment" after its sponsor, Senator Robert Byrd. The most significant departure from Exon-Florio was the requirement that CFIUS review of foreign acquisitions would become mandatory in cases where (1) the acquiring entity is "controlled by or acting on behalf of a foreign government" and (2) "the acquisition results in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States."[42]

Additionally, the Byrd Amendment added two more factors to those originally included under Exon-Florio for the President or its designee to consider in reviewing proposed takeover transactions. The first additional factor mandated consideration of "the potential effects of the proposed . . . transaction on sales of military goods, equipment, or technology to any country."[43] The second related to the transaction's "potential effects" on United States technological leadership in areas "affecting United States national security."[44] Finally, the Byrd Amendment conferred a "briefing requirement" on the Committee to provide, upon request by Congress, reports concerning actions taken on covered transactions[45] and established CFIUS as a "multi agency committee to carry out [§ 2170] and such other assignments as the President may designate."[46]

For over a decade, the Byrd Amendment served as the governing authority for CFIUS. In spite of what may be viewed as a more generous interpretation of "national security" in light of § 2170(f)(4) and (5)'s "potential effects" language,[47] the Byrd Amendment preserved certain

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Amendments 3 (1995).

40. Two failed foreign acquisitions during the H.W. Bush Administration – China National Aero-Technology Import and Export Corporation's attempted purchase of MAMCO Manufacturing Inc. and a French company's proposal to acquire LTV Corporation's missile division – convinced Congress that Exon-Florio could not "aggressively protect national security" without amendment. *See* Deborah M. Mostaghel, *Dubai Ports World Under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?*, 70 ALB. L. REV. 583, 597–600 (2007).

41. Pub. L. No. 102-484, § 837, 106 Stat. 2339, (1992) (codified as amended at 50 U.S.C. app. § 2170 (2018)).

42. Jackson 2020, *supra* note 19, at 9. Recall that Exon-Florio only called for voluntary submission by domestic target companies of foreign acquirers to CFIUS review. *See* Georgiev, *supra* note 20, at 127.

43. Exon-Florio, *supra* note 24, § 2170(f)(4).

44. *Id.* § 2170(f)(5). The "potential effects" language under § 2170(f)(4) and (5) can be seen as broadening the what was captured under the umbrella of national security, while offering no guidepost for what would constitute a "potential effect" detrimental to national security. *See, e.g.*, Mostaghel, *supra* note 40, at 602.

45. Exon-Florio, *supra* note 24, § 2170(g)(1).

46. *Id.* § 2170(k)(1).

47. The United States Government Accountability Office took an opposite view. *See* U.S. Gen. Accounting Office, GAO-05-686: *Defense Trade: Enhancements to the Implementation of Exon-Florio Could Strengthen the Law's Effectiveness*, 13–15, 18–19 (2005) (considering the Committee's ultimate goal to be avoiding a "chilling of foreign investment in the United States"). This overarching policy objective led to the Treasury adopting implementing regulations pursuant to Exon-Florio and the Byrd

shortcomings that concerned critics of Exon-Florio before it; namely, that CFIUS still was not doing enough to effectively screen potentially harmful foreign investment.[48] These semi-dormant concerns were brought to the forefront in 2005 by two especially contentious transactions: the attempted all-cash acquisition of Unocal Oil by CNOOC, a subsidiary of China's state-owned China National Offshore Oil Corporation, and Dubai Ports World's ("DP World") offer to purchase Peninsular and Oriental Steam Navigation Company, a British company that owned and operated six American ports.

Of the two, the DP World debacle had a more pronounced effect on Congress. Despite confidence that China's holdings of "billions of dollars in U.S. Treasury securities" would give it leverage in a CFIUS review, CNOOC retreated from its proposed acquisition amidst public outcry.[49] DP World, on the other hand, voluntarily submitted to CFIUS review and, following a thirty-day review required under § 2170(a),[50] CFIUS decided not to initiate the additional forty-five-day investigation mandated for entities controlled by or acting on behalf of a foreign government.[51] This decision elicited a sharp response from Congress and the public[52] even as advocates, including President Bush, pointed out that the transaction only involved port operations and DP World would not manage port security.[53] Further, there was confusion between CFIUS and Congress with respect to the necessity of the forty-five-day review under the Byrd Amendment.[54] DP World resubmitted the transaction to CFIUS for a forty-five-day review, but the damage was done, and DP World withdrew from the proposed acquisition altogether as public and Congressional criticism intensified.[55]

Frustrated with years of uncertain application of rules and perceived

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Amendment that relied on too narrow a definition of national security to avoid signaling that the government viewed a transaction as "problematic" and harming companies' share prices. *See id.*

48. Mostaghel, *supra* note 40, at 602 ("Although Byrd created a mandatory review of transactions involving foreign governments, it did not create a mandatory reporting mechanism for the parties. Since the parties need not notify CFIUS, the mandatory review may never be triggered.").

49. *Is CNOOC's Bid for Unocal a Threat to America?*, WHARTON SCHOOL (Nov. 21, 2005, http://knowledge.wharton.upenn.edu/article.cfm? articleid=1240). *See also* Ben White, *Chinese Drop Bid to Buy U.S. Oil Firm*, WASH. POST (Aug. 3, 2005, https://www.washingtonpost.com/archive/politics/2005/08/03/chinese-drop-bid-to-buy-us-oil-firm/dead8033-4be2-4944-a251-725476e8c41c/) (predicting that China would deal with "reciprocal reaction" in response to the collapse of the CNOOC transaction).

50. *See* Georgiev, *supra* note 29, at 128.

51. *See* Jackson 2020, *supra* note 19, at 9.

52. The wounds of 9/11 fueled the outcry. *See* David E. Sanger, *Under Pressure, Dubai Port Company Drops Port Deal*, N.Y. TIMES (Mar. 10, 2006, https://www.nytimes.com/2006/03/10/politics/under-pressure-dubai-company-drops-port-deal.html) ("What appeared to set off Democrats and Republicans this time, against the backdrop of concern about possible terrorist attacks, was that the buyer was a state-owned Arab company).

53. Press Release, The White House, Fact Sheet: The CFIUS Process and the DP World Transaction (Feb. 22, 2006), http:// www.whitehouse.gov/news/releases/2006/02/print/20060222-11.html.

54. "Some . . . [in] Congress apparently interpreted the [Byrd Amendment] to direct CFIUS to conduct a mandatory 45-day investigation if the foreign firm involved in a transaction is owned or controlled by a foreign government." Jackson 2020, *supra* note 19, at 9. In contrast, CFIUS interpreted the forty-five-day review to be discretionary, not mandatory. *Id.*

55. *See* Sanger, *supra* note 52.

timid responses to foreign acquisitions, Congress overhauled CFIUS through the Foreign Investment and National Security Act of 2007 ("FINSA").[56] FINSA expanded CFIUS' membership to include the Director of National Intelligence,[57] expanded CFIUS' scope to include any "covered transaction,"[58] and mandated review of any merger, acquisition, or takeover involving foreign government-controlled acquirers or when an acquisition threatened "national security" or foreign control of "critical infrastructure."[59] While "control" was defined in the Treasury's implementing regulations, "national security" was not, leaving "companies . . . forced to piece together a collection of sources that provide limited, vague direction regarding the national security evaluation."[60]

Ultimately, while FINSA buttressed CFIUS and attempted, as Exon-Florio and the Byrd Amendment did before it, to strike a balance between a perceived need for greater oversight of FDI while preserving the United States permissive investment climate, its adoption cemented the ambiguities that plagued the definitions of national security and critical infrastructure from the Committee's inception. Moreover, FINSA traced its origins to a political panic,[61] revealing that the ambiguous definitions of those crucial terms, defended partly for their supposed ability to avoid circumvention by foreign entities, were susceptible to politically motivated manipulation and abuse.[62] FINSA set the stage for an unpredictable FDI policing climate and signaled that the Committee's reach was only another political scare away from further expansion.[63]

PART II. FIRRMA AND AN EMBOLDENED CFIUS

Just as Exon-Florio and FINSA were passed in response to political fears of rivals infiltrating American industry,[64] so was FIRRMA. By

56. Pub. L. No. 110-49, 121 Stat. 246 (2007) [hereinafter FINSA].

57. Jackson 2020, *supra* note 19, at 10–11.

58. FINSA, *supra* note 56, § 2(a)(3) ("The term 'covered transaction' means any merger, acquisition, or takeover that is proposed . . . by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.").

59. *Id.* § 2(b)(2)(B)(III).

60. Christopher M. Tipler, *Defining 'National Security': Resolving Ambiguity in the CFIUS Regulations*, 35 U. PA. J. INT'L. L., 1223, 1239 (2014). *See also id.*, citing the *Technology Preservation Act of 1991, to Amend the 1988 Exon-Florio Provision*: *Hearing on H.R. 2624 Before the H. Subcomm. on Econ. Stabilization of the H. Comm. on Banking, Fin, and Urb. Aff.*, 102d Cong., (1992) (statement of William Barreda, Deputy Assistant Secretary of the Treasury) ("[W]e have not defined national security [because] . . . national security should be looked at in a broad sense)," implying that "defining it would let companies circumvent the definition.").

61. *See* Zimmerman, *supra* note 22, at 1277 (noting that FINSA was passed "in response to foreign investment from one of the United States' main rivals," referring to the failed CNOOC acquisition of Unocal).

62. *See* Tipler, *supra* note 60, at 1239.

63. *See infra* Part II.

64. Recall that Exon-Florio was passed in response to fears of a wave of Japanese and other Asian investors vacuuming up large swaths of American industry and FINSA out of concern that Middle Eastern actors were compromising national security through controlling investments, notably in port infrastructure. *See* Jackson 2020, *supra* note 19, at 6.

President Obama's second term, Congress was increasingly wary of the motives of Chinese investors in the United States.[65] In 2013, a potential acquisition of a United States pork producer by Shanghui, a Chinese company, prompted Senator Debbie Stabenow to cite the health of American families as a national security concern in light of Shuanghui's "troubling track record on food safety."[66] And echoing the much maligned approval of the DP World transaction, CFIUS in 2016 turned a deaf ear to Congressional complaints and permitted Syngenta acquisition by ChemChina.[67] While FIRRMA does not explicitly reference China,[68] that country was clearly the impetus for FIRRMA's passage in 2018.[69] FIRRMA modernized CFIUS but in many respects preserved the Committee's shortcomings and threatens an expansion of Executive power unchecked by judicial limitations.

FIRRMA altered CFIUS in three critical ways. First, it expanded the Committee's mandate, transforming it from a body meant primarily to safeguard American national security interests to one committed to securing America's technological supremacy.[70] CFIUS originally protected tangible national security assets. FIRRMA's "Sense of Congress" makes clear that Congress' expansion of the covered transactions subject to CFIUS review was driven by a goal to protect general technological supremacy[71] – CFIUS is now empowered to recommend classifying a technology as critical.[72]

Second, it expanded the types of covered transactions. CFIUS is no longer limited to considering just mergers and acquisitions and takeovers, but may now review minority investments that do not involve a change in

65. *See* Jackson 2020, *supra* note 19, at 11 (noting that this fear was particularly acute with respect to Chinese investment in the technology sector). *See also* JAMES K. JACKSON, CONG. RES. SERV. RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES 57 (July 3, 2018) (discussing concern among members of Congress members of Congress regarding the potential acquisition of 3Leaf Systems by Huawei, the Chinese telecommunications giant, and CFIUS' position towards sovereign wealth funds generally).

66. Christopher Doering, *Secretive U.S. Panel Eyes China's Smithfield Deal*, U.S.A. TODAY (June 9, 2013, https://perma.cc/6E49-FAWC). *See generally* Reginald Cuyler, *Leaving Home the Bacon: Judicially Reviewing CFIUS' Approval of Shuanghui Acquiring Smithfield Foods*, 6 No. 2 U. PUERTO RICO BUS. L.J. 206 (2015).

67. *See* Jacob Bunge et al., *Powerful U.S. Panel Clears Chinese Takeover of Syngenta*, WALL ST. J. (Aug. 23, 2016, https://perma.cc/X6FZ-9F86) (detailing Senator Grassley's objections to the acquisition). This was a point of particular consternation as Syngenta previously turned down an acquisition offer from Monsanto.

68. That is, with the exception of the specification of Chinese investment in a reporting provision. FIRRMA, *supra* note 2, § 1719(b).

69. "While the Trump Administration has been firm in its messaging that FIRRMA is meant to "close gaps" between the transactions that CFIUS is currently able to review and transactions it currently cannot review despite them raising similar national security concerns, the reality is that those 'gaps' largely pertain to particular Chinese investment trends." Farhad Jalinous et al. *CFIUS Reform Becomes Law: What FIRRMA Means for Industry*, WHITE & CASE (Aug. 13, 2018, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-laws-and-guidance).

70. *See* FIRRMA, *supra* note 13, § 1702(c)(1).

71. *Id.* § 1702(c) (detailing Congress' considerations on covered transactions).

72. *Id.* § 1703(6). *See also infra* Part IV, examining the troublesome classification of critical technologies by CFIUS.

control of the domestic entity as well as certain real estate transactions.[73] Minority investments are covered transactions if they grant a foreign person access to "material nonpublic technical information" regarding a critical technology.[74] Real estate transactions, either by lease or sale, are covered if they impair national security[75] or if they are in close proximity to a military installation.[76] Additionally, CFIUS may now determine an entity's nationality based not only the location and nature of its general partners or investing entity, but also based on who or where its limited partners are.[77]

Third, FIRRMA granted CFIUS more funding and provided for dedicated staff, establishing it as a full-fledged agency and allaying fears that CFIUS was ill-equipped to handle its workload.[78] CFIUS is authorized to share information with other government agencies and allied countries.[79] The lead agencies that comprise the Committee are empowered to request additional staff and submit staffing plans to Congress,[80] and the report the Committee is required to submit to Congress now must include updates on Chinese investment in the United States.[81] FIRRMA expands the Byrd Amendment's mandatory review requirements[82] and provides that any transaction where a foreign government entity would merely acquire "substantial control" is subject to mandatory review.[83] CFIUS has new authority to undertake unilateral reviews[84] and once an investigation begins, CFIUS now has forty-five days, not thirty, to complete an investigation, and may request a fifteen-day extension for "extraordinary circumstances."[85] FIRRMA preserves the *Ralls* court's bar on review of Presidential action through CFIUS.[86] And, contrary to the Trump Administration's claims,[87] a

73. *Id.* § 1703.

74. *Id. See also* Jalinous et al., *supra* note 135, remarking FIRRMA permits CFIUS to review transactions involving "changes in a foreign investor's governance rights, even in the absence of any new investment."

75. *See* FIRRMA, *supra* note 2, § 1703(a)(4)(B)(ii).

76. *Id.* This is a codification of the outcome in *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, 758 F.3d 296 (D.C. Cir. 2014).

77. Peter Young, CFIUS Reform's Impact on Biopharma, 39 No. 2 Pharmaceutical Executive (Feb. 6, 2019, https://www.pharmexec.com/view/cfius-reform-s-impact-biopharma).

78. *See* U.S. Gen. Accounting Office, GAO 18-249: *Committee on Foreign Investment in the United States: Treasury Should Coordinate Assessment of Resources Needed to Address Increased Workload*, 14–18 (2018). CFIUS' budget was increased to $20 million per year for five years.

79. FIRRMA, *supra* note 2, § 1713.

80. *Id.* § 1721(a)–(b).

81. *Id.* § 1719(b).

82. *See* Mostaghel, *supra* note 40, at 602. The Byrd Amendment only required CFIUS to perform a review when the purchasing entity was a foreign government or an agent acting on behalf of a foreign government and the foreign entity would acquire control of the domestic target.

83. FIRRMA, *supra* note 2, § 1706.

84. *Id.* § 1708(2)(B).

85. *Id.* § 1709(2).

86. *Id.* § 1715(2). *See also infra* Part III.

87. *See* Donald J. Trump, President of the United States, Remarks by President Trump at a Roundtable on the Foreign Investment Risk Review Modernization Act (FIRRMA) (Aug. 23, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-roundtable-foreign-investment-risk-review-modernization-act-firrma/.

distinct political undercurrent links these developments – CFIUS may "discriminate among foreign investors by country of origin" by labeling certain countries of "special concern."[88]

FIRRMA granted CFIUS broad new authorities, but the most consequential result is felt in an area where it is silent – concrete definitions of critical infrastructure and national security and a meaningful framework for judicial review. CFIUS has come a long way from its days as a data gathering service[89] and now has substantial oversight and regulatory power that, at present, is insufficiently bounded by limits to guide CFIUS' constituent members in determining between FDI that poses a threat and that which is otherwise innocuous but politically unpalatable. FIRRMA directed the Treasury to promulgate regulations implementing its various provisions,[90] which the Treasury did on January 13, 2020,[91] purporting to "defin[e] additional terms, add[ ] specificity to a number of provisions, and include[ ] illustrative examples, among other things."[92] Far from achieving that goal, the regulations reinforce the prevailing view[93] that definitions of "national security" and "critical infrastructure" must be fluid in order to be useful.[94] The regulations permit CFIUS review of non-controlling investments[95] implicating "critical technologies" in twenty seven industrial sectors[96] and twenty eight categories of infrastructure where "critical infrastructure" is implicated.[97] These sectors together run the gamut of American high-technology manufacturing and industry and beg the question: can anything be critical where everything is?

FIRRMA advances these imprecise notions of "critical industries" and "critical technologies" as broad categories of economic activity, in addition to traditional conceptions of national security, that can subject an entity to CFIUS review. FIRRMA borrows the definition of "critical industries" from the Patriot Act,[98] which called upon Congress to furnish special support for "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a

88. Jackson 2020, *supra* note 19, at 12. A country can be labeled one of "special concern" if it is one with a demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affect United States leadership in areas related to national security. *Id.*

89. *See* Exec. Order No. 11,858, *supra* note 6.

90. *See* Jackson 2020, *supra* note 19, at 15.

91. *Id.*

92. Press Release, Treasury Releases Final Regulations to Reform National Security Reviews for Certain Foreign Investments and Other Transactions in the United States (Jan. 13, 2020, https://home.treasury.gov/news/press-releases/sm872).

93. H.R. REP. NO. 100-576, *supra* note 31, at 926.

94. Ironically, the Treasury's attempt to clarify FIRRMA's scope with respect to national security and critical infrastructure exposes it to the same criticism that Exon-Florio faced. *See* Georgiev, *supra* note 20, at 129 (noting that Exon-Florio's twelve factor test for national security provided too narrow a lens through which to evaluate national security threats).

95. Under FINSA, non-controlling investments were not generally subject to CFIUS review. *See* FIRRMA, *supra* note 2, § 1703.

96. Jackson 2020, *supra* note 19, at 16 n.36.

97. *Id.* at 16 n.37.

98. Pub. L. No. 107-56, § 1014, 84 Stat. 1116 (2001).

debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."[99] FIRRMA's application of this standard to twenty seven industries,[100] including those as inoffensive as radio and television broadcasting, is simply an overbroad distortion of the definitional intent of "critical industries."[101] Beyond protecting "systems and assets . . . vital to the United States,"[102] CFIUS' focus seems to have been redirected to preventing ordinary competition.

Likewise, FIRRMA appropriates and expands the Homeland Security Act of 2002's[103] definition of "critical infrastructure" and defines "critical technologies" according to "US-export-controlled technologies"[104] as those which may be developed or used in one of FIRRMA's twenty seven specified industries or designed by an American business specifically for use in one of those industries.[105] While certain technologies are explicitly categorized as being critical, such as nuclear equipment and facilities,[106] the definition is vague enough that there is no clear line of demarcation between a technology that is novel and one that is truly critical. And because FIRRMA codifies the *Ralls* court's holding,[107] actions taken by the President to block or otherwise prohibit transactions of dubious national security concern are statutorily shielded from judicial review.[108] While FIRRMA allows for *in camera* review of sensitive evidence in judicial proceedings, the overall limited purview of the courts gives credence to CFIUS' reputation as "a secretive process in a black box exempt from judicial review."[109]

FIRRMA thus draws a broad cross section of the modern American economy, especially those industries in which Chinese competition is growing, under CFIUS' umbrella without instituting meaningful guideposts to discern between bona fide national security threats and political threats that can be distorted through the lens of national security. This framework

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99. *Id. See* Jackson 2020, *supra* note 19, at 17. *See also* FIRRMA, *supra* note 2, § 1703(a)(5).

100. *See* Jackson 2020, *supra* note 19, at 17.

101. Crucially, CFIUS may initiate a review of an entity acting in one of the specified industries not only when it seeks to acquire a majority or controlling interest but merely when it will acquire a minority stake, hardly the type of investment that would raise serious concerns over loss of control over important components of national industry. *See* Jackson, *supra* note 19, at 17.

102. FIRRMA, *supra* note 2, § 1703(a)(5).

103. Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified as amended at 6 U.S.C. §101(4)), which in turn adopted the definition from the Patriot Act, Pub. L. No. 107-56, *supra* note 98, and, through a series of additions, expanded the definition to cover a total of seventeen sectors. FIRRMA applies the term to twenty eight industries.

104. Jackson 2020, *supra* note 19, at 18.

105. FIRRMA, *supra* note 2, § 1703(a)(6); Jackson 2020, *supra* note 19, at 20.

106. FIRRMA, *supra* note 2, § 1703(a)(6).

107. *See* Ralls Corp. v. Comm. on Foreign Inv. in the United States, 758 F.3d 296 (D.C. Cir. 2014).

108. *See* FIRRMA, *supra* note 2, § 1703(a)(6). *See also* Jackson 2020, *supra* note 19, at 23 (noting that the President is granted "almost unlimited authority to take 'such action . . . as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States"). Additionally, "such determinations by the President are not subject to judicial review, although the process by which the disposition of a transaction is determined may be subject to judicial review to ensure that the constitutional rights of the parties involved are upheld." *Id.*

109. 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, 272 (2016).

positions the Executive, through the Committee, to interfere in industries on the fringes of national security and in violation of the maxim of economic liberalism that has guided more than a half century of policy choices.[110]

PART III: *RALLS* AND THE CASE FOR JUDICIAL REVIEW OF THE PRESIDENT

From its 1975 inception until 2012, no entity subject to CFIUS review of a covered transaction[111] challenged the results of the Committee's investigations or its recommendations that a proposed transaction be permitted, blocked, or mitigated.[112] Additionally, the courts' lack of power to review CFIUS' determinations or Presidential action following receipt of CFIUS' recommendations was never seriously questioned.[113] The D.C. Circuit Court of Appeals' holding in *Ralls Corp. v. Comm. on Foreign Inv. in the United States*[114] deviated from the status quo, and established a basis for judicial review of CFIUS' determinations when a party under review alleges violations of constitutional procedural due process.[115] The *Ralls* decision was an important restraint on FINSA's wide-ranging application and installed a check on a process otherwise susceptible to abuse.[116] However, the court stopped short of permitting the review of Presidential action taken to block a proposed transaction, limiting its holding to "constitutional claim[s] challenging the process preceding such [P]residential action."[117] *Ralls* was a step in the right direction, but not far enough. Judicial review of the President itself is needed to check FIRRMA's expansion of Executive authority and the Committee's susceptibility to political manipulation. Courts must be able to review all stages of the CFIUS review process, up to and including Presidential action, to ensure an Executive emboldened by FIRRMA does not unjustifiably stifle economic activity in the name of national security. Further, the contractual nature of FDI transactions means courts are equipped to evaluate on a case by case basis FDI's impact on national security, while respecting the government's compelling need to interdict difficult to recognize threats.

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110. *See* Mundheim & Heleniak, *supra* note 4, at 221.

111. *See* FINSA, *supra* note 56, § 2(a)(3) (describing FINSA's definition of a covered transaction).

112. *See id.* § 5. *See also* Zimmerman, *supra* note 22, at 1277 (noting that FINSA codified the use of mitigation agreements to allow proposed transactions to continue following resolution of national security concerns); *Ralls and U.S. Government Settle Only CFIUS Suit in History*, STEPTOE (Oct. 14, 2015, https://www.steptoeinternationalcomplianceblog.com/2015/10/ralls-and-u-s-government-settle-only-cfius-suit-in-history/).

113. FINSA, *supra* note 56, § 6(e) ("The actions of the President under paragraph (1) of subsection (d) and the findings of the President under paragraph (4) of subsection (d) shall not be subject to judicial review.").

114. 758 F.3d 296 (D.C. Cir. 2014).

115. *Id.* at 311 ("We conclude that neither the text of the statutory bar nor the legislative history of the statute provides clear and convincing evidence that the Congress intended to preclude judicial review of Ralls's procedural due process challenge to the Presidential Order.").

116. *See generally supra* Part II.

117. *Ralls* 758 F.3d at 311.

A. The Facts of *Ralls*

Ralls Corporation, a Delaware corporation, was a holding company of Sany Group, a Chinese manufacturing company owned by two Chinese nationals, Dawei Duan and Jialiang Wu.[118] At the time of the disputed acquisition before the D.C. Circuit, Ralls was "in the business of identifying U.S. opportunities for the construction of windfarms" in which the turbines manufactured by Sany Electric, an affiliate also owned by Duan and Wu, could be used.[119] In March 2012, Ralls purchased four American-owned limited liability companies collectively formed by Oregon Windfarms, LLC, an Oregon entity owned by American citizens to develop windfarms in north-central Oregon.[120] The windfarm locations and assets that Oregon Windfarms, LLC developed, and that Ralls purchased, were located in and around the eastern portion of a United States Navy bombing range.[121]

Ralls voluntarily submitted a twenty-five page notice to CFIUS informing it of the acquisition of the Oregon entities.[122] CFIUS initiated an initial thirty-day review,[123] not once disclosing to Ralls the information it reviewed. On July 25, 2012, CFIUS determined that the acquisition presented a national security risk and issued a mitigation order.[124] On July 30, CFIUS launched a subsequent forty-five day review[125] followed by an amended mitigation order.[126] Neither mitigation order informed Ralls of the nature of the national security threat or the evidence CFIUS relied on.[127] CFIUS submitted its report to the President on September 13, requesting his decision to approve or block the transaction.[128] On September 28, the President directed that the transaction be prohibited.[129]

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118. *Id.* at 304.

119. *Id.*

120. *Id.*

121. *Id.* ("Three of the windfarm sites [were] located within seven miles of the restricted airspace while the fourth . . . [was located within the restricted airspace."]. Ralls moved one of the windfarm sites at the Navy's request, "to reduce airspace conflicts," but the site remained within restricted airspace. *Id.* at 305.

122. *Id.* at 305.

123. *Id.* (pursuant to Exon-Florio, *supra* note 24, § 2170(b)(1)).

124. *Ralls* 758 F.3d at 305 ("Order Establishing Interim Mitigation Measures"). The Order required Ralls to "(1) cease all construction and operations at the [project] sites, (2) 'remove all stockpiled or stored items from the [project sites] no later than July 30, 2012, and [not to] . . . deposit, stockpile, or store any new items at the [project sites]' and (3) cease all access to the project sites." *Id.*

125. Exon-Florio, *supra* note 24, § 2170(b)(2).

126. *Ralls* 758 F.3d at 305 (the August 2, 2012 "Amended Order Establishing Interim Mitigation Measures"). The amended Order prohibited Ralls from selling any of the project sites without granting CFIUS the opportunity to object to such sale.

127. *Id.*

128. *Id.*

129. *Id.* at 306 ("Order Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation"). The order stated that "[t]here is credible evidence that leads [the President] to believe that Ralls . . . might take action that threatens to impair the national security of the United States" and that "[p]rovisions of law, other than [§] 721 and the International Emergency Economic Powers Act . . . do not, in [the President's] judgment, provide adequate and appropriate authority for [the President] to protect the national security in this matter."). *Id.*

Ralls filed suit against CFIUS and the President in the United States District Court for the District of Columbia.[130] It alleged that the orders were unconstitutional under the Fifth and Fourteenth Amendments, that CFIUS' orders were invalid under the Administrative Procedure Act, and that CFIUS' and the President's actions were ultra vires.[131] The district court held that the DPA "barred judicial review of Ralls's ultra vires and equal protection challenges to the Presidential Order but not Ralls's due process challenge thereto."[132] The court subsequently ruled in favor of the government's motion to dismiss Ralls' due process claims,[133] noting that Ralls received due process when the government informed it in June 2012 that the transaction had to be reviewed.[134]

On appeal, the D.C. Circuit held that, while the DPA states that "[t]he actions [and findings] of the President . . . [regarding CFIUS' determinations] shall not be subject to judicial review," there was no "clear and convincing" evidence of Congressional intent to bar review of constitutional claims.[135] The court also held that Ralls was deprived of a protected property interest, a deprivation that lacked due process because the government did not "provide notice of, and access to, the unclassified information used to prohibit the transaction."[136] The D.C. Circuit remanded the case "with instructions that Ralls be provided . . . access to the unclassified evidence on which the President relied and an opportunity to respond thereto."[137] The D.C. Circuit established that CFIUS' actions were subject to judicial review, even if the President's actions following CFIUS' recommendations remained beyond reach.

B. The Case for Judicial Review of the President

The *Ralls* court relied primarily on two cases – *Ungar v. Smith* and *Ralpho v. Bell*.[138] Because those cases are about administrative decisions

130. Ralls Corp. v. Comm. on Foreign Inv. in the United States, 926 F.Supp.2d 71 (D.D.C. 2013); *see also* Ralls 758 F.3d at 306 (Ralls amended its complaint to include the President following the Presidential Order and sought to invalidate both mitigation orders issued by CFIUS and the Presidential Order ordering the transaction blocked).

131. Ralls 758 F.3d at 306.

132. *Id.* The DPA is the enabling statute for CFIUS' authority.

133. *Id.* at 307. The district court held that the Presidential Order "did not deprive Ralls of a constitutionally protected property interest . . . because Ralls 'voluntarily acquired those state property rights subject to the known risk of a Presidential veto' and 'waived the opportunity . . . to obtain a determination . . . before it entered into the transaction." *Id.*

134. *Id.*

135. *Id.* at 307–11. The court's finding was supported via a reading of the text of the DPA that revealed it "does not refer to the reviewability of a constitutional claim challenging the process preceding . . . presidential action."

136. *Id.* at 315–20. The court held that Ralls did not waive its property interest by "by failing to seek pre-approval" of the acquisition of the Oregon entities. *Id.* Further, the court found that Ralls needed access to the unclassified information CFIUS withheld during its review in order to have a legitimate opportunity to respond to CFIUS and the President. *Id.* at 320.

137. *Id.* at 325.

138. *See id.* at 308–12. *See also* Ungar v. Smith, 667 F.2d 188, 190–96 (D.C. Cir. 1981) (finding the

made by agencies enacting statutes, they bear strong resemblance to the facts the D.C. Circuit was presented with in *Ralls* and serve well to inform the court's resolution of the case with respect to the process through which CFIUS issued its orders. As a means of evaluating the President's actions, in contrast, they provide little useful guidance. In fact, some observers make the case that reviews of constitutional claims in circumstances involving statutory bars against judicial review should not reach the Executive level at all and must focus only on agency action.[139] At the same time, the Constitution's Article II grants of power are ambiguous, and the debate continues as to whether the "take Care" clause merely authorizes the President to enact policies that Congress sets or if it grants the President an independent, substantive power of his own.[140] In light of the fact that the Administrative Procedure Act is not applicable to Presidential action,[141] an alternative method of judicial review is explored here as an appropriate means of reviewing the actions of the President once CFIUS has concluded its review process: nonstatutory review.[142]

The judicial role in the review of any Presidential action should, concededly, be narrow.[143] Nonstatutory review, a legal concept that has existed in American jurisprudence since the early days of the Republic,[144] preserves the basic principle that the courts not intrude into the realm of policymaking while maintaining their ability to provide constitutional oversight.[145] At its core, nonstatutory review – so named because judicial review occurs in spite of the absence of a statute providing for a judicial

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court held that it could not review agency-determined facts where Congress forbade such review, but that it had jurisdiction over constitutional claims about the agency's procedural mechanisms for making those factual determinations); Ralpho v. Bell, 569 F.2d 607, 613, 621-22 (D.C. Cir. 1977) (holding that "a broadly worded statutory bar [does] not preclude . . . consideration of a procedural due process claim.").

139. *See*, e.g., Christopher M. Fitzpatrick, *Where* Ralls *Went Wrong: CFIUS, the Courts, and the Balance of Liberty and Security*, 101 CORNELL L. REV. 1087, 1101 (2015) (citing Webster v. Doe, 486 U.S. 592, 598–99 (1988) (seeking review of actions of the Central Intelligence Agency); Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 669 (1986) (seeking review of a Medicare regulation)).

140. Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 3 (1982).

141. Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, COLUM. L. R. 1612, 1613 (1997) (citing Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992). The President is not an "agency" within the meaning of the APA. Although this Paper does not engage with the APA, it is worth noting that "[t]here is widespread agreement that nonstatutory review survived the APA's passage" and "nonstatutory review was specifically intended to be one of the 'applicable form[s] of legal action' that could be used under the APA itself. *Id.* at 1665. Additionally, the Court in *Dalton v. Specter*, 511 U.S. 468 (1994) (another case rejecting review of Presidential action under the APA decided two years after *Franklin*) noted that "[w]e may assume for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA." Dalton, 511 U.S. at 474.

142. This standard of review is reflective of the principle that "[c]ourts can police the executive implementation of statutes in a way that will assure the integrity and visibility of the Constitution's policymaking process as a whole." Bruff, *supra* note 140, at 7.

143. The courts must limit themselves to the important function of ensuring constitutional processes for lawmaking, and the execution of those policies, is followed. *See id.*

144. Siegel, *supra* note 141, at 1614.

145. Bruff, *supra* note 140, at 7 ("The Courts can police the executive implementation of statutes in a way that will assure the integrity and visibility of the Constitution's policymaking process as a whole.").

remedy – avoids the United States' sovereign immunity by calling for the assumption, in essence a legal fiction, that a suit against a government official that alleges unlawful official behavior is a suit only against that individual and not against the government of the United States. It is especially well-suited for the kind of Presidential action that often comes before the courts, and was at issue in *Ralls*: the administration of statutory programs that have a domestic effect.[146]

Nonstatutory review was historically employed when a "plaintiff . . . aggrieved by government action" filed suit against the government official who took the allegedly wrongful action rather than the government.[147] Courts could then, upon a favorable finding for the plaintiff, provide relief by issuing judgment against the government official personally, because the government official is separate from the government and does not share in its sovereign immunity protections.[148] The framework for a modern, practical application of nonstatutory review was set forth by the Court in *Ex parte Young*.[149] There, the Court explained that a suit following the procedure set forth above is not a suit against the state. Reasoning that the state could not lawfully order an officer to violate the Constitution, the officer is not officially acting on behalf of the state.[150] The unconstitutional nature of the officer's action thus renders him "stripped of his official or representative character" and he is "subjected in his person to the consequences of his individual conduct,"[151] unprotected by a defense of sovereign immunity.

Nonstatutory review of a low-ranking government official appears less intrusive than reviewing Presidential action, but nothing suggests the nonstatutory review formula cannot equally apply to the President. The basic principle underlying this position is simple: the President itself is not the sovereign and is in form and function, as are all other government officers, only an agent of the true sovereign – the American people. Indeed, the essential notion of fairness that undergirds the constitutional system depends on a legal framework where "[n]o man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."[152] In order for this bold claim to carry substance, it need apply to the highest of high government officers.

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146. Siegel, *supra* note 141, at 1614 ("Courts themselves, in the absence of statutory direction, created nonstatutory review for the specific purpose of assuring . . . remedies [against unlawful government action].").

147. Siegel, *supra* note 141, at 1624.

148. *Id.*

149. 209 U.S. 123 (1908). Edward T. Young, the Attorney General of Minnesota, was named as a defendant in a suit brought by shareholders of The Northern Pacific Railway against the railroads to prevent them from complying with a Minnesota law limiting prices that railroads could charge for tickets. Young claimed his actions to enforce the law were subject to sovereign immunity and the court lacked jurisdiction under the Eleventh Amendment.

150. *Id.* at 159.

151. *Id.* at 160.

152. United States v. Lee, 106 U.S. 196, 220 (1882).

Moreover, nonstatutory review is not a relic of Eighteenth Century jurisprudence – it formed the basis of *Youngstown Sheet & Tube Co. v. Sawyer*.[153] The steel companies brought a nonstatutory suit against the Secretary of Commerce personally for carrying into effect President Truman's seizure order.[154] Citing *Lee*,[155] the district court enjoined the seizure, and by extension the President's action, notwithstanding the government's argument that courts were "without power to negate executive action of the President . . . by enjoining [him]."[156] The court noted that the Supreme Court "[has] held on many occasions that officers of the Executive Branch . . . may be enjoined when their conduct is unauthorized by statute, exceeds the scope of constitutional authority, or is pursuant to unconstitutional enactment."[157] Other cases have similarly reviewed Presidential action on a nonstatutory basis. In *Dames & Moore v. Regan*,[158] the Court upheld President Carter's Executive Order ending the Iranian hostage crisis in a nonstatutory suit brought against the Secretary of the Treasury.[159] And, as Chief Justice Marshall wrote, if only the Court had jurisdiction in *Marbury v. Madison*,[160] it could have provided relief to Marbury, even if that relief entailed the Court issuing an order to an Executive official,[161] at base a nonstatutory remedy.[162]

Youngstown, *Dames v. Moore*, and *Marbury* demonstrate that Presidential actions can be reviewed. *Youngstown* is particularly prescient, and bears the closest resemblance to *Ralls*, for clarifying that decisions made in the name of national security are not beyond the reach of the courts. *Ralls* presented the D.C. Circuit with a matter far less grave than what the Court grappled with in *Youngstown* – windfarms close to a bombing range pale in comparison to a possible steel shortage facing a nation conducting active military operations halfway around the world. Why, then, would the court in *Ralls*, and courts generally, hesitate to review the President?

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153. 343 U.S. 579 (1952). *See also* Siegel, *supra* note 141, at 1636. Note that, while President Truman was not named as a defendant by the steel companies, and the case did not lead to an injunction directed at the President, the Court directly considered the validity of the President's order to the Secretary of Commerce.

154. Siegel, *supra* note 141, at 1636.

155. United States v. Lee, 106 U.S. 196 (1882).

156. Siegel, *supra* note 141, at 1636 (citing Defendant's Opposition to Plaintiffs' Motion for a Preliminary Injunction at P 3, Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569 (D.D.C. 1952) (No. 1635-52), reprinted in H.R. Doc. No. 82-534, pt. I, at 19 (1952).

157. Youngstown, 103 F. Supp. at 576.

158. 453 U.S. 654 (1981).

159. *See* Siegel, *supra* note 141, at 1676 n. 265. Also cited in this footnote is *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (validity of an order issued by President Franklin Roosevelt under the National Industrial Recovery Act reviewed in action against officials of the Department of the Interior).

160. 5 U.S. 137 (1803).

161. Siegel, *supra* note 141, at 1625–26. If the Court had jurisdiction in, relief would have come in form of a writ of mandamus compelling Secretary of State James Madison to deliver Marbury's commission.

162. *Id.* at 1625.

C. Nonstatutory Review and the Separation of Powers

As Professor Siegel writes, courts "that would be entirely comfortable issuing injunctive relief in *Youngstown v. Sawyer* recoil from the thought that they might issue substantively identical relief in a case called *Youngstown v. Truman*"[163] because they forget the essential fiction that nonstatutory review relies on – suits against the President must be treated as if they are not really suits against the President.[164] A second obstacle is "that the premise that the President is truly the defendant seems to conjure up some notion that the suit violates the separation of powers, as though the judiciary, by issuing an injunction to the President, has exercised the [E]xecutive power."[165] In dispensing the first qualm, nonstatutory suits do not intrude on any special immunity the President may enjoy[166] and pose no risk of "distract[ing] him from his public duties,"[167] the prevention of such distractions being the purpose of an immunity shield. As with all nonstatutory suits, the government ultimately answers for the misconduct of its officials – the President would be defended by government lawyers and would suffer no personal liability, as would be appropriate given that the true defendant in nonstatutory suits is, in fact, the government.

With respect to the second, Justice Scalia noted in his *Franklin* concurrence that "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive."[168] Clearly, the hesitancy of courts to entertain action against the President is a matter not of "substance, but . . . of delicacy."[169] With respect to *Youngstown*, Professor Siegel observes that the Court's injunction against Secretary of Defense Sawyer to not seize the steel mills had the same subordinating effect on the Executive as would an order to President Truman enjoining him directly from seizing the mills.[170] The Court had no misgivings nullifying Executive action when a lower Executive officer was the target of the Court's injunction. It should follow that an identical injunction against the President itself would no more constitute the

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163. *Id.* at 1673.

164. *See* Jennifer L. Long, Note, *How to Sue the President: A Proposal for Legislation Establishing the Extent of Presidential Immunity*, 30 VAL. U.L. REV. 283 (1995) (discussing arguments that the Constitution provides the President with temporary immunity from civil suit).

165. Siegel, *supra* note 141, at 1673.

166. *See generally* Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701 (1995). The notion of a "distraction immunity" is distinct from the concept of sovereign immunity. Instead, it is founded on the belief that civil suits against the President pose a significant danger that the President could be distracted from his vital public duties by matters of purely private interest.

167. Siegel, *supra* note 141, at 1674.

168. See Franklin v. Massachusetts, 505 U.S. 788, 826 (1992) (Scalia, J., concurring in part and concurring in the judgment) (Justice Scalia went on to lament the apparent degradation of the separation of powers, writing "[i]t is a commentary upon the level to which judicial understanding—indeed, even judicial awareness—of the doctrine of separation of powers has fallen, that the District Court entered [an] order against the President without blinking an eye.").

169. Siegel, *supra* note 141, at 1676.

170. *Id.*

judiciary taking Executive action than would the Court's ultimate resolution of *Youngstown*.

Courts need the ability to directly reach the President post-FIRRMA, where ambiguous treatment of important definitional elements invites the Executive to test the limits to which CFIUS can be deployed in response to largely political rather than bone fide national security threats.[171] While the President's ultimate authority to define the parameters of the nation's foreign policy is undisputed,[172] political quibbles cannot justify the rescission of rights individuals and entities are properly entitled to, especially when CFIUS jurisdiction over them is suspect. While it is thought that "the success of the separation of powers depends on each branch avoiding a test of the utmost limits of its power,"[173] the judiciary cannot retreat from pushing the limits of its review power the same way the political branches can, for "[i]f a court sends a plaintiff away without remedy out of courtesy to the other branches of government, it may be withholding an action to which the plaintiff has a right."[174] In reviewing the President's actions through CFIUS, courts cannot merely ask the President to reveal the legal basis for his decision,[175] as the President would simply cite FIRRMA's problematic expansions of authority. Instead, it must be recognized that judicial review is neither subordinated by nor a threat to the separation of powers doctrine,[176] nor should the doctrine be considered a blanket bar in cases where the President is a named defendant.[177] And arguments justifying the immunity of the President from review on the grounds of delicacy or to preserve a symbolic impression that the Executive, not the judiciary, is in charge are insufficient on their own. As demonstrated in Part IV, that line of reasoning can bring considerable harm. Nonstatutory review of the President is proper as a legitimate exercise of judicial power and as a needed check on an expanded CFIUS.

In sum, a nonstatutory suit against the President is simply a mechanism that compels the government to obey the law. The President's role as a defendant should be of no special significance if the maxim that "[n]o man in this country is so high that he is above the law"[178] is to mean anything. Presidential action cannot be afforded special treatment merely because it is

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171. *See infra* Part IV.

172. The Court famously noted that the President holds "very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

173. Siegel, *supra* note 141, at 1696.

174. *Id.* at 1697. *See also id.* n. 356 (noting that, despite the risks posed by abrogation of the full scope of the judiciary's powers, courts have developed many techniques for avoiding decisions of troublesome questions).

175. Bruff, *supra* note 140, at 8.

176. Joel A. Smith, *Separation of Powers Redux – Receded Scope of Judicial Review*, 44-JUN. M.D.B.J. 18, 20 (2011).

177. *See* Siegel, *supra* note 141, at 1698. Clashes between the judiciary and the Executive may arise in numerous circumstances, and to permit the courts to dispense with meritorious cases out of deference to Executive judgment would be an untenable subjugation of the judicial branch.

178. United States v. Lee, 106 U.S. 196, 220 (1882).

the President who is acting, especially if that action would interfere with the fulfillment of the remedial imperative. The court in *Ralls* applied this principle insofar as it evaluated the actions of CFIUS,[179] but extending its holding to the President itself is a needed, and appropriate step. Following the adoption of FIRRMA, robust judicial review of Presidential action is vital to ensure CFIUS' broad national security prerogative is not subject to politically motivated abuse.

PART IV. BIOPHARMACEUTICALS, CHINA, AND A NEW FRONTIER FOR A POLITICIZED CFIUS

Unfortunately, CFIUS already appears engaged in politically motivated reviews of transactions that do not clearly implicate national security. The United States is the world's largest market for biopharmaceutical and biotechnology research and development (together "Biopharma and Biotech"), an industry that accounts for more than $1.3 trillion in economic output and, directly and indirectly, supports nearly 4.7 million domestic jobs.[180] The industry's key strengths have long been a permissive government regime of minimal market barriers, robust intellectual property protections, and a vast network of academic research institutions.[181] Historically, foreign capital was welcomed as a means of economic risk spreading, given the notoriously difficult process of developing and bringing to market new therapies.[182] 2018 saw FDI-backed Biopharma and Biotech deals raise close to $10 billion in research funding,[183] a sizeable portion of which originated from Chinese investors who often took minority stakes in joint ventures.[184] And prior to FIRRMA, Biopharma and Biotech companies had little to fear in the way of CFIUS interference – research and development of therapeutics and diagnostics for diseases was of minimal concern to the national security establishment.[185]

In a post-FIRRMA world, there is little assurance that CFIUS' hands-

179. *See generally* Ralls Corp. v. Comm. on Foreign Inv. in the United States, 758 F.3d 296 (D.C. Cir. 2014).

180. *Biopharmaceutical Spotlight: The Biopharmaceutical Industry in the United States*, SelectUSA (https://www.selectusa.gov/pharmaceutical-and-biotech-industries-united-states).

181. *Id.*

182. Steve Dickman, *U.S. Crackdown on Foreign Biotech Investment Makes Us Poorer, not Safer*, FORBES, (MAY 24, 2019, 7:21 AM), https://www.forbes.com/sites/stevedickman/2019/05/24/us-crackdown-on-foreign-biotech-investment-makes-us-poorer-not-safer/#43c4707d5581.

183. *U.S. Biotech Sees Surge of Asian Investment*, REUTERS (Sept. 4, 2018, https://fingfx.thomsonreuters.com/gfx/rngs/BIOTECH-CHINA-INVESTMENT/0100806Y0EC/index.html).

184. *Id*. *See also* Miyu Ono & Hannah Cabot, *The Disappearance of Chinese Capital in U.S. Biotechnology*, Back Bay Life Science Advisors (Sept. 5, 2019, https://www.bblsa.com/industry-insights/2020/1/7/the-disappearance-of-chinese-capital-in-us-biotechnology) (noting that Chinese FDI increased from $519 million in 2016 across 41 deals to $1.5 billion in 2017 for forty-five transactions, mostly in the form of minority acquisitions and startup financing).

185. David J. Levine & Raymond Paretzky, *Foreign Investments in U.S. now Covered by CFIUS*, Volume X No. 301 NAT'L L. REV. (May 21, 2019, https://www.natlawreview.com/article/foreign-investments-us-biotech-now-covered-cfius).

off approach to FDI in Biopharma and Biotech will persist. Two years after FIRRMA's adoption, there are strong indicators of a broad policy shift that stands to fundamentally alter the industry. "Research and Development in Biotechnology" is listed as one of the twenty seven "critical sectors" identified by the Treasury where even minority foreign investments may trigger CFIUS intervention.[186] In 2018, Biotechnology Innovation Organization ("BIO"), a leading industry trade association that represents over 1,000 biotechnology companies, research institutions, and other related organizations in the United States,[187] wrote an open letter to the Treasury following the passage of FIRRMA, expressing concerns about the lack of clarity surrounding the "emerging" and "foundational" technologies that are the ostensible focus of CFIUS' protection efforts under FIRRMA.[188] BIO further warned of a chilling effect on investments in critical technologies[189] – critical not in the national security sense, but rather with respect to their necessity for drug and therapy development.

The following year, a BIO vice president remarked that "[FIRRMA is] starting to slow things down, and . . . a couple of investments [did] not go through because one of the key components of a deal was this outside, foreign investment."[190] The additional uncertainty and legal and consulting costs that are attendant with a CFIUS review have given foreign investors pause, leading to reductions of up to twenty percent[191] of FDI in Biopharma and Biotech deals and a shift of both money and research to Europe and other jurisdictions with less restrictive, and consequently more attractive, investment policies.[192] Adding to the flight risk is FIRRMA's retroactive review component, which empowers CFIUS to revisit an approved transaction and overturn it if subsequent developments or additional foreign investment imperil national security, in the Committee's eyes.[193] Submitting to a CFIUS, and thus a national security, review is a new concept for many Biopharma and Biotech companies, but one that will become increasingly familiar for either or both of two reasons: the expansive, ill-defined concepts

186. Jackson 2020, *supra* note 19, at 16.

187. Tom DiLenge, President, Advocacy, Law & Public Policy Biotechnology Innovation Organization, *Open Letter to Thomas Freddo, Deputy Assistant Secretary for Investment Security, U.S. Department of the Treasury*, 1 (Nov. 9, 2018, https://www.bio.org/sites/default/files/legacy/bioorg/docs/Final%20BIO%20Comment%20Letter%20on%20CFIUS%20Pilot%20-%2011.9.2018.pdf).

188. *Id.* at 3.

189. *Id.*

190. Dan Stanton, *Biotech VC Down 20% in US as Policies Drive Away Foreign Investors, BIO Says*, XCONOMY (Nov. 29, 2019, https://xconomy.com/national/2019/11/29/biotech-vc-down-20-in-us-as-policies-drive-away-foreign-investors-bio/).

191. *Id.*

192. *Id.*

193. Jonathan Gafni et al., *Foreign Investment in the U.S.: Five Things You Need to Know About the Draft FIRRMA Regulations*, LINKLATERS (Oct. 2019, https://www.linklaters.com/en-us/insights/blogs/linkingcompetition/2019/october/foreign-investment-in-the-us-five-things-you-need-to-know-about-the-draft-firrma-regulations) (noting that CFIUS may initiate a retroactive review of subject transactions within the past three years to confirm that the foreign investor still qualifies for the exception). *See also* Incremental Acquisitions, 31 C.F.R. § 800.305 (2020).

of "critical technologies" and "emerging and foundational technologies" baked into FIRRMA[194] and the increasing Chinese investment in American Biopharma and Biotech firms.

In its regulations implementing FIRRMA, the Treasury notes that it "does not independently define emerging and foundational technologies. Rather, it incorporates by cross-reference the emerging and foundational technologies that the Department of Commerce identifies pursuant to a separate rulemaking" process.[195] The Department of Commerce's previous interpretation of "critical technologies" was limited to only those "chemicals, biological agents, or other sensitive materials that are highly controlled under the Export Administration Regulations . . . , the Select Agent Program, or the International Traffic in Arms Regulations . . . ."[196] However, in conjunction with FIRRMA, the Department of Commerce set forth rules for determining what, exactly, constitutes "emerging and foundational technologies."[197] A baldly circular process, the determination of such technologies is left not to an objective set of criteria but instead the judgment of the President and an "interagency process" that will identify "emerging and foundational technologies that . . . are essential to the national security of the United States."[198] As a result, and in keeping with other murky legislative definitions of important concepts, Biopharma and Biotech companies are left with little meaningful ability to anticipate whether products under development or in planning stages are "emerging or foundational technologies" so "essential to the national security of the United States" that accepting FDI in connection with their production will invite a knock on the door from CFIUS.

A. CFIUS' China Problem

The potential for confusion is illustrated by CFIUS' notice in May 2020 to Ekso Bionics Holdings, Inc. requiring the termination of a joint venture with Zhejiang Youchuang Venture Capital Investment Co., Ltd. to develop a robotic exoskeleton for use in rehabilitating stroke and spinal cord injury patients.[199] The joint venture proposed to build a manufacturing and service center in China that would incorporate Ekso's technology into robotic components for the Chinese and larger Asian market.[200] From the limited

194. FIRRMA, *supra* note 2, § 1703.

195. Critical Technologies, 31 C.F.R. § 800.215 (2020).

196. Laura Fraedrich et al., *Facing FIRRMA: CFIUS Review of the Biotechnology and Life Sciences Sector*, JONES DAY (Oct. 2019, https://www.jonesday.com/en/insights/2019/10/facing-firrma-cfius-review?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration).

197. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Title XVII, Sec. 1758 et seq., Pub. L. No. 115-32, 132 Stat. 2208 (2018).

198. *Id.* Sec. 1758(a)(1)(A).

199. Press Release, *Ekso Bionics Announces CFIUS Determination Regarding China Joint Venture*, EKSO BIONICS HOLDINGS (May 20, 2020, https://www.globenewswire.com/news-release/2020/05/20/2036681/0/en/Ekso-Bionics-Announces-CFIUS-Determination-Regarding-China-Joint-Venture.html).

200. Paul Marquardt et al., *CFIUS Blocks Joint Venture Outside the United States, Releases 2018-*

available information, it appears the Chinese partner would have simply licensed Ekso's technology and would have gained no ownership of assets within the United States, seemingly exempting it from CFIUS' jurisdiction.[201] The Committee, however, thought differently and considered the exoskeleton's robotic technology a "critical technology" within the meaning of FIRRMA.[202] Crucially, this illustrates two points. First, the transferability of important technologies is subject to limitation.[203] The Biopharma and Biotech industry depends on unencumbered information sharing to speed and improve the development of often life-saving technologies, a necessity that CFIUS heretofore felt uncompelled to interfere with. Second, CFIUS now appears to construe "control" liberally, such that a minority foreign investor with no rights over any domestic United States property or technology, is considered to exert sufficient control over the domestic United States entity to warrant CFIUS intervention.[204]

The problem of increased CFIUS scrutiny facing Biopharma and Biotech is compounded by the fact that Chinese FDI constitutes the largest individual pool of foreign capital invested in American firms.[205] Contributions by Chinese firms to American Biopharma and Biotech between 2016 and 2017 grew 187%, outpacing the increase in Chinese investment in American industry across all sectors.[206] The symbiotic nature of the relationship between American FDI recipients and Chinese investors is apparent: the funding enables American companies to pursue novel drug research and development or revive work on experimental drugs and devices previously deprioritized for financial reasons, while Chinese investors are able to import valuable scientific expertise into China to fuel that country's burgeoning domestic biotechnology industry.[207] Additional, but no less consequential, benefits of Chinese FDI to American recipients are access to the world's largest consumer market, one that has long been difficult to penetrate, and closer relationships with Chinese academics, researchers, and

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2019 Data, and Goes Electronic, CLEARY GOTTLIEB (June 3, 2020, https://www.clearymawatch.com/2020/06/cfius-blocks-joint-venture-outside-the-united-states-releases-2018-2019-data-and-goes-electronic/).

201. *Id.*

202. It is worth noting that Ekso previously collaborated on projects for the Defense Advanced Research Projects Agency focused on industrial and military applications for exoskeletons similar to those to be licensed in the scuttled joint venture. *Id.*

203. While outbound technology licensing does not automatically fall under CFIUS' jurisdiction, the technology involved in such outbound licensing may itself be subject to United States export control requirements. *See* Levine & Paretzky, *supra* note 185.

204. *See* Transactions that are not Covered Control Transactions, 31 C.F.R. § 800.302(b) (2020). Ordinarily, an acquisition of less than ten percent of a United States entity in which no additional governance rights over the United States entity are conveyed is not an acquisition of "control" for CFIUS purposes.

205. *See* Ono & Cabot, *supra* note 184.

206. *Id.* In the same period, Chinese investment in American industry across all sectors grew by 161%.

207. *See id.* To illustrate the urgency felt in China to establish a thriving domestic biopharmaceutical research and production market, China has the world's largest population of diabetics (over 100 million), and the country's cancer rate is expected to increase ninety-five percent by 2035. *Id.*

scientists that can speed development of important technologies.[208]

FIRRMA, and the Trump Administration's general animosity toward China, has changed this.[209] From its high-water mark in 2017, Chinese FDI in American Biopharma and Biotech fell ninety percent between 2017 and June 2018.[210] In 2019, CFIUS forced PatientsLikeMe, a Massachusetts-based health care firm which sold a majority stake to China's iCarbonX to gain access to the Chinese company's artificial intelligence, to unwind the transaction,[211] citing concerns that patient data may become available to the Chinese company. And of 231 filings submitted to CFIUS under FIRRMA in 2019, [212] only one transaction was blocked – the acquisition of StayNTouch, Inc., a Delaware company, by a Chinese firm.[213] FIRRMA's preservation of murkily-defined national security and critical infrastructure concepts and broad extension of CFIUS' authority has placed new pressure on foreign, particularly Chinese, investors, reduced international research and development collaboration, and produced financial shortfalls for American firms.[214] Further, the onset of COVID-19 will only hasten the Committee's pivot toward Chinese investment. There is concern that the pandemic, which precipitated an unprecedented economic decline,[215] will lead to "fire sales" of United States firms experiencing steep declines in share prices, enabling Chinese actors to acquire stakes in distressed biotech firms and compromise national security interests.[216]

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208. *See id.*

209. There are innumerable sources examining and discussing the Trump Administration's posture toward China. *See, e.g., Put the American People First, not China*, THE WHITE HOUSE (October 30, 2020, https://www.whitehouse.gov/articles/put-the-american-people-first-not-china/).

210. Thilo Hanemann, *Arrested Development: Chinese FDI in the US in 1H 2018*, Figure 1, RHODIUM GROUP (Jun. 19, 2018, https://rhg.com/research/arrested-development-chinese-fdi-in-the-us-in-1h-2018/).

211. Christina Farr & Ari Levy, *The Trump Administration is Forcing this Health Start-Up that took Chinese Money into a Fire Sale*, CNBC (Apr. 4, 2019, https://www.cnbc.com/2019/04/04/cfius-forces-patientslikeme-into-fire-sale-booting-chinese-investor.html).

212. Comm. on Foreign Inv. in the United States, *Annual Report to Congress*, 3 (2019, https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2019.pdf).

213. *Id.*

214. As one example, Momenta Pharmaceuticals in Cambridge, Massachusetts, announced plans to lay off half its work force after CFIUS scrutiny of a planned spinoff of part of its business to a syndicate of Chinese investors caused a partial shutdown of the company. *See* Dickman, *supra* note 182. *See also* Andrew Dunn, Momenta to Halve Workforce with 110 Job Cuts, Including Co-founder and CFO, BIOPHARMADIVE (Oct. 8, 2018, https://www.biopharmadive.com/news/momenta-to-halve-workforce-with-110-job-cuts-including-co-founder-and-cfo/538657/).

215. The S&P 500 index reported losses in March 2020 of thirty-two percent. The comparable loss of value during the 2009 financial crisis required a full year. Craig Lazzara, *Coronaviral Corrections*, S&P GLOBAL (Mar. 26, 2020, https://www.spglobal.com/en/research-insights/articles/coronaviral-correlations).

216. Himamauli Das, *Inight: Five CFIUS Enhanced Enforcement Trends During Covid-19*, BLOOMBERG L. (May 19, 2020, https://news.bloomberglaw.com/white-collar-and-criminal-law/insight-five-cfius-enhanced-enforcement-trends-during-covid-19).

B. A Statutory Solution

Biopharma and Biotech is a vital component of not only the domestic economy but the global health ecosystem, and heavy handed CFIUS interference threatens to compromise the economic wellbeing of the sector and the wellbeing of countless patients around the world who depend on innovative drugs and therapies made possible by FDI. If courts remain unable to review Presidential action under *Ralls'* judicial review framework, limited statutory reform is needed to cure FIRRMA's ambiguities and ensure CFIUS does not shackle the competitive Biopharma and Biotech investment climate.

First, FIRRMA should be amended to provide for permanent membership for both the Centers for Disease Control and Prevention and the Food and Drug Administration on the Committee. These agencies will be able to lend specific scientific expertise to Committee deliberations regarding threat risks posed by FDI in Biopharma and Biotech on a case by case basis. The agencies' presence on the Committee will likely send a reassuring signal to investors and potential domestic targets that the government is conscious of the real concerns regarding transparency FIRRMA generated. Additionally, fuller integration of the medical and scientific communities into the United States' national security infrastructure will contribute to greater inter-agency communication and help the government more nimbly respond to novel threats arising in the Biopharma and Biotech sector.

Second, and most importantly, the statutory language needs to define the types of technologies work on which would expose a company to CFIUS review. As formulated, FIRRMA permits CFIUS and the Executive too much latitude in determining, and moving, the point at which a company comes into the Committee's crosshairs.[217] There is an argument to be made that there is nothing inherently wrong with CFIUS being able to review FDI across an array of industries, even those not traditionally considered to implicate national security.[218] But while maintenance of national security is unquestionably the Executive's prerogative, Congress' delegation of largely unchecked authority under FIRRMA enables the President to construe ambiguous terms to suit political policies at the expense of investor certainty. While the lifespans of political proclivities can be short, wanton application of CFIUS to transactions where participants have little ability to predict or expect review will undermine confidence in the United States' investment markets.

Congress must act to specify the critical technologies it considers vital to national security interests to prevent long term loss of investor confidence. Doing so will at a minimum provide transaction participants reasonable

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217. For another example of the Committee's drift from traditional national security concerns, *see* Eamon Javers, *U.S. Blocked Chinese Purchase of San Diego Fertility Clinic Over Medical Data Security Concerns*, CNBC (Oct. 16, 2020, https://www.cnbc.com/2020/10/16/trump-administration-blocked-chinese-purchase-of-us-fertility-clinic.html).

218. H.R. REP. NO. 100-576, *supra* note 31.

notice that CFIUS review should be factored into the formulation of a deal. Moreover, Congress has the ability to develop detailed lists and categories of critical technologies[219] and can revisit them periodically to ensure their continued relevance and effectiveness. These limited statutory reforms avoid the introduction of additional ambiguities that would follow from an extensive modification of CFIUS and preserve Congress' intent to grant the Executive broader enforcement capabilities through CFIUS while protecting the integrity of the American investment marketplace.

CONCLUSION

With "[t]oday's great power competition taking place in a more global, commercially-driven and rapidly evolving technological environment,"[220] CFIUS finds itself at a crossroads. The Committee evolved over five decades into an important component of the United States' national security apparatus, but that evolution has often been lurching and motivated as much by political fears as by veritable national security concerns. FIRRMA's expansion of CFIUS' power compounded the problems posed by vague definitions of national security and critical infrastructure and exacerbated long-simmering tensions between a liberal economic policy and a need to protect the nation against ever more sophisticated threats.[221] Absent a workable standard of judicial review of Presidential actions, and with essential concepts and terms left nebulous, FIRRMA permits the Executive largely unchecked authority to declare any FDI-backed transaction a threat to the nation's security. In order to preserve the fidelity of American investment markets, protect the expectations of important economic actors, and maintain CFIUS' credibility as a judicious national security entity unaffected by political sentiment, Congress must act to cure the statutory flaws that have blurred the Committee's focus. Failure to do so will entrench FIRRMA's structural issues and set a precedent for further politicization of CFIUS at the expense of American economic vitality.

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219. Congress attempted to do just this through FIRRMA, although its effort fell short. *See* Jackson 2020, *supra* note 19, at 16 n.36.

220. Simon Owens, *National Security in an Age of Evolving Threats*, POLITICO (Dec. 17, 2019, https://www.politico.com/sponsored-content/2019/12/national-security-in-an-age-of-evolving-threats).

221. *See* Mundheim & Heleniak, *supra* note 4.