NOTE

THE "LEGAL BLACK HOLE": CFIUS AND THE IMPLICATIONS OF TRUMP'S EXECUTIVE ORDER AGAINST TIKTOK

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Executive orders prohibiting foreign transactions demonstrate the broad reach of the President's national security powers. While these powers stem from Congressional authorizations and deference from the judiciary, their use in regulating private transactions presents issues with transparency, and the results are often unforgiving to the transacting parties. This Note explains how current legislation empowering the President to prohibit foreign transactions is problematic, and advocates for a transparency-focused framework to balance the interests of transacting parties and national security.

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INTRODUCTION

In 2018, Broadcom, a then Singapore-based semiconductor manufacturing company, agreed to acquire U.S.-based semiconductor producer Qualcomm.[1] The deal involved a $117 billion bid and a dozen banks.[2] However, Broadcom abruptly withdrew its bid two days after President Donald J. Trump issued an order barring the transaction.[3] The order emphasized concern over national security as central to the prohibition of the deal.[4] Broadcom was not an isolated instance: in August 2020, Trump issued a similar executive order calling for Chinese-owned ByteDance to divest from TikTok, a video-based social media application with over 100 million active U.S. users.[5] Trump's relatively frequent use of such orders has shed light on the broad executive powers that can be employed to interfere with private transactions. While preceding President Barack Obama took similar action twice throughout his two terms, President Trump blocked three transactions during his one term in office.[6]

Trump's actions are of particular importance to the sphere of international corporate transactions. These transactions play a significant role in the American economy,[7] yet Broadcom and TikTok have demonstrated that the President's national security powers may be used to grant him unilateral authority to regulate private transactions involving foreign parties. Moreover, when it comes to national security, the President enjoys a significant degree of deference from the judiciary. As such, this Note will point out how existing legislation governing the executive's national security powers is problematic when they are applied to prohibit foreign transactions and provides little recourse to affected parties.

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1 *Timeline: Broadcom-Qualcomm Saga Comes to an Abrupt End*, REUTERS (Mar. 14, 2018, 10:27 AM), https://www.reuters.com/article/us-qualcomm-m-a-broadcom-timeline/timeline-broadcom-qualcomm-saga-comes-to-an-abrupt-end-idUSKCN1GQ22N.

2 *Id.*

3 *Id.*; Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited, 83 Fed. Reg. 11,631, 11,631 (Mar. 15, 2018) [hereinafter Regarding the Proposed Takeover].

4 *Id.*

5 *See* Addressing the Threat Posed by TikTok, and Taking Additional Steps to Address the National Emergency With Respect to the Information and Communications Technology and Services Supply Chain, 85 Fed. Reg. 48,637, 48,637-38 (Aug. 11, 2020) [hereinafter Addressing the Threat Posed by TikTok]; Alex Sherman, *TikTok Reveals Detailed User Numbers for the First Time*, CNBC (Aug. 24, 2020, 3:53 PM), https://www.cnbc.com/2020/08/24/tiktok-reveals-us-global-user-growth-numbers-for-first-time.html.

6 *See* JAMES K. JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 21 (2020).

7 *See Benefits of Foreign Direct Investment (FDI),* SELECTUSA, https://www.selectusa.gov/FDI-benefits (last visited July 22, 2021) [hereinafter *Benefits of FDI*].

First, this Note will detail the authority behind the relevant executive orders as well as the background on the Committee of Foreign Investment in the United States (CFIUS), the executive advisory panel that investigates foreign transactions. Next, this Note will explore the benefits of foreign direct investment (FDI) and argue that targeted executive regulation may lead to the chipping away of FDI benefits that the U.S. economy enjoys. Finally, this Note proposes a more effective means of balancing CFIUS and private interests by outlining a regulatory scheme that is more transparent and offers affected parties an opportunity to be heard through in-camera hearings.

I. BACKGROUND

The President's authority to prohibit foreign transactions comes from legislation granting the executive branch authority over certain matters in national security. Such legislation, which are often cited in executive orders, includes the International Emergency Economics Power Act (IEEPA) and the Defense Production Act (DPA) Of 1950.[8]

A. The International Emergency Economics Power Act (IEEPA) and Section 721 of the Defense Production Act of 1950

The IEEPA grants the President authority to regulate commerce, particularly if a foreign party is involved.[9] Specifically, the statute allows the President to investigate, regulate, or prohibit (1) any transaction in foreign exchange, (2) any transfer of credit or payment involving a foreign country or national, and (3) the importing or exporting of currency or securities by any person subject to the jurisdiction of the United States.[10]

Similarly, Section 721 of the DPA ("Section 721") grants the President authority to review certain covered transactions through CFIUS,[11] and it allows actions to be taken against any transaction that threatens to impair the national security of the United States.[12] While parties may voluntarily request review,[13] CFIUS automatically initiates an investiga-

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[8] *See e.g.*, Addressing the Threat Posed by TikTok, 85 Fed. Reg. at 48,637; Regarding the Proposed Takeover, 83 Fed. Reg. at 11,631; Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 77 Fed. Reg. 60,281, 60,281 (Oct. 3, 2012).

[9] *See* 50 U.S.C. § 1702; International Emergency Economics Power Act, Pub. L. No. 95-233, § 201, 91 Stat. 1626 (1977).

[10] *Id.* § 1702(a)(1)(A).

[11] 50 U.S.C. § 4565(b)(1)(A). A "covered" transaction includes any merger, acquisition, or takeover which results in foreign control of any person engaged in interstate commerce in the United States. *Id.* § 4565(a)(4)(B).

[12] *Id.* § 4565(b)(2).

[13] *Id.* § 4565(b)(1)(C)(i).

tion if it determines that a transaction would threaten national security or result in critical infrastructure being controlled by a foreign entity.[14]

B. The Committee on Foreign Investment

Section 721 also established CFIUS as a nine-member, interagency body chaired by the Secretary of Treasury.[15] The committee is responsible for assessing foreign transactions for national security risks.[16] Upon finding such a risk, CFIUS has the authority to condition the transaction to certain requirements or, like in TikTok's case, recommend that the President block it altogether.[17] CFIUS operates as an investigative body, and as such, the committee primarily makes reports and recommendations to the President.[18] In short, CFIUS provides the evidence and support that the President uses when issuing his executive orders. Nonetheless, the CFIUS recommendation itself has coercive power and has compelled companies to call deals off "voluntarily" before any presidential action takes place.[19]

Procedurally, CFIUS may review any foreign transaction at its own discretion or in response to the transacting parties' voluntary filing.[20] Where CFIUS discretion is exercised, Section 721 requires that CFIUS review the covered foreign transaction to determine whether (1) the transaction threatens to impair national security; (2) the foreign entity is controlled by a foreign government; or (3) the transaction would result in control of any critical infrastructure that could impair national security.[21] Where parties voluntarily file their transactions, CFIUS must review the voluntary filing, which parties often provide as a means of ensuring that CFIUS will not later interfere with the deal.[22]

The typical CFIUS review process includes three stages: review, investigation, and presidential action.[23] The committee first has thirty days to review the transaction in question to determine if it will pursue an investigation.[24] If an investigation is deemed necessary, CFIUS has

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14 *Id.* § 4565(b)(2)(B).

15 E. Maddy Berg, Note, *A Tale of Two Statutes: Using IEEPA's Accountability Safeguards to Inspire CFIUS Reform*, 118 COLUM. L. REV. 1763, 1766 (2018) [hereinafter *A Tale of Two Statutes*].

16 *Id.* at 1767.

17 *Id.*

18 *See* Anthony Michael Sabino, *Transactions That Imperil National Security*, 77 N.Y. ST B.J. 20, 21–22 (2005).

19 *See e.g.,* Ana Swanson & Paul Mozur, *MoneyGram and Ant Financial Call Off Merger, Citing Regulatory Concerns*, N.Y. TIMES (Jan. 2, 2018), https://www.nytimes.com/2018/01/02/business/moneygram-ant-financial-china-cfius.html.

20 *A Tale of Two Statutes*, *supra* note 15, at 1767.

21 50 U.S.C. § 4565(b)(2)(B).

22 *A Tale of Two Statutes*, *supra* note 15, at 1768.

23 *Id.* at 1772.

24 50 U.S.C. § 4565(b)(1)(C)(v)(III)(bb).

another forty-five days to complete the investigation and provide its recommendation to the President.[25] Following CFIUS's recommendation, the President has fifteen days to take action and decide whether to block the transaction.[26]

The current CFIUS regime was predominantly established by the Exon-Florio amendment of 1988 to the DPA, which granted the President authority to block proposed or pending foreign "mergers, acquisitions, or takeovers" of "persons engaged in interstate commerce in the United States" that pose a threat to national security.[27] CFIUS's power was subsequently expanded with the National Defense Authorization Act for the Fiscal Year of 1993 (known as the Byrd Amendment), which requires review of investments made by an acquirer that is controlled by or acting on behalf of a foreign government and that would result in control of a party engaged in interstate commerce in the United States.[28]

In 2018, the Foreign Investment Risk Review Modernization Act (FIRRMA) further increased reviewable transactions to encompass non-passive, minority-position investments in critical technology or infrastructure and real estate investments close to national security facilities.[29] FIRRMA also encourages CFIUS to consider whether covered transactions come from a "country of special concern."[30] In theory, this means that even if a transaction does not implicate national security concerns on its face, it could still be subject to review if the parties involved were from a country deemed of "special concern" by the committee.[31]

II. PROBLEMS WITH THE EXISTING AUTHORITY AND CFIUS

In TikTok's case, Trump expressed concern over the data-collection practices of the application and the company's connection with the Chinese government.[32] The application would allegedly allow the Chinese government to access Americans' personal and proprietary information, potentially exposing Americans to tracking, blackmail, and corporate es-

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[25] *See id.* § 4565(b)(2)(C)(i); § 4565(l)(2).

[26] *Id.* § 4565(d)(2).

[27] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1425; JACKSON, *supra* note 6, at 7.

[28] National Defense Authorization Act for the Fiscal Year of 1993, Pub. L. No. 102-484, 106 Stat. 2315, 2463-65; JACKSON, *supra* note 6, at 9.

[29] *See* Foreign Investment Risk Review Modernization Act, Pub. L. No. 115-232, 132 Stat. 1636, 2177-83 (2018); Andrew Thompson, *The Committee on Foreign Investment in the United States: An Analysis of the Foreign Investment Risk Review Modernization Act of 2018*, 19 J. HIGH TECH. L. 361, 374–75 (2019).

[30] § 1702(c)(1), 132 Stat. at 2176; Thompson, *supra* note 29, at 366–67, 401. Countries of "special concern" have "demonstrated or declared [a] strategic goal of acquiring a type of critical technology or critical infrastructure that would affect United States leadership in areas related to national security." § 1702(c)(1), 132 Stat. at 2176.

[31] Thompson, *supra* note 29, at 401.

[32] Addressing the Threat Posed by TikTok, 85 Fed. Reg. 48,637, 48,637 (Aug. 11, 2020).

pionage.[33] While the cited risks are legitimate concerns of national security,[34] the use of executive national security powers to block foreign investment also presents some issues with accountability and consistency.

One immediate observation that can be made regarding Section 721 is that the provision does not appear to set any explicit limitations to presidential review powers. While the Act offers eleven factors to be considered when assessing national security risks,[35] the Act explicitly states that these factors are ones which "the President or the President's designee *may* . . . consider . . . ,"[36] and therefore, leaves room for the possibility of decisions being made based on non-disclosed considerations at the President's sole discretion. Furthermore, the findings and subsequent actions of the President under this authority are not subject to judicial review.[37]

There is also an absence of protections for the parties whose transactions are under review. In terms of scope, the President can only review certain "covered transactions," but the DPA's definition of "covered transaction" is quite expansive.[38] Procedurally, the President is required to adhere to a forty-five day limit for investigations and report results to Congress.[39] Similar to Section 721, the IEEPA allows the President to regulate and prohibit any transaction in foreign exchange or command any transaction involving any property in which any foreign country or a national thereof has any interest, if the involved person or property is subject to the jurisdiction of the United States.[40] The only limitations on the IEEPA are procedural, mandating that the President declare a national emergency before exercising his IEEPA powers as well as reporting to and consulting with Congress "in every possible instance."[41]

Moreover, since CFIUS is an executive-appointed agency,[42] its membership, and therefore decision making, is subject to change with each new administration and, as previously mentioned, decisions made by the President to block transactions are nonreviewable.[43] This means that the President enjoys significant unilateral power over affected par-

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33 *Id.*

34 *See* U.S. v. Robel, 389 U.S. 258, 266 (1967) (stating that espionage and sabotage are substantial interests).

35 50 U.S.C. § 4565(f).

36 *Id.* (emphasis added).

37 *Id.* § 4565(e).

38 *See id.* § 4565(a)(4).

39 *Id.* § 4565(b)(2)(C), (b)(3).

40 50 U.S.C. § 1702(a)(1)(A).

41 50 U.S.C. §§ 1631, 1641, 1703(a).

42 *See* Sabino, *supra* note 18, at 20–21.

43 50 U.S.C. § 4565(e).

ties, as they cannot contest the legitimacy of the President's decision–that is, whether it is reasonable to believe that the transaction poses national security concerns. Therefore, barring any constitutional claims,[44] parties involved in a blocked transaction seldom have any recourse to the costs associated with putting their deals together.

The aforementioned issues with existing authorities are significant because of the reach that the authorities grant the executive. The DPA has been used to force the divestiture of dating apps (possibly due to the sensitive nature of the data),[45] as well as wind farms (due to their close location to restricted airspace) alike.[46] Furthermore those who seek to challenge such actions in court have to overcome a judicial system that generally favors deference when it comes to national security.[47] Indeed, the Supreme Court has held the opinion that the President is in the best position to make judgements regarding necessary national security measures.[48]

While FIRRMA addresses some of the shortcomings of the executive's broad review power,[49] the aforementioned authorities and the executive have not attempted to define "national security" as they apply to the President's authority to review and block foreign transactions. This ambiguity, combined with CFIUS's confidential review procedure, has led to seemingly inconsistent prohibitions[50] and to CFIUS review being dubbed a "legal black hole."[51]

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44 *See e.g.*, Ralls Corp. v. Comm. on Foreign Inv. in U.S., 758 F.3d 296, 307–08, 311 (D.C. Cir. 2014).

45 Echo Wang, *China's Kunlun Tech Agrees to U.S. Demand to Sell Grindr Gay Dating App.*, REUTERS (May 13, 2019, 5:06 PM), https://www.reuters.com/article/us-grindr-m-a-beijingkunlun/chinas-kunlun-tech-agrees-to-u-s-demand-to-sell-grindr-gay-dating-app-idUSKCN1SJ28N.

46 *See* Ralls Corp. v. Comm. on Foreign Inv. in U.S., 758 F.3d 296, 325 (D.C. Cir. 2014).

47 *See id.* at 313–14.

48 *See e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2409 (2018) (acknowledging "the deference traditionally accorded to the President" with respect to national security matters); *cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004) (stating that "our Constitution recognizes that core strategic powers of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.").

49 Under FIRRMA, certain limited disclosures must be provided should a party challenge the committee's findings in court and exempts review of indirect participation by foreign persons in investment funds. Thompson, *supra* note 29, at 378–79.

50 For example, CFIUS questionably approved of Shuanghui's acquisition of the largest U.S. pork supplier despite findings that the company uses hazardous additives. Reginald Cuyler, *Leaving Home the Bacon: Judicially Reviewing CFIUS' Approval of Shuanghui Acquiring Smithfield Foods*, 6 U. P.R. BUS. L. J. 206, 209–11 (2015).

51 Thompson, *supra* note 29, at 401.

III. THE IMPORTANCE OF FOREIGN DIRECT INVESTMENT

Foreign direct investment is crucial to economic growth. In the U.S., from 2018 to 2019, the country's FDI position increased $331.2 billion from $4.13 trillion to $4.46 trillion.[52] FDI also introduces technological innovation.[53] In 2016, 53% of utility patents were filed from foreign sources, and in 2017, $62.6 billion was spent in the U.S. by foreign-owned firms on research and development.[54] Furthermore, FDI creates employment opportunities for the invested-in country. For the United States, in 2017, 7.4 million U.S. workers were employed by foreign-owned firms.[55] Additionally, data from the Internal Revenue Service (IRS) indicates that, in 2013, 5.9 million jobs were attributable to the beneficial economic effects of foreign-owned firms.[56] The benefits of FDI go beyond innovation and job creation as well; FDI has helped ailing U.S. companies, increased real estate values, and contributed to venture capital and local economies.[57]

A perceived expansion of CFIUS activity may discourage FDI and chip away at its potential benefits. For example, in 2006, Dubai Ports World (DPW), a state-owned ports management company from the United Arab Emirates, attempted to acquire Peninsular & Oriental Stream Navigation Co., giving DPW the operating rights to six American ports.[58] Backlash from an initial CFIUS approval of the transaction prompted a mutual agreement between DPW and CFIUS to a forty-five day review.[59] However, Congress then intervened, threatening to block the transaction through legislative means and convincing DPW to finally sell its port leases.[60]

While a direct link cannot be established between CFIUS and non-investment decisions, some have noted that decreases in FDI from particular countries seem to coincide with high-profile CFIUS investigations and recommendations.[61] Following the DPW controversy, foreign invest-

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52 *Direct Investment by Country and Industry, 2019*, BUREAU OF ECON. ANALYSIS, https://www.bea.gov/news/2020/direct-investment-country-and-industry-2019 (July 23, 2020, 8:30 AM).

53 Yiheng Feng, *"We Wouldn't Transfer Title to the Devil": Consequences of the Congressional Politicization of Foreign Direct Investment on National Security Grounds*, 42 N.Y.U. J. INT'L L. & POL. 253, 256 (2009).

54 *Benefits of FDI, supra* note 7.

55 *Id.*

56 *Id.*

57 Joanna Rubin Travalini, *Foreign Direct Investment in the United States: Achieving a Balance Between National Economy Benefits and National Security Interests*, 29 NW. J. INT'L L. & BUS. 779, 781 (2009).

58 *See* Christopher M. Tipler, *Defining 'National Security': Resolving Ambiguity in the CFIUS Regulations*, 35 U. PA. J. INT'L L. 1223, 1229 (2014).

59 *Id.*

60 *Id.*

61 *See id.* at 1259.

ment in the U.S. originating from the United Arab Emirates fell by over $1 billion in 2006.[62] As a result, an increase in blocked transactions, especially that of high-profile companies, may lead to an increased reluctance to contribute to FDI in the U.S.

IV. A CONSTITUTIONAL LIMIT ON EXECUTIVE NATIONAL SECURITY POWERS THROUGH DUE PROCESS

While it is difficult to pinpoint the limits of CFIUS and presidential national security powers, courts have indicated that relief, especially in situations of forced divestitures, may be found through the affected party's right to due process. The Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*[63] took an early stance in limiting the President's power to seize private property, even when the action is based on national security reasons.[64] In 2014, a party directly challenged CFIUS determinations in *Ralls Corp. v. Committee on Foreign Investment in the United States*.[65] In the first and only challenge of a CFIUS determination, the D.C. Circuit held that the affected parties' due process rights entitled them to be presented with the basis of CFIUS's determination for a chance of rebuttal.[66]

A. Youngstown *and Private Property Rights Against National Security Powers*

In *Youngstown Sheet & Tube Co. v. Sawyer,* the Supreme Court explored the question of presidential seizure in the context of national security.[67] The case was sparked by President Harry S. Truman's order to the steel industry, citing the threat of the Korean war.[68] Specifically, a 1952 labor dispute between steelworkers and manufactures threatened a nation-wide strike that would have created a shortage of much-needed steel.[69] In response, President Truman issued an order seizing the nation's steel plants, citing his authority under the Constitution and as the Commander in Chief.[70] Nonetheless, the Supreme Court found Truman's argument unconvincing and stated that the authority to seize private property could only be authorized by Congress.[71]

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62 *Id.*
63 343 U.S. 579 (1952).
64 *See id.* at 587–88.
65 758 F.3d 296 (D.C. Cir. 2014).
66 *See id.* at 325.
67 *See Youngstown*, 343 U.S. at 582.
68 *See id.* at 582–83.
69 *Id.*
70 *Id.*
71 *Id.* at 587 ("[W]e cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of

Youngstown took an early stance in establishing a limit on the President's use of wartime powers to infringe on private property. In his concurrence, Justice Jackson articulated a tripartite scheme that the Supreme Court would later apply in evaluating executive action generally.[72] Specifically, Jackson stated that "when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum . . . . "[73] Writing for the majority opinion, Justice Black shared the same sentiment, stating that, more fundamentally, "[t]he President's power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself."[74] However, today, Congress seems to have taken the side of the executive. The DPA and IEEPA have significantly expanded presidential wartime powers and granted executive authority beyond what existed when *Youngstown* was decided.[75] Because legislation has explicitly authorized the President to prohibit certain transactions, it is questionable whether affected parties would have effective grounds to challenge Presidential action solely based on *Youngstown's* precedent.

B. A Direct Challenge to CFIUS in Ralls

Over fifty years after *Youngstown*, the D.C. appellate explored the conflict between the executive's broad authority over private transactions and property rights in *Ralls Corp. v. Committee on Foreign Inv. in U.S.*[76] In *Ralls*, following CFIUS investigation, President Obama issued an executive order based on his presidential power granted by the DPA and IEEPA to force the Ralls Corporation to divest in various acquisitions it had made.[77] Ralls was an American company in the business of producing windfarms; the founders were Chinese nationals who also held positions in a Chinese wind turbine producer, hoping to merge the operations of their businesses.[78] While the executive order itself did not state the basis on which the president made his decision, the case revealed that the acquired properties' close proximity to restricted airspace was possibly one of the deciding factors.[79]

Ultimately, the court held that the Order deprived Ralls of constitutionally protected property interests without due process of the law and

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private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.").

72 *Id.* at 635–38.

73 *Id.* at 635.

74 *Id.* at 585.

75 *See A Tale of Two Statutes*, *supra* note 15, at 1768–72.

76 758 F.3d 296 (D.C. Cir. 2014).

77 *Id.* at 305–06.

78 *Id.* at 304.

79 *Id.* at 325.

ordered that Ralls be provided access to unclassified evidence supporting CFIUS's findings and a chance for rebuttal.[80] *Ralls* was the first instance where a party challenged CFIUS findings. The case established that due process requires those under CFIUS review be given a chance to review the nonconfidential evidence that decisions are based on, with an opportunity for rebuttal.[81]

Still, *Ralls* applied to a dispute between CFIUS and a private party with constitutionally cognizable property interests on U.S. soil.[82] On the other hand, many presidential orders that concern pending transactions involve no such interests,[83] and therefore *Ralls* may have limited applicability to those whose pending transactions are blocked. Ultimately, *Ralls* and *Youngstown's* limited applicability to recent instances of prohibited transactions indicate that a means of protection beyond those afforded by due process are warranted as well.

V. CFIUS AND FDI REVIEW GOING FORWARD

A. Mere Deference is an Insufficient Justification

Before examining possible approaches to balancing national security and FDI, it is worth examining why general deference to the executive in national security measures is an insufficient justification. While courts have shown a deferential approach to the President's national security powers, such deference has been granted in cases primarily involving circumstances dealing with war and terrorism. For example, Justice Sutherland in *U.S. v. Curtiss-Wright Export Corporation* articulated a particularly high standard of deference for Presidential national security powers, stating that:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress . . . .[84]

More recently in 2018, Chief Justice Roberts suggested that the President may not necessarily even need a persuasive justification for

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80 *Id.*

81 *See* Thompson, *supra* note 29, at 378–79.

82 *See Ralls,* 758 F.3d at 306.

83 *See e.g.*, Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited, 83 Fed. Reg. 11,631, 11,631 (Mar. 15, 2018).

84 299 U.S. 304, 319–20 (1936).

addressing perceived national security risks.[85] Indeed, in *Trump v. Hawaii*, Justice Roberts held that whether the President's chosen method of addressing perceived risks is justified from a policy perspective is "irrelevant to the scope of his . . . authority," and "when the President adopts a preventive measure . . . in the context of international affairs and national security, he is not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions."[86]

While *Curtiss-Wright* and *Trump* exemplify the degree of court deference to the President in national security measures, it is important to note that these cases arose in the context of preventing physical conflict. In *Trump*, the President used his national security measures to prevent or limit noncitizens from a select group of countries from entering the United States.[87] Trump justified his order on the basis that the countries in question presented heightened terrorism risks.[88] Also, in *Curtiss-Wright*, President Franklin D. Roosevelt used his authority to prohibit the sale of arms to Bolivia, a country engaged in conflict.[89] Roosevelt justified his order on the basis of reestablishing peace between the countries in conflict.[90]

Unlike the *Curtiss-Wright* and *Trump* cases, the use of national security powers to block foreign transactions does not have a well-established precedent of deference.[91] Therefore, while it can be said that courts generally favor deference in national security and foreign matters, there is also a significant distinction in the situations being compared. In cases where deference is favored, the justification generally lies in protecting American citizens from threats of physical harm and terrorism.[92] Indeed, Justice Kennedy articulates this point in *Boumediene v. Bush*, showing respect for the President's national security powers out of recognition that "[u]nlike the President . . . the Members of [the] Court . . . [do not] begin the day with briefings that may describe new and serious threats to our nation."[93] And as a result, "[t]he law must accord the Executive substantial authority . . . ."[94]

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85 Trump v. Hawaii, 138 S. Ct. 2392, 2409 (2018).

86 *Id.*

87 *See id.* at 2405-06.

88 *Id.* at 2403.

89 *Curtiss-Wright Exp. Corp.*, 299 U.S. at 311.

90 *Id.* at 312.

91 The only case in which a CFIUS determination was challenged was in *Ralls Corp. v. Committee on Foreign Inv. in U.S.*, a case in which the court did not allude to or explicitly grant the executive's decision deference as is commonly done in wartime cases. *See generally* Ralls Corp. v. Comm. on Foreign Inv. in U.S., 758 F.3d 296 (D.C. Cir. 2014).

92 *See e.g., Trump*, 138 S. Ct. at 2408-09; Boumediene v. Bush, 553 U.S. 723, 797 (2008).

93 *Boumediene*, 553 U.S. at 797.

94 *Id.*

However, *Boumediene* arose from the war on terror,[95] and in the case of blocked transactions, sitting Presidents have given different reasons. For example, rather than being grounded in protecting the U.S. from terrorism, Trump's executive order calling for TikTok's divestiture cites privacy concerns and the potential for corporate espionage.[96] Whether this concern deserves the same degree of deference as terrorism is subject to debate, but at the very least, they should be recognized as different. Therefore, because national security is "broad and malleable,"[97] perhaps different contexts warrant different degrees of deference. In urgent situations in which armed conflict or terrorism are the issue, the executive deserves a higher degree of deference out of recognition that it can make the most informed decision. However, in the context of private commercial transactions, perhaps a less deferential standard should be afforded out of recognition that such planned transactions are often disclosed and are put together methodically through a period of time.

As such, unlike terrorism or physical conflicts, private transactions offer opportunities for relevant authorities to step in to examine the issues and add preventive measures, therefore eliminating the waste associated with blocking deals outright once they reach their final stage. Ultimately, Blocking FDI transactions under national security powers should not merely be justified on the basis that the executive has the authority and deference to do so because such deference was granted in the context of preventing a different type of risk. While there are also legitimate risks in foreign transactions, CFIUS has an opportunity to examine and mitigate those risks by cooperating with the parties to the deal.

B. Increased Transparency

Perhaps the most significant issue with CFIUS recommendations and their subsequent results (presidential action) is that they offer little transparency into the executive's decision-making process. For example, President Trump's decision to block Qualcomm's acquisition of Broadcom came with seemingly little justification.[98] The executive order specifically states only that the transactions may lead to "action that threatens to impair the national security of the United States."[99] Follow-

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95 *Id.* at 732–33.

96 Addressing the Threat Posed by TikTok, and Taking Additional Steps to Address the National Emergency With Respect to the Information and Communications Technology and Services Supply Chain 85 Fed. Reg. 48,637 48,637 (Aug. 11, 2020).

97 Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004).

98 *See* Thompson, *supra* note 29, at 399–401 (arguing that CFUIS politicization, characterized by competition with China for military supremacy, guided the order).

99 Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited, 83 Fed. Reg. 11,631, 11,631 (Mar. 15, 2018).

ing this conclusion, the executive order goes on to mandate the termination of the deal and subsequent actions.[100] The executive order does not point to specific aspects of the proposed takeover or the possible actions that would threaten national security if the takeover succeeded.[101]

Similarly, President Obama's order in 2012 requiring Ralls Corporation to divest its windfarm ownership exhibits the same lack of transparency. Just like Trump's Qualcomm order, Obama's order fails to cite specific risks associated with Ralls's possession of the windfarm as well as how his determination was made.[102] Lack of transparency is a significant issue because it fails to provide prospective dealmakers, both foreign and domestic, any insights as to how to avoid similar fates as Ralls and Qualcomm. Given that such deals are often high stakes,[103] it is problematic for parties to leave the fates of their deals to an authority that provides little to no insight as to how it operates.

As a result, certain modifications should be made to the existing regulations[104] pertaining to investments in the United Stated by foreign persons. The changes that this Note proposes aims to achieve the following goals: (1) to provide parties entering an FDI transaction with expectations of CFIUS's involvement; and (2) to improve communications between the involved parties and CFIUS representatives. One immediate change that could be made has already been proposed by various scholars who have expressed agreement about CFIUS's lack of transparency. For example, some have proposed that CFIUS regulations should be modified to include a list of specific industries and technologies that would be presumed to raise national security concerns[105] and provide examples to which companies can compare their proposed transactions.

These proposed changes would be effective at increasing the transparency of CFIUS procedures and providing both foreign and domestic parties with an opportunity to assess the regulatory risks of their proposed transaction. Applied to the Broadcom-Qualcomm deal, if such measures were present, Broadcom would have been informed that semiconductors were among the technologies that are presumed to implicate national security concerns. With this understanding, perhaps Broadcom

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100 *See id.*

101 *Id.*

102 *See* Regarding the Acquisition of Four U.S. Wind Farm, Project Companies by Ralls Corporation, 77 Fed. Reg. 60,281, 60,281 (Oct. 3, 2012).

103 For example, Chinese financial company Ant Financial offered to acquire MoneyGram for $1.2 billion. But after CFIUS raised concerns about the proposed takeover, the parties terminated their tentative deal and Ant paid $30 million in termination fees. *See* Greg Roumeliotis, *U.S. Blocks MoneyGram Sale to China's Ant Financial on National Security Concerns*, REUTERS (Jan. 2, 2018, 4:36 PM), https://www.reuters.com/article/us-moneygram-intl-m-a-ant-financial-idUSKBN1ER1R7.

104 31 C.F.R. § 800 (2019).

105 Tipler, *supra* note 58, at 1273.

would not have proceeded with its bid or invested less resources into securing its deal knowing that there was a significant chance of CFIUS intervention. As a result, the presented propositions satisfy the first goal of providing parties with realistic expectations of CFIUS involvement.

In addition to communicating examples of transactions that would automatically implicate national security concerns, CFIUS should also encourage communication between dealmakers and the committee. This would not be a dramatic change to the existing framework; for example, section 800.501(b) of current CFIUS regulations already provides, and even encourages, a means of meeting with committee staff members and parties to clarify issues pertaining to the transaction.[106] 800.501(b) should be expanded to make such meetings mandatory and provide parties with a grace period to amend certain issues that CFIUS finds.

Additionally, 800.501(b) should provide meeting opportunities before parties decide whether to submit their transactions for CFIUS review, as the current provision offers meetings only to parties already under CFIUS review.[107] Although certain transactions that are not under review may be stipulated by the parties as covered transactions and voluntarily submitted for review,[108] if parties were given the option to meet with the committee to discuss tentative transactions before any implications of a review or investigation, it would be beneficial to both sides. For the parties to the transactions, such an opportunity would be informative of whether their deals may raise concerns with CFIUS, allowing them to address the issues at a preliminary stage and to acquire a better understand of whether to (voluntarily) submit their transactions for CFIUS review. For CFIUS, clarifying the committee's stance to parties, especially those whose transactions do not implicate national security concerns, would allow the committee to save their resources from being used on voluntary filings that are of no concern in the first place.

C. In-Camera Hearings

Ralls established that parties may also have a right to judicial review following a CFIUS recommendation.[109] However, the circumstances of *Ralls* are unique in that the executive order in question called for the divestiture of property to which the plaintiffs already had

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106 31 C.F.R. § 800.501(b) ("During an investigation, party to the transaction under investigation may request a meeting with the Committee staff; such a request will ordinarily be granted.").

107 *See id.*

108 *Id.* § 800.402(n).

109 *See* Ralls Corp. v. Comm. on Foreign Inv. in the United States, 758 F.3d 296, 311 ("This conclusion is consistent with *Ralpho* and *Ungar*, where we determined that similarly broad statutory language did not bar our review of constitutional claims challenging the process by which unreviewable determinations were reached.").

rights.[110] Given that CFIUS also makes determinations on foreign transactions that are pending, *Ralls* and the extremely limited judicial precedent involving CFIUS do not provide much insight as to the remedies parties can seek through court. After all, CFIUS legislation explicitly states that determinations made by the executive on such matters are nonreviewable.[111]

Nonetheless, the non-reviewability clause presents issues with accountability. Given the general absence of explicit reasoning in the executive orders, such a privilege granted to CFIUS leaves room for arbitrary decision making. As a result, courts should be able to consider the merits on which CFIUS makes its determinations. One can counter that the nature of CFIUS and executive action is confidential, as was emphasized in *Ralls*.[112] Therefore, perhaps a balance in the competing interests of confidentiality and an opportunity to be heard could be found through in-camera hearings.

CFIUS is no stranger to in-camera hearings.[113] For example, such a means was used in *In re Global Crossing Ltd.*, in which the New York Bankruptcy Court granted such a hearing for prospective foreign buyers.[114] However, *Global Crossing* was also unique in that the movant's motives were not challenging CFIUS determinations, but rather ensuring that the evidence that was to be presented to CFIUS would not be disclosed to competitors.[115] Nonetheless, given that courts have shown a willingness to accommodate in-camera hearings in matters relating to CFIUS, perhaps such a means could be the norm for those wishing to challenge CFIUS determinations as well.

CONCLUSION

President Trump's executive order calling for the divestiture of the video-sharing application TikTok exemplifies increased executive activity over foreign transactions. While it is within the executive's responsibility and authority to do so, the broad scope of legislation empowering the President and CFIUS presents transparency issues. As a result, parties to a prohibited deal or forced divestiture are sometimes left without means of protection, and those looking from the outside are left without guidance as to how to navigate their own deals. This Note proposes that to address this issue, CFIUS regulations and procedures should be modi-

110 *Id.* at 304–06.

111 50 U.S.C. § 4565(e).

112 *See Ralls,* 758 F.3d at 319 (citing Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 209-10 (D.C. Cir. 2001).

113 *See e.g., In re* Glob. Crossing Ltd., 295 B.R. 720, 722 (Bankr. S.D.N.Y. 2003) (granting a motion to hear evidence relating to CFIUS in-camera).

114 *Id.*

115 *Id.* at 723.

fied such that: (1) information regarding technologies and transactions that will automatically implicate national security concerns (and therefore CFIUS review) are made public; (2) there are increased opportunities for communication between transacting parties and CFIUS; and (3) parties who wish to dispute CFIUS and executive determinations may do so through in-camera hearings.