

# CFIUS AS A CONGRESSIONAL NOTIFICATION SERVICE

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## ABSTRACT

*How can Congress play a role in formulating national security policy? This Article identifies one way that Congress already plays such a role: in its oversight of executive branch decisions regarding foreign investments in the United States. The executive’s role in this relationship is passive; it is best understood as a congressional notification service. This Article considers the implications of such a service, which could serve as a model for increased congressional involvement in other aspects of foreign affairs. It offers historical support for the descriptive claim that Congress plays a central role in policing foreign investments for national security concerns; the mildness of the executive role is shown both qualitatively and quantitatively through a content analysis of the “boilerplateness” of executive approvals of foreign acquisitions. The role Congress has played in national security and foreign direct investment policymaking has implications for theories of presidential administration and executive discretion in foreign affairs, and also for practicing lawyers interested in defining what exactly the scope of “national security” might be. The Article concludes with a review of these implications.*

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## I. INTRODUCTION

The Supreme Court suggested in *United States v. Curtiss-Wright Export Corp.* that “if, in the maintenance of our international relations, embarrassment . . . is to be avoided and success for our aims achieved, congressional legislation . . . must often accord to the President a degree of discretion and freedom from statutory restriction.”<sup>1</sup> But what does “often” mean? Should Congress always defer to the president in foreign affairs?

These questions have particular salience in the wake of a period in which the executive branch has acted controversially in prosecuting the war on terror.<sup>2</sup> And they will remain important as countries try to coordinate the development of a new global regulatory architecture to deal with the recent financial crisis, which implicates both executive prerogatives on essential security<sup>3</sup>—indeed, the Central Intelligence Agency (“CIA”) has identified

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1. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

2. This increase in executive branch action has inspired a blizzard of academic concern. *See, e.g.*, Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 673–75 (2000) (discussing the virtues of an appropriately cabined doctrine of deference in foreign affairs); Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1771–74 (2007) (suggesting that the level of judicial deference accorded executive interpretation of treaty language should be determined based on the origins and circumstances of the executive’s process in interpreting the treaty); Eric A. Posner & Cass R. Sunstein, *Debate, Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1204–07 (2007) (arguing for deference to the executive’s interpretation of ambiguous statutes). *See also* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999) (examining the historical increase in deference to the executive in foreign affairs by both Congress and the courts).

3. *See* Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, at 15–36 (Univ. of Chi. Law Sch., John M. Olin Law & Econ.

the economic crisis of 2008 as the foremost current threat to national security<sup>4</sup>—and bread-and-butter questions of economic regulation, in which Congress has always played a critical role.

In fact, Congress does not, nor necessarily should it, defer to the executive in foreign affairs. One way that Congress can and has exercised control in this area is through its oversight of the Committee on Foreign Investment in the United States (“CFIUS” or “the Committee”), the institution that decides whether foreign interests should be allowed to purchase American assets. This Article explains how Congress has created a role for itself in the making of foreign policy by turning CFIUS—an institution that would appear to represent absolute executive discretion in discerning the national security interests of the United States—into essentially a congressional notification service.

This is shown by essaying an approach that legal scholars can use to analyze institutions that (though they might be replete with the characteristics of law and lawyering) do not lend themselves to conventional legal analysis because they do not explain their actions as courts and agencies ordinarily do.<sup>5</sup> CFIUS is a prime example of such an institution; as Anthony Sabino has noted, “Almost nothing is known about the internal functioning of [the Committee].”<sup>6</sup> CFIUS does not disclose its deliberations, nor does it explain its decisions.<sup>7</sup>

Despite this obstacle, principles of national security law—and the balance of powers between Congress and the president—can still be

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Working Paper No. 442, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1301164](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1301164) (arguing that the executive branch is descriptively likely to take the policymaking lead during crises because of its institutional advantages in taking action).

4. See Mark Mazzetti, *Global Economy Top Threat to U.S., Spy Chief Says*, N.Y. TIMES, Feb. 13, 2009, at A14. For commentary, see, for example, Peter Boone & Simon Johnson, *The Next World War? It Could Be Financial*, WASH. POST., Oct. 12, 2008, at B1 (cautioning that “[i]f governments don’t respond [to the financial crisis] with sensible, coordinated policies, there’s a risk of financial war”).

5. Such institutions are common in law enforcement: criminal prosecutors often do not explain why they decide not to prosecute, and administrative agencies are not obliged under the Administrative Procedure Act to explain their decisions about which regulations to prioritize in enforcement. See 5 U.S.C. § 701(a)(2) (2006) (recognizing the extent to which “agency action is committed to agency discretion by law”). In addition, other national security agencies, especially the intelligence agencies, also operate using undisclosed policies—for example, the Freedom of Information Act does not require agencies to disclose matters related to national security. See 5 U.S.C.S. § 552(b)(3) (LexisNexis 2009).

6. Anthony Michael Sabino, *Transactions That Imperil National Security: A Look at the Government’s Power to Say “No,”* N.Y. ST. B.A.J., Nov./Dec. 2005, at 20, 20.

7. See *In re Global Crossing, Ltd.*, 295 B.R. 720, 722 (Bankr. S.D.N.Y. 2003) (stating that “[g]iven the national security-related nature of the CFIUS review process, it is generally protected from disclosure to the public,” subject to only certain exceptions).

deduced from CFIUS's record. The outcomes of CFIUS review, which can be obtained by putting together third-party reviews of the Committee and nonconfidential reports from the Committee to Congress, can be used as a tool. In addition, a content analysis of the "boilerplateness" of the few Committee decisions that are public can be used to see who CFIUS singles out and why, and to discern how much work it does—compared, critically, to what Congress does—in overseeing foreign investment.

To be sure, determining a "law of CFIUS" is not easy. The Committee's legal mandate is replete with discretion. CFIUS is specifically charged with the task of reviewing proposed foreign acquisitions to determine whether they will impair "national security,"<sup>8</sup> and the Committee has said the term "is to be interpreted broadly and without limitation to particular industries," its scope lying wholly "within the President's discretion."<sup>9</sup> Prospective foreign acquirers first submit their deals to the Committee for an evaluation over a thirty-day period, and if CFIUS is concerned enough to investigate further, a subsequent forty-five-day window exists.<sup>10</sup> After this evaluation period, the Committee must send a recommendation to the president, who can then either block the transaction or permit it to go forward.<sup>11</sup> CFIUS may recommend blockage to the president or refuse to approve the deal unless the acquiring company agrees to a variety of conditions, such as preventing foreigners from accessing the operations of the target asset, guaranteeing law enforcement access to the firm's resources, and so on.<sup>12</sup> These conditions take the form of "mitigation agreements," so called because the acquirer agrees to take the steps to

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8. U.S. Dep't of Treasury, Office of Investment Security: Committee on Foreign Investment in the United States (CFIUS), <http://www.ustreas.gov/offices/international-affairs/cfius/> (last visited Aug. 15, 2008) [hereinafter CFIUS Overview]. In *Webster v. Doe*, the Supreme Court concluded that as a statutory matter there was "no law to apply" in employment decisions by the CIA. *Webster v. Doe*, 486 U.S. 592, 599 (1988) (quoting S. REP. NO. 79-752, at 26 (1945)). The decision suggests that employment in a national security agency was essentially at will, discretionary, and unreviewable. *Webster* is controversial for many reasons, and the question of how its statutory national security exemption applies in other contexts is one such contested issue—in other words, if national security concerns bar judicial review of agency employment decisions, exactly which, if any, agency decisions made in the interest of national security are judicially reviewable?

9. See Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 56 Fed. Reg. 58,774, 58,775 (Nov. 21, 1991). See also Catherine H. Gibson, *Frankfurter's Gloss Theory, Separation of Powers, and Foreign Investment*, 36 N. KY. L. REV. 103, 110 (2009) (noting how Congress has granted the president "wide discretion" in determining what national security threats will "trigger CFIUS's powers").

10. See 50 U.S.C.S. app. § 2170(b)(1)–(2) (LexisNexis 2009). See also CFIUS Overview, *supra* note 8.

11. 50 U.S.C.S. app. § 2170(b)(3)(B), (d)(1).

12. *Id.* § 2170(l)(1)(A). See also *infra* notes 109–25.

“mitigate any threat to . . . national security.”<sup>13</sup>

A more in-depth understanding of what exactly the Committee does is important in an era of economic globalization and cross-border deals. CFIUS investigations of transactions are increasing—one Treasury official reported a 74 percent increase in reviews between 2005 and 2006, and scrutiny has not declined since then.<sup>14</sup> American publicly traded companies have responded to the prospect of such a review by filing Form 8-K and other reports with the Securities and Exchange Commission that notify investors that CFIUS reviews might affect their businesses;<sup>15</sup> there were approximately sixty-three of these reports in 2004, 102 in 2005, 143 in 2006, and 318 in 2007.<sup>16</sup>

CFIUS also played a key role in three headline-making failed deals: when China National Offshore Oil Corporation (“CNOOC”), the state-owned Chinese oil company, tried to take over Unocal;<sup>17</sup> when Dubai Ports World tried to purchase the multinational shipping venture Peninsular and Oriental Steam Navigation Company (“P&O”) (along with its American harbor assets);<sup>18</sup> and when Bain Capital, with minor participation by the Chinese venture Hulawei, tried to purchase technology manufacturer 3Com.<sup>19</sup> CFIUS has also complicated other transactions, including recent

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13. 50 U.S.C.S. app. § 2170(l)(1)(A).

14. *Committee on Foreign Investment in the United States (CFIUS), One Year After Dubai Ports World: Hearing Before the H. Comm. on Financial Servs.*, 110th Cong. 89 (2007) [hereinafter *CFIUS Hearing*] (testimony of Clay Lowery, Treasury Assistant Secretary); Jim Abrams, *A Year After Dubai Port Deal, Congress Sends Investment Bill to White House*, ASSOCIATED PRESS, July 11, 2007 (noting legislation to increase the prominence of CFIUS in light of growing national security concerns).

15. Form 8-K is the current report companies must file with the Securities and Exchange Commission to “announce major events that shareholders should know about.” See SEC, Form 8-K, <http://www.sec.gov/answers/form8k.htm> (select “Form 8-K”) (last visited Sept. 19, 2009).

16. These numbers resulted from a search of Westlaw’s EDGAR database on July 24, 2008. The search entered was “(committee /3 ‘foreign investment’ /3 ‘United States’) or CFIUS.”

17. See *CNOOC Withdraws Its Bid for Unocal*, ONLINE ASIA TIMES, Aug. 4, 2005, <http://www.atimes.com/atimes/China/GH04Ad02.html>; *Unocal Reject CNOOC After Chevron Raises Takeover Offer*, PEOPLE’S DAILY ONLINE, July 21, 2005, [http://english.peopledaily.com.cn/200507/21/eng20050721\\_197449.html](http://english.peopledaily.com.cn/200507/21/eng20050721_197449.html). See also Rawi Abdelal & Adam Segal, *Has Globalization Passed Its Peak?*, FOREIGN AFF., Jan./Feb. 2007, at 103, 109 (noting CFIUS’s role in an increasingly politicized approval process).

18. See Abdelal & Segal, *supra* note 17; *Lobbyist’s Last-Minute Bid Set Off Ports Controversy* (National Public Radio broadcast Mar. 8, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5252263>. For an overview of the crisis and the broader implications for CFIUS review, see STEVEN M. DAVIDOFF, *GODS AT WAR: SHOTGUN TAKEOVERS, GOVERNMENT BY DEAL, AND THE PRIVATE EQUITY IMPLOSION* 107–32 (2009).

19. See Press Release, 3Com and Bain Capital Partners Announce Mutual Withdrawal of CFIUS Application (Feb. 20, 2008), available at [http://www.3com.com/corpinfo/en\\_US/pressbox/press\\_release.jsp?INFO\\_ID=281478](http://www.3com.com/corpinfo/en_US/pressbox/press_release.jsp?INFO_ID=281478); DealBook, <http://dealbook.blogs.nytimes.com/2008/02/20/3com-bain-withdraw-deal-from-regulatory-approval/> (Feb. 20, 2008, 09:17 EST).

efforts by the now-failed investment bank Lehman Brothers to salvage equity by selling half of the firm to Chinese and South Korean investors, a transaction that would have been subject to CFIUS review.<sup>20</sup>

The Committee is also affecting America's most important international relationships.<sup>21</sup> China has expressed serious concern over the Committee's work<sup>22</sup> and has moved to create its own counterpart to it.<sup>23</sup> India has also threatened to create a regime to match the one enforced by CFIUS after experiencing what it perceived as poor treatment by the institution.<sup>24</sup> Germany, in 2004, implemented a comprehensive CFIUS-like program.<sup>25</sup> Given the danger of a surge in market-damaging economic

20. See, e.g., Henny Sender & Francesco Guerrera, *Lehman's Secret Talks to Sell 50% Stake Stall*, FIN. TIMES, Aug. 20 2008, <http://www.ft.com/cms/s/0/586ed412-6ee6-11dd-a80a-0000779fd18c.html>.

21. See Posting of Heidi N. Moore to Deal Journal, [http://blogs.wsj.com/deals/2008/06/11/deals-deal-makers-2008-does-the-world-like-doing-business-with-americans/?mod=googlenews\\_wsj](http://blogs.wsj.com/deals/2008/06/11/deals-deal-makers-2008-does-the-world-like-doing-business-with-americans/?mod=googlenews_wsj) (June 11, 2008, 09:15 EST) (noting that "several Asian sovereign wealth funds have been talking to the Committee on Foreign Investment in the U.S. in the past day to understand what the U.S. agency expects in terms of governance and other concerns"). Also, consider this mollifying speech by a Treasury Department official:

I know some of you may have concerns about the investment review process in the United States, known as CFIUS, or the Committee on Foreign Investment in the United States, a committee that is chaired by the U.S. Treasury. However, I want to make clear that the legal authority of CFIUS is narrowly targeted to address only acquisitions that raise genuine national security concerns, not broader economic interests or industrial policy factors.

David McCormick, Treasury Under Sec'y for Int'l Affairs, Global Financial Turmoil and Its Implications for China, Remarks at the Inaugural Session of the Lujiazui Financial Forum in Shanghai (May 9, 2008), available at <http://www.treas.gov/press/releases/hp972.htm>.

22. See, e.g., *China Blasts Draft CFIUS Regulations, U.S. Businesses Urge Revisions*, INSIDE U.S. TRADE, June 13, 2008, at 12 (recounting Chinese criticism of the draft CFIUS regulations as "excessively stringent").

23. China has begun to adopt laws to block foreign acquisitions that "it deems are not in China's national interest." U.S. GAO, GAO-08-320, FOREIGN INVESTMENT: LAWS AND POLICIES REGULATING FOREIGN INVESTMENT IN 10 COUNTRIES app. V, at 43 (2008), available at <http://www.gao.gov/new.items/d08320.pdf> [hereinafter GAO 2008 REPORT]. See also Andrew Batson & Matthew Karnitschnig, *China Plans System to Vet Foreign Deals for Security*, WALL ST. J., Aug. 26, 2008, at C1 (stating that "China's government is formalizing a process for reviewing foreign acquisitions of local companies for national-security concerns," while quoting one observer's comment that "[i]t looks like a national-security-review mechanism similar to CFIUS in the U.S., where several ministries are involved").

24. GAO 2008 REPORT, *supra* note 23, app. VIII, at 71 (stating that India's National Security Council Secretariat "suggested . . . establish[ing] a process for assessing security threats related to foreign investment, similar to the U.S. CFIUS process"); DAVID M. MARCHICK & MATTHEW J. SLAUGHTER, COUNCIL ON FOREIGN RELATIONS, CSR NO. 34, GLOBAL FDI POLICY: CREATING A PROTECTIONIST DRIFT 12 (2008), available at [http://www.cfr.org/content/publications/attachments/FDI\\_CSR34.pdf](http://www.cfr.org/content/publications/attachments/FDI_CSR34.pdf) ("[India] has considered creating new national security-related screening in the telecoms field—in part in reaction to a CFIUS review of an Indian company undertaking a U.S. acquisition—but has not moved to implement any new restrictions.").

25. See GAO 2008 REPORT, *supra* note 23, app. VII.

protectionism, a National Security Council official has strongly urged the United States to send a clear message that CFIUS review is narrowly tailored to national security issues.<sup>26</sup>

But even with this healthy increase in attention, the most incongruous fact about CFIUS is that, although it is feared by investors and Wall Street, when evaluated seriously, that fear appears to be largely misplaced in fact. While antitakeover specialist firm Wachtell, Lipton, Rosen and Katz had no fewer than five corporate partners (including a name partner and co-chair of its executive committee) pen pieces dealing with the Committee during a five-month period between November 2007 and March 2008,<sup>27</sup> the Committee itself almost never actually prevents foreign acquisitions from going forward. According to the Government Accountability Office and the Treasury Department, CFIUS has launched in-depth reviews of acquisitions in thirty-seven of the 1800-plus filings made since 1988.<sup>28</sup> Only once has the president denied clearance of a deal after CFIUS review: in the 1990 acquisition of a U.S. aerospace manufacturer by an army-controlled Chinese firm.<sup>29</sup>

The executive branch hardly hides this fact. As one Treasury official explained to the Chinese, in 2007, “less than 10 percent of all foreign direct investments were reviewed by [CFIUS], and the vast majority of those were resolved without controversy, including those by state-owned enterprises.”<sup>30</sup>

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26. See Alan Beattie, *US Warns over Rules on Foreign Takeovers*, FIN. TIMES, May 5, 2008, <http://www.ft.com/cms/s/0/ced4bb48-1a3c-11dd-ba02-0000779fd2ac.html> (noting “a succession of interventions by rich country governments to block foreign takeovers on grounds of national interest”).

27. See James Cole, Jr. & Igor Kirman, *Takeover Law and Practice*, in *DOING DEALS 2008: UNDERSTANDING THE NUTS & BOLTS OF TRANSACTIONAL PRACTICE 11* (PLI Corporate Law & Practice, Course Handbook Series No. 13981, 2008); Edward D. Herlihy, *Takeover Law and Practice 2007*, in *CONTESTS FOR CORPORATE CONTROL 2008: CURRENT OFFENSIVE & DEFENSIVE STRATEGIES IN M&A TRANSACTIONS 213* (PLI Corporate Law & Practice, Course Handbook Series No. 13964, 2008); David A. Katz, *Takeover Law and Practice 2007*, in *SEVENTH ANNUAL INSTITUTE ON SECURITIES REGULATION IN EUROPE 855* (PLI Corporate Law & Practice, Course Handbook Series No. 13750, 2008); Patricia A. Vlahakis, *Takeover Law and Practice 2007*, in *39TH ANNUAL INSTITUTE ON SECURITIES REGULATION 807* (PLI Corporate Law & Practice, Course Handbook Series No. 11518, 2007).

28. See *infra* tbl.

29. Ilene Knable Gotts, Leon B. Greenfield & Perry Lange, *Is Your Cross-Border Deal the Next National Security Lightning Rod?: Identifying Potential National Security Issues and Navigating the CFIUS Review Process*, A.B.A. SEC. BUS. L. TODAY, July/Aug. 2007, at 31, 33, available at <http://www.abanet.org/buslaw/blt/2007-07-08/lange.shtml>.

30. Alan Holmer, Special Envoy for China, Sustaining Economic Growth, Remarks at Wuhan University on the U.S.-China Strategic Economic Dialogue (May 21, 2008), available at <http://www.treas.gov/press/releases/hp992.htm>.

Why, then, do people care so much? This question is taken up in the remainder of this Article. Part II suggests that a historical review reveals that investors fear Congress more than CFIUS itself. As one CFIUS practitioner has said, “[T]here [is] a two-step CFIUS process if you have a sensitive asset”; for the first step “you have to go to the Hill and basically say here’s why this investment is not a problem,” and only for the second step is the Committee involved.<sup>31</sup> Further, the assistant secretary in the Treasury Department in charge of overseeing CFIUS has also said that pre-filing consultation with the Hill is a crucial part of controversial acquisitions.<sup>32</sup>

Congress exercises this control over CFIUS by repeatedly amending its statute to bring the Committee more in line with its policy preferences—both by requiring ever-more-extensive reporting on every decision that CFIUS makes, along with additional ad hoc briefings and annual and quadrennial reports, and by reviewing and frequently overturning particular decisions of CFIUS, much like a court, in order to encourage the Committee to act consistently with the congressional view about what national security requires.<sup>33</sup>

Part III hypothesizes that the Committee’s increasingly pro forma output is consistent with the story that it is Congress, and not the executive branch, that sets the parameters of what national security permits with regard to foreign direct investment. This hypothesis is partially tested, and some of the reasons why the Committee acts as it does are examined, with a content analysis of the few publicly available mitigation agreements imposed by the Committee on foreign acquirers. The content analysis employs plagiarism software that compares the amount of borrowing between agreements.<sup>34</sup> As it turns out, some CFIUS agreements look more alike than others, and the basis for the use of what essentially amounts to boilerplate appears to be related to two simple factors: (1) whether the foreign acquirer is government owned or privately owned and (2) whether

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31. Interview by David Wessel with Matthew J. Slaughter & David M. Marchick, Council on Foreign Relations Discussion: Global FDI Policy: Correcting a Protectionist Drift (June 26, 2008), available at [http://www.cfr.org/publication/16695/global\\_fdi\\_policy.html](http://www.cfr.org/publication/16695/global_fdi_policy.html).

32. David Zaring, *ASIL Tries to Explain What You Need to Know About CFIUS*, CONGLOMERATE, Apr. 11, 2008, <http://www.theconglomerate.org/2008/04/what-you-need-t.html>.

33. This explanation is consistent with accounts such as those from Jack Beermann, who has written on Congress’s increasing level of executive oversight in Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727 (2009).

34. Those agreements include the subset of CFIUS reviews of telecommunications license transfers, which the Federal Communications Commission makes public. CFIUS does not publicize mitigation agreements, nor do other federal agencies. See *infra* notes 118–19 and accompanying text.

or not the foreign acquirer is based in a prosperous country allied with the United States.

Part IV lays out three conclusions that can be drawn from this analysis. First, a qualification to the story of ever-increasing “presidential administration” is necessary. Since 2001, legal scholars have debated the claims that, descriptively, the president plays a particularly large role in the setting of administrative policy, to the exclusion of the courts and Congress; that, constitutionally, a strong presidential role is permitted; and that, normatively, this influence is a good thing.<sup>35</sup> Many have criticized this perspective, especially as recent claims of national security–based prerogatives have embroiled the country in allegations of torture and general administrative ineptitude.<sup>36</sup> But CFIUS is an example of meaningful congressional supervision at the heart of executive foreign policy.

Second, and perhaps more as a matter of form than substance, the way CFIUS works is a challenge to those international law scholars who believe that law, and particularly international law, has little to say about questions of national security.<sup>37</sup> CFIUS features regulations, litigation, and processes, and bears no indication that the United States makes arbitrary determinations based on what national security requires rather than in accord with what the commander in chief of its military thinks is best. Rather, CFIUS is an example of an institution with an adjudicative legal process and with ultimate supervision by a nonpresidential actor—

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35. Elena Kagan is the scholar most associated with this view. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001). But other scholars, from all walks of the political spectrum, have expressed agreement with this theory, particularly when it comes to matters of national security. See, e.g., Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT’L LAW. 715, 749 (1992) (noting that “[c]ongressional attempts to place statutory checks on this broad delegation of power have failed,” and thus “Presidents have expansively defined threats to national security,” arguing that foreign affairs are a matter of presidential domination).

36. See, e.g., David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71 (2009); Stephen Skowronek, Essay, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070 (2009).

37. For contemporary proponents of this view, see, for example, Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007). Their work stems from the so-called realist tradition in international relations scholarship, which posits that the international world is lawless and anarchic. See KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 88 (1979) (stating that “[i]nternational systems are decentralized and anarchic”); Curtis A. Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing that customary international law rarely constrains sovereigns). According to this view, the United States will predictably do whatever it must to further its international interests, law be hanged.

Congress—which suggests that the chains of legalization may even apply in matters of national security.

Third, CFIUS practice tells us something about what the term “national security” means, at least to the United States. Caution is appropriate in drawing broad conclusions here, but the number of international and domestic legal obligations that contain national security exceptions is breathtaking. When do those exceptions apply? It appears that American policy suggests that national security is protected by American staffing in sensitive industries—defense contractors, raw materials providers, and high-technology industries in particular—with access rights given to American law enforcement and intelligence agencies. Congress appears to believe, perhaps more so than does the executive, that national security requires the domestic ownership of some industrial production and of some natural resource firms.<sup>38</sup>

## II. CONGRESS’S INCREASINGLY HONED TOOL

This part discusses how CFIUS has evolved largely by becoming an increasingly honed congressional notification service. To be sure, that evolution has happened in fits and starts. CFIUS was created, reevaluated, and redefined in response to particular economic crises. In this regard, the Committee follows the crisis-driven development of most economic regulators and, indeed, of many regulatory reforms in general.<sup>39</sup> As Dara Cohen, Mariano-Florentino Cuéllar, and Barry Weingast have observed, “[C]rises enlarge windows of opportunity for legislative action” and accordingly can create the opportunity for political reorganization.<sup>40</sup> Congress has responded to crises by ever expanding its supervision of CFIUS.

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38. C. S. Eliot Kang, *U.S. Politics and Greater Regulation of Inward Foreign Direct Investment*, 51 INT’L ORG. 301, 302–03 (1997). The extensiveness with which national security–based policies are being applied in the domestic context is worth noting. Although national security exceptionalism has a long history, it has only grown in importance since the onset of the war on terror—which has transformed, usually uncomfortably, civilian regulators into war on terror fighters, and also elevated, somewhat surprisingly, the importance of lawyers in the process of waging that war. See generally David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359 (2007) (critiquing the mobilization of administrative agencies in waging the war on terror).

39. For examples of crisis-driven regulation, see Stuart Banner, *What Causes New Securities Regulation? 300 Years of Evidence*, 75 WASH. U. L.Q. 849 (1997) (propounding the crisis-oriented theory of securities regulation), and Larry E. Ribstein, Commentary, *Bubble Laws*, 40 HOUS. L. REV. 77, 83–90 (2003) (using the crisis theory to critique the passage of the Sarbanes-Oxley Act).

40. Dara Kay Cohen, Mariano-Florentino Cuéllar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 678 (2006).

## A. THE EVOLUTION OF CFIUS

Before CFIUS was founded, the president enjoyed some congressionally granted powers to take action against foreign-owned corporations operating—or proposing to operate—in the United States. But his authority was an extremely blunt instrument. Pursuant to the 1917 Trading with the Enemy Act (“TWEA”), the president held broad wartime powers to ban or limit transactions involving property in which an enemy country or national had an interest,<sup>41</sup> with Congress amending the statute in 1933 to permit such action in “peacetime national emergencies.”<sup>42</sup> After the Vietnam War, Congress again revised this regime through the International Emergency Economic Powers Act (“IEEPA”), which granted the president authority “to deal with any unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.”<sup>43</sup>

These powers were real, but it was not clear whether a troubling merger would qualify as a sufficient national emergency trigger to allow the president to exercise them. Other statutes failed to clarify the matter; the Defense Production Act of 1950 (“DPA”) explicitly provided for a clear executive role in acquisition approvals of military contractors, but executive authority with regard to other sectors of the economy remained unclear.<sup>44</sup>

This statutory ambiguity apparently did not trouble the executive branch, but it did trouble Congress. In 1975, as the country was emerging from a painful oil embargo that was motivated in part by Middle Eastern distaste for American foreign policy, oil-rich investors were increasingly

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41. Trading with the Enemy Act (TWEA), Pub. L. No. 65-91, § 5, 40 Stat. 411, 415 (1917).

42. *Regan v. Wald*, 468 U.S. 222, 226 n.2 (1984) (citing Act of Mar. 9, 1933, Pub. L. No. 73-1, sec. 2, § 5(b), 48 Stat. 1, 1). The Act of March 9, 1933, amended TWEA, granting the president powers during wartime “or during any other period of national emergency.” Act of Mar. 9, sec. 2, § 5(b), 48 Stat. at 1. For an overview of TWEA’s evolution, see Aaron Xavier Fellmeth, *Cure Without a Disease: The Emerging Doctrine of Successor Liability in International Trade Regulation*, 31 YALE J. INT’L L. 127, 163–65 (2006) (offering a contemporary review of the powers granted by TWEA), and Stanley J. Marcuss, *Grist for the Litigation Mill in U.S. Economic Sanctions Programs*, 30 LAW & POL’Y INT’L BUS. 501, 501–02 (1999) (same).

43. International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, § 202(a), 91 Stat. 1625, 1626 (1977) (codified at 50 U.S.C. § 1701(a) (2006)). See generally Frederic Block, *Civil Liberties During National Emergencies: The Interactions Between the Three Branches of Government in Coping with Past and Current Threats to the Nation’s Security*, 29 N.Y.U. REV. L. & SOC. CHANGE 459, 460–78 (2005) (discussing the president’s power to act during national emergencies and statutes that authorize presidential declarations of national emergencies).

44. Defense Production Act (DPA) of 1950, Pub. L. No. 81-774, 64 Stat. 798.

looking to invest in American assets.<sup>45</sup> Congress expressed concern regarding the “return in the form of direct investment of a portion of the Organization of Petroleum Exporting Countries’ [(‘OPEC’s’)] huge petrodollar surplus, gained just after a politically motivated oil embargo on the United States.”<sup>46</sup>

To forestall congressional legislation that might discriminate against OPEC, the Ford administration announced the creation of CFIUS and instructed it mildly to “monitor[] the impact of foreign investment in the United States . . . and . . . coordinat[e] the implementation of United States policy on such investment.”<sup>47</sup>

CFIUS operated exceedingly quietly for the next decade, and Congress grew displeased with that quiescence. As Representative Frank Wolf (R-VA) protested in 1989, CFIUS “has only reviewed 29 cases since it was established . . . and has never concluded that a prospective acquisition required any Federal intervention.”<sup>48</sup>

But it was the 1988 proposal of Fujitsu, a Japanese firm, to acquire Fairchild Technologies, a Silicon Valley firm with a famous past and a struggling present involving all-too-expensive semiconductors, that prompted Congress to make its first clarification and expansion of executive authority to police foreign acquisitions.<sup>49</sup> As one article noted, some congressmen thought that permitting Fujitsu to acquire Fairchild would be akin to “selling Mount Vernon to the redcoats.”<sup>50</sup>

Accordingly, Congress amended Section 721 of the DPA through legislation commonly referred to as the Exon-Florio Amendment, named after its chief sponsors in the Senate and the House, Senator James Exon

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45. See John Ing, *Gold: Rich Country, Poor Country*, SAFEHAVEN, Feb. 8, 2007, <http://www.safehaven.com/article-6872.htm> (noting attempts by “hedge and commodity players” to “corner the physical markets”).

46. Kang, *supra* note 38, at 302.

47. Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1975).

48. 135 CONG. REC. H902 (daily ed. Apr. 3, 1989) (statement of Rep. Wolf).

49. The United States and Japan were engaged at the time in a trade war over semiconductors—a war that Japanese manufacturers would eventually win. See Peter T. Kilborn, *US-Japan Trade Tension Mounts*, N.Y. TIMES, Apr. 15, 1987, at D5 (describing the trade dispute and noting that “[a]s the . . . deadline neared for the American imposition of stiff retaliatory duties on imports of Japanese semiconductor goods, American officials were ruling out a compromise of the sort that ended the countries’ previous conflicts over trade”).

50. William C. Rempel & Donna K. H. Walters, *The Fairchild Deal: Trade War; When Chips Were Down*, L.A. TIMES, Nov. 30, 1987, at 1. One other roughly contemporaneous transaction excited congressional interest: the British raider Sir James Goldsmith also attempted to take over Goodyear Tire and Rubber. See EDWARD M. GRAHAM & DAVID M. MARCHICK, U.S. NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 41 (2006).

(D-NE) and Congressman James Florio (D-NJ).<sup>51</sup>

Exon-Florio gave the executive branch power, first by explicitly authorizing the president to investigate foreign acquisitions,<sup>52</sup> and second by giving the president power to block acquisitions of particular concern or to impose conditions on the acquisition before approving the sale.<sup>53</sup> The test created by Congress permitted the president to act if there was “credible evidence” that a transaction would “impair” national security and that the impact could not be lessened by any other legal provision, such as export controls, sanctions regimes, or the powers already granted by TWEA and IEEPA.<sup>54</sup>

The president was given the authority to “suspend or prohibit any covered transaction that threatens to impair the national security of the United States.”<sup>55</sup> The president also was given the power to “negotiate, enter into or impose, and enforce any agreement or condition with any party to the covered transaction in order to mitigate any threat to the national security of the United States that arises as a result of the covered transaction.”<sup>56</sup>

The president delegated this authority to CFIUS by executive order, and in the five years following the passage of Exon-Florio, CFIUS investigated only sixteen transactions, blocking one acquisition (one of only a handful of times it would ever do so).<sup>57</sup> Congress again grew displeased with the work rate—in 1992, Democratic Senator Robert Byrd

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51. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, sec. 5021, § 721, 102 Stat. 1107, 1425–26 (codified as amended at 50 U.S.C.S. app. § 2170 (LexisNexis 2009)). See also W. Robert Shearer, Comment, *The Exon-Florio Amendment: Protectionist Legislation Susceptible to Abuse*, 30 HOUS. L. REV. 1729, 1731 n.12 (1993). In some ways this process was an exchange: Exon-Florio allowed for greater governmental intervention in foreign direct investments, but free traders got much of the rest of the landmark Act.

52. Exon-Florio authorized the president to investigate the “effects on national security” of mergers, acquisitions, and takeovers by foreign persons. Omnibus Trade and Competitiveness Act of 1988 § 721(a), 102 Stat. at 1425.

53. *Id.* § 721(c), 102 Stat. at 1425–26.

54. *Id.* § 721(d), 102 Stat. at 1426. This provision explicitly states that:

The President may exercise the authority conferred by subsection (c) only if the President finds that—

(1) there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security, and  
(2) provisions of law, other than this section 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 the matter before the President.

*Id.* (citation omitted).

55. 50 U.S.C.S. app. § 2170(d)(1).

56. *Id.* § 2170(l)(1)(A).

57. Shearer, *supra* note 51, at 1754–66 (discussing ten of the investigations conducted by CFIUS in the five years following the passage of Exon-Florio).

protested that “[a]lthough Exon-Florio gives the President broad latitude to determine what constitutes a threat to national security, to date the administration has chosen to make little use of that authority.”<sup>58</sup>

The resulting Byrd Amendment made three relevant changes to the Exon-Florio statute. Two of these changes were designed to require the Committee to perform more investigation in particularly sensitive contexts,<sup>59</sup> with the third change designed to ensure that Congress would be apprised regarding more foreign acquisitions.<sup>60</sup>

It is the third change that is the most notable. These additional requirements expanded the Committee’s reporting obligations “whether or not” the Committee took action to prohibit an acquisition at the end of an investigation.<sup>61</sup> Congress also demanded an immediate report, to be repeated every four years, detailing any credible evidence regarding either industrial espionage or a coordinated attempt by foreign countries or companies to usurp American control over “critical technologies.”<sup>62</sup>

58. 138 CONG. REC. S6599 (daily ed. May 13, 1992) (statement of Sen. Byrd).

59. First, the Byrd Amendment required investigations in “any instance in which an entity controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition, or takeover which could result in control . . . that could affect the national security of the United States.” National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, sec. 837, § 721(b), 106 Stat. 2315, 2464 (1992) (codified as amended at 50 U.S.C.S. app. § 2170). Second, the amendment added several factors that it invited the Committee to consider when passing on an acquisition, such as a country’s record on cooperation in counter-terrorism efforts, or adherence to nonproliferation control regimes. *See id.*

60. Although the statutory language requiring congressional notification is quite clear, the language “requiring” CFIUS to consider certain factors when investigating, or even to launch an investigation in the first place, is qualified. *Id.* sec. 837, § 721(g), 106 Stat. at 2464 (adding a requirement that the president provide Congress with a written report of the findings and conclusions of its investigation). In the case of CFIUS, such investigatory requirements often turn on an initial determination that the transaction is in fact covered, which in turn depends on the president’s interpretations of statutory language that is both judicially unreviewable and broadly phrased.

61. *See id.*

62. Defense Production Act Amendments of 1992, Pub. L. No. 102-558, sec. 163, § 721(k)(1)(B), 106 Stat. 4198, 4219 (codified as amended at 50 U.S.C.S. app. § 2170(m)(3)(A)(ii)). Specifically, the amendment provides:

(1) [ ] In order to assist the Congress in its oversight responsibilities with respect to this section, the President and such agencies as the President shall designate shall complete and furnish to the Congress, not later than 1 year after the date of enactment of this section and upon the expiration of every 4 years thereafter, a report which—

(A) evaluates whether there is credible evidence of a coordinated strategy by 1 or more countries or companies to acquire United States companies involved in research, development, or production of critical technologies for which the United States is a leading producer; and

(B) evaluates whether there are industrial espionage activities directed by foreign governments against private United States companies aimed at obtaining commercial secrets related to critical technologies.

*Id.* sec. 163, § 721(k), 106 Stat. at 4219.

However, despite these changes, CFIUS once again reacted to its new powers rather placidly, blocking no transactions between the passage of the Byrd Amendment and the next round of congressional legislation in 2007.<sup>63</sup> By 2007, congressional displeasure at CFIUS's inaction resulted in more legislation. This displeasure was largely driven by the Dubai Ports World fiasco—an acquisition that infuriated Congress, although it was initially approved by CFIUS<sup>64</sup>—and the proposed acquisition of Unocal by a state-run Chinese oil company.<sup>65</sup> As North Carolina Democrat David Price said in the aftermath of these two would-be mergers, both of which failed after Congress reacted fiercely against them, “You will remember a great deal of discussion in this body on both sides of the aisle on how CFIUS needs to be beefed up and do a better job.”<sup>66</sup>

Therefore, Congress enacted the Foreign Investment and National Security Act of 2007 (“FINSAs”).<sup>67</sup> FINSAs required CFIUS to conduct more investigations, guided those investigations by providing more detailed congressional instruction about what to look for, authorized the Committee to impose sanctions on foreign companies that failed to comply with

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63. See *infra* tbl.

64. In the Dubai Ports World dispute, a company largely owned by the government of Dubai sought to acquire P&O, a British firm that owned or leased the terminal facilities in a number of ports around the world, including six in the United States. See GRAHAM & MARCHICK, *supra* note 50, at 136–39; GARY CLYDE HUFBAUER, YEE WONG & KETKI SHETH, U.S.-CHINA TRADE DISPUTES: RISING TIDE, RISING STAKES 53 (2006). See also GRAHAM & MARCHICK, *supra* note 50, at 140 (describing the criticism CFIUS received for not giving Congress notice of Dubai Ports World's proposed acquisition of P&O); Mike Ahlers et al., *Bush Faces Pressure to Block Port Deal*, CNN, Feb. 20, 2006, <http://www.cnn.com/2006/POLITICS/02/20/port.security/index.html> (describing the reactions of a number of legislators to the proposed acquisition). CFIUS approved the transaction, but before the transaction closed, congressional pressure (such as an adverse 62-2 vote in the House Appropriations Committee) convinced Dubai Ports World to sell the American port facilities to an American-controlled firm. GRAHAM & MARCHICK, *supra* note 50, at 140–41; HUFBAUER ET AL., *supra*, at 53.

65. In the Unocal case, a government-controlled Chinese company saw its \$18.5 billion cash offer for Unocal run into stiff congressional resistance, leading in the end to an acquisition by an American oil company, Chevron, which offered \$17.8 billion in cash and stock. See GRAHAM & MARCHICK, *supra* note 50, at 128–36 (providing an overview of the saga). See also Steve Lohr, *Unocal Bid Opens Up New Issues of Security*, N.Y. TIMES, July 13, 2005, at C1 (describing the role of CFIUS in investments like CNOOC's). For a critical view of congressional action in these transactions, see Douglas Holtz-Eakin, *You Can't Be CFIUS*, WALL ST. J., July 13, 2006, at A8 (“[I]nternational investors looked askance when an acquisition—the purchase by [Dubai Ports World] of [P&O]—dissolved into political controversy . . . [that] came on the heels of heavy-handed congressional interference in [CNOOC's] proposed purchase of American oil company Unocal.”); J. Robinson West, *CNOOC's Miscalculation*, WALL ST. J., July 14, 2005, at A10 (criticizing CNOOC's aggressive approach to its proposed investment in Unocal and explaining how that approach led to congressional frustration).

66. 153 CONG. REC. H6309 (daily ed. June 12, 2007) (statement of Rep. Price).

67. Foreign Investment and National Security Act (FINSAs) of 2007, Pub. L. No. 110-49, 121 Stat. 246 (amending 50 U.S.C.S. app. § 2170).

CFIUS requirements, and mandated that additional, extensive, and detailed reports be provided to Congress.<sup>68</sup> By codifying these requirements, FINSA formalized CFIUS's role statutorily, whereas it had previously been defined only by an executive order of the president.<sup>69</sup>

Substantively, the legislation was marked by ever more congressional specificity, requiring that the Committee "shall immediately" investigate transactions that implicated national security and involved a foreign government-controlled entity.<sup>70</sup> FINSA also encouraged the Committee to initiate transactional reviews *sua sponte*, even if those reviews were retroactive—that is, the Committee was basically encouraged to undo more completed transactions.<sup>71</sup> The statute also required the Committee to assess whether the acquisition would be a potential threat to "critical infrastructure"—a factor that the Committee now had to consider in reviewing acquisitions.<sup>72</sup>

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68. *See id.*

69. *Id.* FINSA's preamble sounds a protectionist note, stating that it promotes the "maintenance of jobs," while "ensur[ing] national security" and "reform[ing] the process by which [foreign] investments are examined for any effect they may have on national security." *Id.* To that end, it formalized some longstanding practices of the institution, largely retaining CFIUS's membership and structure. *Id.* sec. 3, § 721(k)(2), 121 Stat. at 252 (defining the Committee's membership). *See also id.* sec. 3, § 721(k)(2)(J), 121 Stat. at 252 (permitting the president to add members). In 1975, President Ford had issued an executive order designating the U.S. Trade Representative, the Chairman of the Council of Economic Advisers, and the Director of the Office of Management and Budget as additional members. *See Exec. Order No. 11,858*, 40 Fed. Reg. 20,263 (May 7, 1975), available at <http://www.archives.gov/federal-register/codification/executive-order/11858.html>. Under FINSA, CFIUS also retained the mechanism that it had used to conduct investigations in the past. *See* FINSA, sec. 2, § 721(b), 121 Stat. at 247–52 (providing for national security reviews and investigations). For a discussion of this amendment by an attorney practicing in the field, see Philip C. Thompson, *United States: Treasury Department Issues Proposed Regulations Governing Review of Foreign Investment in the United States*, MONDAQ, May 22, 2008, <http://www.mondaq.com/article.asp?articleid=60924>.

70. *See* FINSA, sec. 2, § 721(b)(2)(A)–(B), 121 Stat. at 248–49.

71. *Id.* sec. 2, § 721(b)(1)(D), 121 Stat. at 248.

72. *See id.* sec. 2, § 721(b)(2)(B)(i)(III), 121 Stat. at 249. FINSA also elucidates, in more detail, what Congress would like the Committee to do when it does get around to investigating. First, the statute requires the Committee to do a particular, if undefined, version of analysis when evaluating both nonexclusive factors provided by Congress and other factors indicated as salient: for example, when an agreement or condition designed to "mitigate [a] threat to national security" is imposed, it "shall be based on a risk-based analysis, conducted by the Committee, of the threat to national security of the covered transaction." *Id.* sec. 5, § 721(1)(1)(B), 121 Stat. at 254. National security should be the prime consideration, presumably rather than political or diplomatic considerations, although the statute is not entirely clear on this score. The statute also requires CFIUS to provide a report on an annual basis, not only detailing the reviews and investigations of all covered transactions, *see id.* sec. 7, § 721(m)(1)–(2), 121 Stat. at 257, but also evaluating whether there is "credible evidence of a coordinated strategy . . . to acquire United States companies involved in . . . development . . . of critical technologies for which the United States is a leading producer," *id.* sec. 7, § 721(m)(3)(A)(i), 121 Stat. at 257–58. This request that the Committee become more involved in more transactions is paired with some substantive requirements about the conduct of the investigations that could be difficult for the Committee to meet.

Moreover, CFIUS was given more penal authority. FINSA provided for the “imposition of civil penalties for any violation . . . , including [violations of] any mitigation agreement.”<sup>73</sup> FINSA also encouraged the Committee to “develop and agree upon methods for evaluating compliance with any agreement entered into or condition imposed with respect to a covered transaction that will allow the Committee to adequately assure compliance,” which bolstered the sanctioning authority.<sup>74</sup>

Perhaps most importantly, Congress more explicitly identified itself as the monitor of the Committee and once again increased CFIUS’s reporting requirements. Congress now requires CFIUS to submit an annual report—with the classified portions of the report only accessible to Congress<sup>75</sup>—and further reporting upon completion of either a review or an investigation.<sup>76</sup> Moreover, upon congressional request, CFIUS has been directed to “promptly provide briefings on a covered transaction for which all action has concluded under this section, or on compliance with a mitigation agreement or condition imposed with respect to such transaction.”<sup>77</sup>

As a result of these amendments, the connection between CFIUS activity and congressional oversight is now extremely close. Treasury officials have testified that in practice, “CFIUS now notifies and provides

Consider, in this regard, whether the Director of National Intelligence will be able to “expeditiously carry out a thorough analysis of any threat to the national security of the United States posed by any covered transaction,” and also “seek and incorporate the views of all affected or appropriate intelligence agencies with respect to the transaction,” within twenty days of the Committee receiving notice of the transaction. *Id.* sec. 2, § 721(b)(4)(A)–(B), 121 Stat. at 251.

73. *Id.* sec. 9, § 721(h)(3)(A), 121 Stat. at 259. The statute also gives CFIUS the authority to enforce these penalties, as well as a mechanism for blocking transactions; under the statute, the president “may direct the Attorney General of the United States to seek appropriate relief, including divestment relief, in the district courts of the United States.” *Id.* sec. 6, § 721(d)(3), 121 Stat. at 256. Proposed Committee regulations specified the power to include liquidated damages provisions in mitigation agreements. *See Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons*, 73 Fed. Reg. 21,861, 21,863 (Apr. 23, 2008) (codified at 31 C.F.R. § 800.801 (2009)).

74. FINSA, sec. 5, § 721(1)(3)(B)(ii), 121 Stat. at 255.

75. *See id.* sec. 7, § 721(m)(3)(B), 121 Stat. at 258. That report must include trend information on mergers and filings, as well as

[a] list of all notices filed and all reviews or investigations completed during the period, with basic information on each party to the transaction, the nature of the business activities or products of all pertinent persons, along with information about any withdrawal from the process, and any decision or action by the President under this section.

*Id.* sec. 7, § 721(m)(2)(A), 121 Stat. at 257.

76. *See id.* sec. 2, § 721(b)(3)(A)–(B), 121 Stat. at 249–50. In both cases, Congress has required that the Committee “transmit to the members of Congress . . . a certified written report . . . on the results of the investigation, unless the matter under investigation has been sent to the President for decision.” *Id.* sec. 2, § 721(b)(3)(B), 121 Stat. at 250.

77. *Id.* sec. 7, § 721(g)(1), 121 Stat. at 256.

briefings to the Congressional Committees of jurisdiction on every case for which action has concluded under the Exon-Florio amendment.”<sup>78</sup>

#### B. THE FLOWERING OF CONGRESSIONAL OVERSIGHT

CFIUS’s evolving legal authority is a story about substantive flexibility, albeit with increasing specification, procedural limits, and congressional notification requirements imposed by Congress. The important terms that trigger CFIUS investigations, such as “covered transaction,”<sup>79</sup> “foreign person” and “U.S. person,”<sup>80</sup> “critical infrastructure,”<sup>81</sup> and “national security,”<sup>82</sup> have always been either defined broadly or left carefully undefined.<sup>83</sup> Further, the short duration of the permissible period for CFIUS investigations means that the procedural limitations constrain the Committee more than the substantive provisions of the DPA, as amended.<sup>84</sup>

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78. See *CFIUS Hearing*, *supra* note 14, at 90 (testimony of Clay Lowery, Treasury Assistant Secretary).

79. For a lengthy discussion of covered transactions, see 31 C.F.R. § 800.301 (2009).

80. See *id.* § 800.216 (defining “foreign person”). As seen in the Dubai Ports World fiasco—which involved the sale of an American asset by a British firm to a sovereign-owned firm based in Dubai—based on these definitions, any business in the United States qualifies as a U.S. person, even if it is already owned by a foreign person. On the other hand, if assets defined as U.S. persons are sold to foreign persons, they become foreign persons because a foreign entity exercises, or could exercise, control over them. See *id.* For example, if the American subsidiary of P&O (the British corporation that owned the American ports) purchased another American asset, that too would be a reviewable transaction.

81. See FINSA, sec. 2, § 721(a)(6), 121 Stat. at 247.

82. National security has never been defined by Congress, although Congress has offered the president a few nonexclusive factors that may be useful to consider. According to the Committee, the term “national security” has always been “interpreted broadly,” with the determination of whether a transaction would threaten national security lying entirely “within the President’s discretion.” Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 56 Fed. Reg. 58,774, 58,775 (Nov. 21, 1991).

83. To just take one example, a “covered transaction” is “any” merger, acquisition, or takeover by “any” foreign person that could result in foreign control of “any” person engaged in interstate commerce. FINSA, sec. 2, § 721(a)(3), 121 Stat. at 246. More specific terms like “critical infrastructure”—which could potentially apply to any road, wire, or farm in the country, as well as the operators, suppliers, and maintainers of roads, wires, and farms—have never been closely defined; indeed, one CFIUS official has opined that trying to define and limit such a term is “unproductive.” See Zaring, *supra* note 32. CFIUS has proposed regulations that spend plenty of energy defining “covered transactions,” offering examples of control, critical infrastructure, and other terms that have the effect of illustrating what counts under the agency’s rules, without cabinining its ability to reach other, dissimilar matters in the future. See 31 C.F.R. § 800.301 (clarifying the meaning of the term “covered transaction” by defining and discussing related terms).

84. The thirty-day review of covered transactions for the initial national security review has not changed since Exon-Florio—nor has the forty-five-day deadline for the completion of formal investigations following the initial review, nor the fifteen-day deadline for presidential action. 50

But the real story of CFIUS's constraint lies in its increasingly close supervision by Congress.<sup>85</sup> Since the Committee was founded, Congress has regularly leapt into the breach of objecting to foreign acquisitions, to the point that Committee members would advise foreign acquirers to consult with Congress before embarking on mergers.<sup>86</sup> The Dubai Ports World and CNOOC-Unocal deals are recent examples of how Congress, essentially sitting in review of CFIUS, reversed transactions that the Committee either had already approved or might have approved.<sup>87</sup> And these examples of active congressional involvement in executive branch national security determinations are by no means unique.

Moreover, CFIUS's amendments have all been preceded by controversial transactions that Congress asked the executive branch to stop. In 1990, 119 members of Congress wrote to the president seeking an investigation of British Tire and Rubber's proposed hostile acquisition of the Norton Company (the prosaically named British firm that was controlled by the corporate raider Sir James Goldsmith), again urging action for reasons of national security.<sup>88</sup> Further, in 2001, after a Dutch company sought to acquire the Silicon Valley Group, an American semiconductor manufacturer, a number of congressmen, including then—

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U.S.C.S. app. § 2170(b)(1)(E), (b)(2)(C), (d)(2) (LexisNexis 2009). This grant of substantive power with procedural limitations is increasingly common, particularly in the putatively deferential world of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, which requires courts to defer to agency interpretation of ambiguous statutory provisions—a rule that provides more flexibility in substantive grants of power than do clear deadlines like those faced by CFIUS. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

85. Some would find this sort of oversight to be useful. See, e.g., Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006) (arguing that a narrow definition of presidential statutory authority is desirable because it better enables Congress to police the president's assertion of authority and because it provides a check on the president's tendency to claim statutory authorization for executive action). Stack argues that statutes should not be considered to grant authority to the president absent explicit delegations by Congress, affording discretion only when the statute expressly grants that power to the president. See *id.* at 267; Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 543 (2005) (arguing that when the basis for the president's actions is statutory, "Congress is the ultimate source of power"). Of course, the DPA, as amended, does give the president these sorts of powers—only they are tempered by the reporting structure.

86. See Interview with Matthew J. Slaughter & David M. Marchick, *supra* note 31. See also Jonathan C. Stagg, Note, *Scrutinizing Foreign Investment: How Much Congressional Involvement Is Too Much?*, 93 IOWA L. REV. 325, 342 (2007) ("Congress has chosen to take action in several instances where it considered a transaction a threat to national security, even after CFIUS conducted an investigation and approved the deal.").

87. See *supra* notes 17–18, 64–65 and accompanying text. See also David E. Sanger, *Dubai Expected to Ask for Review of Port Deal*, N.Y. TIMES, Feb. 26, 2006, at 1 (describing the Dubai Ports World fiasco as involving a "severe political error [in] failing to consult with Congress").

88. GRAHAM & MARCHICK, *supra* note 50, at 124.

Senate majority leader Republican Trent Lott from Mississippi, successfully insisted that CFIUS conduct a full forty-five-day investigation of the acquisition.<sup>89</sup> And in 2008, six senators asked CFIUS to conclude that an American railway targeted by an activist British hedge fund was “critical [U.S.] infrastructure” and thus could not be acquirable.<sup>90</sup>

Takeover targets and competitors have responded accordingly. In the case of Dubai Ports World, it was Eller and Company, a small partner with P&O, whose complaints may have driven extensive congressional outrage. Eller hired congressional lobbyists to press its case, and Dubai Ports World hired its own lobbyists in response.<sup>91</sup> Similarly, Chevron lobbied hard for congressional action on CNOOC’s proposed acquisition of Unocal, and it ended up acquiring the company for a lower price than the Chinese bidder had offered.<sup>92</sup>

In practice, this has given Congress a significant role in the approval of controversial foreign takeovers. CFIUS officials themselves attest that would-be foreign acquirers have started going to the Hill, as well as to both CFIUS and investment banks, when becoming interested in a domestic acquisition.<sup>93</sup>

There is a positive political theory story to tell here. As political scientists such as Mathew McCubbins, Roger Noll, and Barry Weingast (known as “McNollgast”) have written, the mechanisms of congressional oversight are well established and serve different procedural functions.<sup>94</sup> Congress listens to constituents for “fire alarms” that trigger the need for legislative action, such as cries from Wall Street and the financial regulators that a financial bailout is needed or when scandals like the U.S.

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89. See *id.* at 124–25.

90. See Stephanie Kirchgaessner, *UK Fund Set to Escape CFIUS Probe*, FIN. TIMES, June 11, 2008.

91. See Neil King, Jr. & Gregg Hitt, *Small Florida Firm Sowed Seed of Port Dispute*, WALL ST. J., Feb. 28, 2006, at A3.

92. See GRAHAM & MARCHICK, *supra* note 50, at 128–36.

93. Zaring, *supra* note 32.

94. See Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 434–35 (1989) (mentioning various congressional oversight techniques). Positive political theorists, for example, have conceptualized the two chief ways Congress might supervise agencies: “police patrol” and “fire alarm” oversight. Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 7 (1994). See also Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 43 (1994) (commenting that “[p]ositive political theory describes regulatory policymaking as a part of a world in which political actors function within institutions rationally and strategically in order to accomplish certain goals”).

Attorney firings prompt the convening of legislative hearings.<sup>95</sup> In addition, Congress uses hearings and reports as “police patrols” to notify the legislature of inconsistent executive policy determinations.<sup>96</sup>

CFIUS is a particularly strong version of a police patrol regime. Congress has stepped up the Committee’s reporting obligations with each successive amendment of the Committee’s governing legislation.<sup>97</sup> Moreover, the system marries a strict version of this paradigmatic method of congressional supervision to national security—an issue area where presidents are thought to enjoy broad, almost unchecked authority.<sup>98</sup>

In this way, Congress has turned CFIUS, an agency at the heart of implementing the president’s policies on national security, into an outfit that in many ways serves and is closely supervised by the legislature. In a world where scholars bemoan the lack of oversight of the executive’s national security determinations by the coordinate branches, CFIUS may offer a way forward.<sup>99</sup>

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95. See Arthur Lupia & Mathew D. McCubbins, *Learning from Oversight: Fire Alarms and Police Patrols Reconstructed*, 10 J.L. ECON. & ORG. 96, 97 (1994) (“Fire-alarm oversight . . . is relatively passive, indirect, and decentralized. Legislators who conduct fire-alarm oversight establish a system of rules, procedures, and informal practices that enable [interested third parties] to examine administrative decisions . . . [and] to seek remedies from agencies, courts, and [the legislature] itself.” (internal quotation marks omitted)). McCubbins and his coauthors, as well as those who have followed them, have tended to conclude that congressional supervision of agencies is relatively effective, arguing that the Administrative Procedure Act (“APA”), which requires a certain level of disclosure by agencies, was enacted by a rational Congress concerned with ensuring the efficacy of fire alarm–style oversight. See, e.g., McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 199 (1999) (“Fire alarm oversight also requires that elected officials, once the fire alarm has sounded, investigate conflicting claims among constituent groups and an agency. To undertake this function, elected officials must have ready access to relevant information . . . . The APA helps to ensure that this information is provided through the openness provisions and the requirement that agencies allow affected parties to participate.”). See also David Zaring, *Three Models of Constitutional Torts*, J. TORT L., Issue 1, 2008, art. 3, at 2–3 (describing the scandal oversight mechanism).

96. As Lupia and McCubbins have explained, “Police-patrol oversight is the centralized and direct approach to uncovering hidden knowledge and is what most people think about when they discuss the oversight function of legislatures. An example of police-patrol oversight is a legislator who personally conducts an audit of agency activity.” Lupia & McCubbins, *supra* note 95, at 97. This catchy term, as well as the term “fire alarm,” comes from Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

97. See *supra* Part II.A.

98. In this sense, CFIUS is not entirely unprecedented; indeed, the broader regime of international trade has often featured active congressional oversight. See Paola Conconi, Giovanni Facchini & Maurizio Zanardi, *Fast Track Authority: Trade Policy or Politics?*, VOX, May 21, 2008, <http://www.voxeu.org/index.php?q=node/1159> (noting a 2008 congressional decision to cut back on the ability of the executive to “fast track” trade agreements).

99. See, e.g., Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U.

This congressional oversight story fits the facts of CFIUS better than does its initially plausible opposite; one might counterargue that CFIUS's historical unwillingness to block foreign acquisitions in the way Congress preferred suggests congressional weakness rather than strength. Congress's regular protests might be designed as empty threats; while the federal agency does the politically unpopular work of ensuring that foreign investment is unfettered, Congress is free to occasionally pound the table loudly in purposefully ineffective but politically advantageous ways.

But Congress's particular policy preferences are less meaningful than the rate of change. Congress may be happy to have an ineffectual executive committee passing on most mergers and taking political heat for it, or it may not. Nevertheless, there is no question that Congress has regularly increased its supervision over the Committee, that it has regularly gotten involved in individual transactions, that it has reversed as many of those transactions as the Committee itself, and that after three substantial amendments to the Committee's governing legislation within twenty years and despite regular informal oversight, it has begun to require the Committee to provide it with more information on mergers.<sup>100</sup> Regardless of the politics of the substantive effort, the fact is that foreign acquirers have more to fear from Congress than from the Committee—and much of what the acquirers do fear lies in the notice that the Committee provides to the legislature.

### III. NATIONAL SECURITY AND INVESTMENT IN PRACTICE

How CFIUS works in practice is best demonstrated by looking at the outcomes—at least the outcomes that we know about—of CFIUS review. This is done in two ways. First, what we know about every CFIUS decision made over the course of its post-Exon-Florio existence is considered. We do not know much about the content of its work, but some qualitative conclusions can be drawn based on both the outcomes of that work and the hints of past practice that can be found in the public record. Second, one subset of CFIUS outcomes that is publicly available—conditions imposed on telecommunications license transfers—is evaluated for “boilerplateness.” This, in turn, provides some indication as to whether the

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CHI. L. REV. 123 (1994) (defending Congress's regulation of presidential action by noting the need for a restoration of a proper system of checks and balances).

100. See Foreign Investment and National Security Act (FINSIA) of 2007, Pub. L. No. 110-49, sec. 7, § 721(m), 121 Stat. 246, 257–58 (requiring a detailed annual report); *id.* sec. 7, § 721(g)(1), 121 Stat. at 256 (requiring information at requests of congressmen). See also *id.* sec. 2, § 721(b)(3)(B), 121 Stat. at 249–51 (requiring certification to Congress); *supra* Part IIA.

Committee is going through the motions of review or carefully evaluating and extracting concessions from each controversial merger in efforts to protect national security.

The actual practice of the Committee shows that, although apparently a hurdle that foreign acquirers rather fear, it rarely interferes with foreign acquisitions—and when it does interfere, it does so in a pro forma manner. CFIUS’s minute blockage record and its relatively modest imposition of conditions on acquirers, when considered alongside Congress’s increasingly important role in vetting CFIUS acquisitions, bolster the Congress-not-the-president account of CFIUS that is proffered here.

#### A. QUALITATIVE AND DESCRIPTIVE EVIDENCE

CFIUS’s statutory scheme would appear to grant it and the president a great deal of largely unfettered discretion to do with proposed foreign acquisitions as they see fit. But in practice, Richard Perle, a former member of the Committee, once said, “The committee almost never met, and when it deliberated it was usually at a fairly low bureaucratic level . . . I think it’s a bit of a joke.”<sup>101</sup>

Is it? A simple review of the results of CFIUS reviews is instructive. CFIUS rarely launches investigations into foreign acquisitions, and it blocks transactions even more rarely.<sup>102</sup> The table below provides this data.<sup>103</sup>

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101. *Bush, Congress in Dark About Port Deal*, CBS NEWS, Feb. 22, 2006, <http://cbs4denver.com/national/Politics.Republicans.Democrats.2.264247.html>.

102. *See infra* tbl.

103. For the source of this data, see U.S. GAO, GAO-05-686, DEFENSE TRADE: ENHANCEMENTS TO THE IMPLEMENTATION OF EXON-FLORIO COULD STRENGTHEN THE LAW’S EFFECTIVENESS 14 tbl.2, 18 tbl.3 (2005), available at <http://www.gao.gov/new.items/d05686.pdf> [hereinafter GAO 2005 REPORT]. *See also* 2008 CFIUS ANN. REP. TO CONGRESS: PUB. VERSION 2–3, available at <http://www.treas.gov/offices/international-affairs/cfius/docs/CFIUS-Annual-Rpt-2008.pdf> (providing data for the years 2005–2007); GRAHAM & MARCHICK, *supra* note 50, at 57 tbl.2.1 (providing data for the years 1998–2005); U.S. GAO, GAO/NSIAD-00-144, DEFENSE TRADE: IDENTIFYING FOREIGN ACQUISITIONS AFFECTING NATIONAL SECURITY CAN BE IMPROVED 8 tbl.1 (2000), available at <http://www.gao.gov/archive/2000/ns00144.pdf> [hereinafter GAO 2000 REPORT] (providing data for the years 1988–1999); U.S. GAO, GAO-02-736, DEFENSE TRADE: MITIGATING NATIONAL SECURITY CONCERNS UNDER EXON-FLORIO COULD BE IMPROVED 5 tbl.1 (2002), available at <http://www.gao.gov/new.items/d02736.pdf> [hereinafter GAO 2002 REPORT] (providing data for the years 1997–2001).

TABLE. Aggregate CFIUS Activity: September 1998–December 2007

<i>Year</i>	<i>Notifications to CFIUS</i>	<i>CFIUS Investigations</i>	<i>Offers Withdrawn After Investigation</i>	<i>Prohibition Recommendations to the President</i>
1988	14	1	0	0
1989	200	5	2	1
1990	295	6	2	0
1991	152	1	0	0
1992	106	2	1	0
1993	82	0	0	0
1994	69	0	0	0
1995	81	0	0	0
1996	55	0	0	0
1997	62	0	0	0
1998	65	2	2	0
1999	79	0	0	0
2000	72	1	0	1
2001	55	1	1	0
2002	43	0	0	0
2003	41	2	1	1
2004	53	2	2	0
2005	64	1	1	0
2006	111	7	5	2
2007	138	6	5	0
Total	1837	37	22	5

The president has only rejected one merger since the creation of CFIUS.<sup>104</sup> That case begged for presidential action, involving, as it did, an

104. GAO 2005 REPORT, *supra* note 103, at 10. Indeed, regulators who work with CFIUS have come to expect presidential approval. The Federal Communications Commission observed in 1997 that “the Executive Branch has never asked the Commission to deny an application on national security or law enforcement grounds.” Amendment of the Comm’n’s Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic & Int’l Satellite Serv. in the U.S., 12 F.C.C.R. 24094,

American airplane parts manufacturer and a Chinese company that was both owned by China's Ministry of Aerospace Technology and affiliated with the People's Liberation Army.<sup>105</sup> CFIUS has otherwise permitted almost every acquisition it has faced to proceed without comment. As the table above shows, of the thousands of foreign investments made in the United States in any year, only a few are brought to CFIUS's attention. That attention proceeds beyond the review stage to the investigation stage exceedingly rarely, and rarer still (although comparatively more common than investigations) is a withdrawal of a bid to acquire an American asset after an investigation. Over the life of CFIUS, the Committee has recommended to the president that an acquisition be prohibited in only five cases; in all but one of those cases, the president allowed the acquisition to proceed.<sup>106</sup>

As a descriptive matter, since Exon-Florio, CFIUS notifications (which are presumably driven by the parties to a merger unless the Committee goes out and beats the bushes following the amendments to its authority) have appeared to spike when Congress legislates,<sup>107</sup> and not at other times such as during the 2001 collapse of the dot-com bubble or external shocks like the September 11, 2001, terrorist attacks. Figure 1, which depicts the number of notifications to and investigations by the Committee, gives a sense of the evolution of the Committee's work over time.<sup>108</sup>

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24171 (1997).

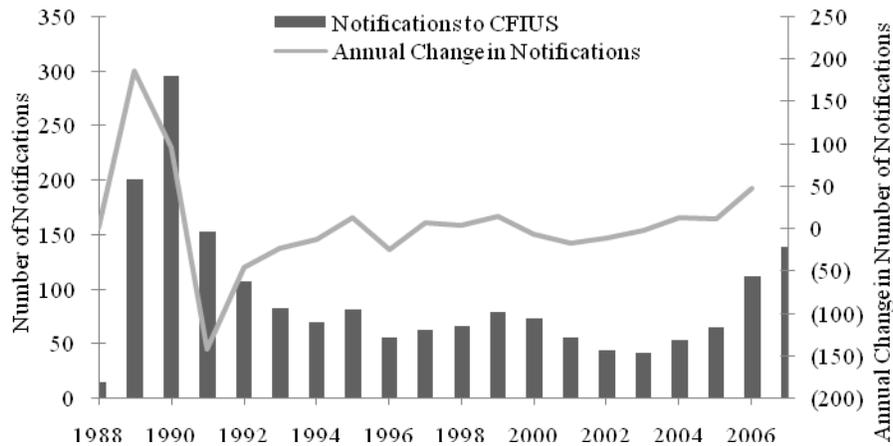
105. See GAO 2000 REPORT, *supra* note 103, at 9. As the transaction risked providing China with access to American aerospace products, but restricted exportation to other countries, and because China was then considered a totalitarian dictatorship hostile to the interests of the United States, it is difficult to imagine a way that the transaction would have survived even the mildest level of scrutiny. Moreover, this occurred in 1989, the year of Chinese unrest and repression that concluded with the Tiananmen Square crackdown. See Nicholas D. Kristof, *A Reassessment of How Many Died in the Military Crackdown in Beijing*, N.Y. TIMES, June 21, 1989, at A8.

106. See GAO 2005 REPORT, *supra* note 103, at 10. See also *supra* tbl.

107. The three amendments to the DPA were Exon-Florio in 1988, the Byrd Amendment in 1992, and FINSA in 2007. See *supra* notes 51, 58–59, 67 and accompanying text. Table 1 displays the corresponding spikes in numbers of notifications. See *supra* tbl.

108. Interestingly, the number of notifications correlated to investigations at 67 percent, according to a Pearson test; the correlation was significant at the 0.1 percent level, suggesting that the more matters CFIUS sees, the more likely it is to get involved. For the sources of data for figure 1, see *supra* note 103.

FIGURE 1. Change in CFIUS Notifications, September 1988–December 2007



This is not a record that should strike terror into the hearts of foreign direct investors. But just as prosecutors and plaintiffs' attorneys focus on the cases they settle instead of the ones they take to trial, the Treasury Department has claimed that CFIUS's impact "goes far beyond sample statistics. . . . Blocking a transaction is a crude tool and serves no purpose when more subtle remedies are available . . . ." <sup>109</sup> When the subtlety of the remedy is taken into account, the Treasury says, "CFIUS has been very successful." <sup>110</sup>

This putative success is manifested in two advantages of the CFIUS process: first, the informal efforts of CFIUS to deter an acquirer from going through the process, thus precluding the need for a formal recommendation that the transaction be blocked and avoiding the subsequent embarrassment

109. Jeffrey P. Bialos, *National Security Considerations in International Commercial Agreements: Foreign Investment Rules and Export Rules*, in INTERNATIONAL COMMERCIAL AGREEMENTS 1994, at 649 n.4 (PLI Commercial Law & Practice, Course Handbook Series No. A4-4463, 1994) (quoting U.S. Treasury Dep't, Staff Analysis of the Economic Strategy Institute's Report, "Foreign Investment in the United States; Unencumbered Access" 2 (July 1991)). See also GAO 2002 REPORT, *supra* note 103, at 6 ("As a matter of practice, the Committee tries to avoid the use of investigations and presidential determinations. The Committee reviews foreign acquisitions to protect national security while seeking to maintain the U.S. open investment policy. For many companies, being the subject of an investigation has negative connotations.").

110. Bialos, *supra* note 109, at 650 n.4 (quoting U.S. Treasury Dep't, *supra* note 109, at 2).

of presidential action; and second, CFIUS's ability to impose conditions, or "mitigation agreements," on completed acquisitions. The idea is that the Committee does not apply its rules often but rather forces conditions on deals, as might a prosecutor's office—there, the decisions are discretionary, deliberations are secret, and there is a need for a savvy bar of practitioners who can cajole and negotiate with the prosecutors (and CFIUS increasingly has such a bar).<sup>111</sup>

It is difficult to know how often the first subtle tool—the quiet prohibition—is utilized, but observers like Eliot Kang have been persuaded that "CFIUS's investigatory scrutiny has led a number of foreign buyers to withdraw from 'done-deals' or modify the terms of purchase."<sup>112</sup> For example, informal consultations may have deterred Dubai's sovereign wealth fund from following through on two recent proposed acquisitions of American assets. The managing director of that fund noted that the deals "might meet political opposition in the U.S.," though it is hard to know whether this opposition came from Congress or reflected pressures from CFIUS itself.<sup>113</sup>

Similarly, bankruptcy opinions have occasionally illustrated what might be called the quiet hand of the Committee. When the telecommunications company Global Crossing proposed merging with a Chinese company to get out of default, a bankruptcy court noted that the bona fides of the Chinese acquirer "plainly made securing approval from CFIUS, which focuses in significant part on national security concerns, difficult or impossible."<sup>114</sup> Likewise, according to another bankruptcy

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111. In this view, the comparison would be between acquirers and targets on the one hand, and defendants and victims on the other. The mitigation agreements would be the plea deals struck, and the prospect of a blocked transaction, the never-utilized, often-threatened death penalty. For more on this sort of analogy, see Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005) (analogizing sentencing commissions to agencies).

112. Kang, *supra* note 38, at 304. For example, these agreements have "encourage[d] [foreign acquirers] to support U.S. research and development and maintain domestic production, among other things." *Id.*

113. *Dubai Rejects Two US Deals Fearing Political Backlash*, KIPPREPORT, June 18, 2008, <http://www.kippreport.com/2008/06/dubai-rejects-two-us-deals-fearing-political-backlash/> (quoting Andrew Wright, managing director of the fund).

114. *In re Global Crossing, Ltd.*, 295 B.R. 726, 732 (Bankr. S.D.N.Y. 2003). The *Global Crossing* matter is one of only three appearances by CFIUS in the federal courts as of August 2008—the others involved a bankruptcy proceeding and a passing reference to a takeover defense—suggesting how far outside the realm of judicial review the Committee lies. See *Consol. Gold Fields, PLC v. Anglo Am. Corp. of S. Africa Ltd.*, 713 F. Supp. 1457, 1464 (S.D.N.Y. 1989) (noting, in passing, CFIUS's lack of challenge to a potential acquisition as a factor weighing in favor of the acquisition); *In re Chateaugay Corp.*, 198 B.R. 848, 852–54 (Bankr. S.D.N.Y. 1996) (noting CFIUS's investigation of a proposed acquisition of the assets of an entity in bankruptcy proceedings and the foreign acquirer's withdrawal

court, CFIUS also appears to have pressured another foreign bidder to withdraw from the sale of Chateaugay, a bankrupt defense contractor.<sup>115</sup>

Accordingly, it is possible that CFIUS frequently blocks foreign acquisitions with a wink and a nudge—we simply do not, and probably cannot, collect the data on the subject, with only news stories and fleeting allusions in reorganization opinions to guide us. On the other hand, there is reason for some skepticism about the possibility that the Committee is a blocking machine. The news stories that do report that mergers have failed on word from CFIUS are few, despite the fact that failed mergers are actively covered in the business press. The Treasury Department has said that the Committee approves most deals without a peep, and it downplays the threat posed by the Committee when it meets with foreign officials.<sup>116</sup> Accordingly, the isolated cases of blockage that we do know about look more like rare exceptions rather than exemplars of the rule.

The other subtle tool that CFIUS utilizes in lieu of blocking transactions is the so-called mitigation agreement. These agreements are the conditions imposed by the Committee on the merger—the tax, if you like—in exchange for its approval of an acquisition.<sup>117</sup>

It is hard to say how frequently CFIUS imposes these agreements, as it does not report on the number of mitigation agreements that it has concluded (or, for that matter, on anything other than to Congress, and even then reports are often confidential).<sup>118</sup> Like much of what the Committee does, these agreements have not been published for public scrutiny; CFIUS has been exempted from the Freedom of Information Act by its governing statute.<sup>119</sup> Additionally, members of the Committee themselves have often said that conditions are rarely imposed on foreign acquisitions,<sup>120</sup> and we do know that most foreign acquisitions are concluded without a word from CFIUS.<sup>121</sup>

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from the proposed transaction).

115. *In re Chateaugay*, 198 B.R. at 853.

116. *See* Holmer, *supra* note 30.

117. *See* 50 U.S.C.S. app. § 2170(l)(1)(A) (LexisNexis 2009).

118. The Congressional Research Service has noted that “[a]s a consequence of the confidential nature of the CFIUS review of any proposed transaction, there are few public sources of information concerning the Committee’s work to date.” JAMES K. JACKSON, CONG. RESEARCH SERV., REPORT NO. RS22197, THE EXON-FLORIO NATIONAL SECURITY TEST FOR FOREIGN INVESTMENT 4 (2006).

119. That statute provides that “[a]ny information or documentary material filed with the President or the President’s designee pursuant to this section shall be exempt from disclosure.” 50 U.S.C.S. app. § 2170(c).

120. *See* Holmer, *supra* note 30. Holmer was a member of CFUIS when serving as Deputy U.S. Trade Representative.

121. Thomas E. Crocker, *What Banks Need to Know About the Coming Debate over CFIUS*,

How often are mitigation agreements imposed? According to one Department of Homeland Security (“DHS”) official, the DHS alone participated in thirteen mitigation agreements between 2003 and 2005 and fifteen agreements in 2006 pursuant to its work with CFIUS.<sup>122</sup> The Department of Defense has written a National Industrial Security Program Operating Manual (“NISPOM”) that standardizes the mitigation agreements that are concluded among companies that do business with the Department.<sup>123</sup> Additionally, as we shall see, the Department of Justice, in conjunction with the Federal Bureau of Investigation (“FBI”) and occasionally with other government agencies, has imposed at least twenty-eight mitigation agreements on telecommunications providers between 1997 and 2007.

In some cases, these agreements have consequences. For example, when Lenovo, a Chinese company partly owned by the state, sought to purchase IBM’s personal computer business, the deal was allowed to go forward, but CFIUS required that Lenovo’s access to the identity of federal government customers of IBM be blocked, and it prevented Chinese nationals from accessing certain IBM records by requiring that Lenovo physically seal off from Chinese employees two buildings in a North Carolina office park.<sup>124</sup>

In addition, before it could purchase an American asset, a state-owned Singaporean telecommunications company was obligated to enter into a mitigation agreement including what observers have called “tough new requirements”; such requirements may include, for example, American citizen staffing, inspection rights for U.S. agencies, strict visitation policies restricting foreign national access, and third-party auditing of the company’s network security protocols.<sup>125</sup> These conditions might not seem particularly new to those familiar with standard network security agreements made with all telecommunications license holders, and as we will see, they apply to many foreign acquirers of domestic providers. But

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*Foreign Direct Investment, and Sovereign Wealth Funds*, 125 *BANKING L.J.* 457, 458 (2008) (noting that only 6.5 percent of foreign investments are even reviewed by CFIUS).

122. *Foreign Ownership: Hearing Before the Subcomm. on Transportation Security & Infrastructure Protection of the H. Comm. on Homeland Security*, 110th Cong. 12 (2007) (statement of Stewart A. Baker, DHS Assistant Secretary for Policy).

123. A copy of this manual is available at <http://www.fas.org/sgp/library/nispom.htm> (last visited Nov. 1, 2009). For further discussion of NISPOM, see Robert A. Borich, Jr., *Globalization of the U.S. Defense Industrial Base: Developing Procurement Sources Abroad Through Exporting Advanced Military Technology*, 31 *PUB. CONT. L.J.* 623, 630–31 (2002).

124. Sabino, *supra* note 6, at 22.

125. GRAHAM & MARCHICK, *supra* note 50, at 65–66.

nonetheless, it is easy enough to see them as burdensome.

These anecdotes and aggregate reports from the government, then, suggest that it is in the use of mitigation agreements that CFIUS does much of its regulating.

## B. CONTENT ANALYSIS

When mitigation agreements are imposed, a content analysis can tell us which types of agreements look alike. As it turns out, at least in telecommunications acquisitions, the Committee treats similar foreign acquirers similarly, which suggests that lawyers interested in predicting what conditions CFIUS may impose upon acquisitions should consider the characteristics of the acquirer—whether or not their clients are government owned and whether they are based in countries aligned with the United States.

The similarity of conditions imposed on similar acquirers can be shown by using plagiarism software to analyze the “boilerplateness” of the few mitigation agreements that are publicly available. In what follows, I describe the hand-collected data, discuss the merits of an examination of the boilerplateness of the data, reveal which agreements were more likely to contain similar content than other agreements, describe other qualitative evidence that reveals more about CFIUS’s use of boilerplate, and discuss some limitations of the approach.

The only industry sector in which we know what exactly CFIUS requires of foreign purchasers is the telecommunications sector. The Federal Communications Commission (“FCC”) publishes the mitigation agreements that CFIUS concludes with foreign acquiring firms as appendices to license transfers,<sup>126</sup> which the FCC must approve after any merger involving a license holder in its regulated industry.<sup>127</sup> This chink in CFIUS’s armor of secrecy provides a window into what the Committee actually does. Further, because CFIUS usually approves acquisitions, it is in these mitigation agreements that the real effect of the Committee, if any, can be found.

I collected twenty-eight such agreements from the exhibits attached to

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126. See, e.g., VSNL Am., Inc., 19 F.C.C.R. 16555, 16567 n.73 (2004).

127. See 47 U.S.C. §§ 214, 310(d) (2006); Jamie S. Gorelick, John H. Harwood II & Heather Zachary, *Navigating Communications Regulation in the Wake of 9/11*, 57 FED. COMM. L.J. 351, 395 (2005). Further, as a general matter, every time a telecommunications license holder is purchased, the license allowing for operation in the regulated industry must be transferred to the acquiring company. See 47 U.S.C. §§ 214, 310(d).

FCC license transfers between 1997 and 2007, which comprised, as best I could determine, all of the agreements imposed on foreign purchasers of FCC license holders during that period. The agreements accompanied transactions ranging from sales of satellites<sup>128</sup> to acquisitions of internet “backbone,”<sup>129</sup> transnational cable operators,<sup>130</sup> and cell phone carriers.<sup>131</sup>

Among other variables, I coded these agreements for the likelihood that the foreign acquirer’s country of origin was an American ally, which I proxied through membership in the Organisation for Economic Co-Operation and Development (“OECD”) (a “dummy,” or yes/no, variable). Where acquisitions involved coalitions of purchasers from a variety of other countries, countries in the coalition were counted as OECD-based only if every member of the syndicate hailed from such a country.<sup>132</sup> Nineteen of the twenty-eight foreign acquirers were reported by the FCC to be based in OECD-member countries.

I also coded the acquisitions for foreign sovereign ownership—a question of some controversy after the proposed sovereign-owned Dubai Ports World and CNOOC acquisitions, which failed amidst considerable congressional opposition. I used a dummy variable to assess sovereign ownership because CFIUS has previously objected even to small percentage partners in proposed acquisitions, as was the case when Hulawei proposed to purchase 16 percent of 3Com. If the FCC reported that any portion of the acquiring company was foreign-sovereign owned, I counted it as a “yes.” Twenty-one of the twenty-eight acquirers were reported by the FCC as entirely privately owned.

I hypothesized that CFIUS members would be most likely to impose specific, individually tailored conditions on sovereign-owned acquirers based in non-OECD countries and, accordingly, that it would impose similar or formulaic conditions on acquisitions from privately owned companies based in OECD-member countries.

This hypothesis was designed to tease out what we could learn about CFIUS’s practice regarding foreign investors from the language of its agreements. It was possible that specific, detailed, and tailored agreements would be imposed upon the sorts of acquisitions we might expect to be

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128. See *Lockheed Martin Global Telecomms.*, 16 F.C.C.R. 22897 (2001).

129. See *Comme’ns, Inc.*, 17 F.C.C.R. 19212 (2002).

130. *VSNL Am.*, 19 F.C.C.R. 16555.

131. *Applications of Cellco P’ship*, 23 F.C.C.R. 12463 (2008).

132. The United States has more allies than there are members of the OECD; my coding was thus meant to be conservative, reaching all countries that either did not look like the United States economically or were thought to be members of the developing world.

most worrisome—acquisitions by non-allied, sovereign-owned firms from countries like China or Russia. But just like any repeat contractor, the government makes use of boilerplate in its agreements, and mitigation agreements are no exception.<sup>133</sup> How does this predilection for boilerplate interact with potential concerns about foreign investment from the “wrong” sorts of countries?

I tested my hypotheses by subjecting the published telecommunications mitigation agreements to a content analysis through standard plagiarism software; thus, perhaps a word or two in defense of this method are in order. Mark Hall and Ronald Wright have explained that “[w]hile conventional legal scholarship analyzes issues presented in one case or a small group of exceptional or weighty cases, content analysis works by analyzing a larger group of similarly weighted cases to find overall patterns.”<sup>134</sup> Often this sort of content analysis is done qualitatively, through the hand coding of cases.<sup>135</sup> But the advent of computers has made

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133. Although contract scholars have debated whether boilerplate is a sign of bargaining power and, potentially, oppression by the drafter, *see, e.g.*, Symposium, “Boilerplate”: *Foundations of Market Contracts*, 104 MICH. L. REV. 821 (2006); Lucian A. Bebchuck & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006) (suggesting that boilerplate can be beneficial in “redressing” the imbalance in consumer contracts where sellers are deterred from opportunistic behavior by a desire to protect their reputations and opportunistic buyers have no reputation to lose); Omri Ben-Shahar, *Foreword to “Boilerplate”: Foundations of Market Contracts Symposium*, 104 MICH. L. REV. 821, 822 (2006) (noting how “buried one-sidedness is also a very familiar feature of boilerplate contracts” and that, “[d]isguised by ‘legalese,’ [these contracts] are often unbalanced, favoring their drafter”); Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857 (2006) (arguing that boilerplate facilitates bargaining because it is enforced on a case-by-case basis); Ronald J. Mann, “Contracting” for Credit, 104 MICH. L. REV. 899 (2006) (arguing that boilerplate is detrimental to credit card holders), empirical research studies by Omri Ben-Shahar, James White, and Florencia Marotta-Wurgler have suggested that boilerplate can contain unfairness, *see* Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953, 982 (2006); Florencia Marotta-Wurgler, *What’s in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. EMPIRICAL LEGAL STUD. 677, 680 (2007). In the case of the government, these agreements have an air of the pro forma about them.

134. Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63, 66 (2008). Klaus Krippendorff defines “content analysis” as “a research technique for making replicable and valid inferences from texts (or other meaningful matter) to the contexts of their use.” KLAUS KRIPPENDORFF, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* 18 (2d ed. 2004). For an overview of some of the basics of content analysis from a social science perspective, *see id.* at 18–43.

135. For some well-known examples of hand coding in a variety of legal issue areas, *see* Robert A. Hillman, *Questioning the “New Consensus” on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580 (1998) (analyzing courts’ application of the promissory estoppel theory by collecting and examining data from court opinions); Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75 (1998) (examining

quantitative content analysis possible—analysis which can be a useful supplement to close readings of legal documents. In David Tabak’s view, “Quantitative content analysis, in its most pure form, will contain no judgment calls or subjectivity other than those that can be explicitly stated in the description of how the analysis was performed.”<sup>136</sup> Litigators have increasingly turned to quantitative content analysis in securities cases,<sup>137</sup> as of course have law firms with their document management systems.<sup>138</sup>

Plagiarism software has been used by political scientists to measure the influence that party briefs<sup>139</sup> and lower court opinions<sup>140</sup> have on Supreme Court opinions, and it is becoming increasingly important in academic environments.<sup>141</sup> Using it has some advantages over other empirical textual approaches. For example, it avoids the problems and burdens of individually coding materials and exemplifies some of the potential of software-rooted approaches to textual analysis that scholars like George Geis have found promising.<sup>142</sup>

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Supreme Court federal jurisdiction decisions for grammatical structures identified as obfuscating meaning); *id.* at 80 n.12 (mentioning other scholars who have categorized rhetorical moves made by the Supreme Court in cases dealing with constitutional interpretation); Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157 (2000) (conducting two empirical studies of federal, court-ordered school desegregation by examining written district and appellate court opinions and district court docket sheets); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998) (interpreting a term’s worth of references to legislative history in Supreme Court opinions addressing statutory questions); and Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641 (2003) (hand coding indefinite contract cases). I must confess my own membership in the hand-coding fraternity. See David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297 (2006) (surveying the federal court practice of citing opinions from foreign high courts).

136. David Tabak, *Making Assessments About Materiality Less Subjective Through the Use of Content Analysis*, in SECURITIES LITIGATION & ENFORCEMENT INSTITUTE 2007, at 691, 696 (PLI Corporate Law & Practice, Course Handbook Series No. 11072, 2007).

137. See *id.* at 699–700 (noting ways in which quantitative content analysis can be used in securities litigation).

138. See George S. Geis, Essay, *Automating Contract Law*, 83 N.Y.U. L. REV. 450, 471–76 (2008) (describing the features, as well as the cost, of corporate “knowledge-management” systems).

139. See, e.g., Pamela C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties’ Briefs*, 61 POL. RES. Q. 468, 473–77 (2008) (discerning which factors affect the extent to which parties’ briefs influence the content of Supreme Court opinions).

140. See, e.g., Bryan Calvin, Paul M. Collins, Jr. & Pamela C. Corley, *Lower Court Influence on U.S. Supreme Court Opinion Content*, 67 ANN. MEETING OF THE MIDWEST POL. SCI. ASS’N (2009), available at <http://www.psci.unt.edu/~pmcollins/MPSA%202009.pdf> (examining the ability of lower federal courts to shape the content of Supreme Court opinions).

141. For an overview, see Samuel J. Horovitz, Note, *Two Wrongs Don’t Negate a Copyright: Don’t Make Students Turnitin If You Won’t Give It Back*, 60 FLA. L. REV. 229 (2008) (describing the Turnitin system, its origins, and plagiarism more generally).

142. See Geis, *supra* note 138, at 476–96.

I used the plagiarism software package Wcopyfind 2.6 to analyze the mitigation agreements concerning license transfers in the telecommunications sector. Wcopyfind was created at the University of Virginia and has been used in recent law and court research,<sup>143</sup> though not, to my knowledge, in legal scholarship. I compared each of the twenty-eight mitigation agreements in the telecommunications sector with one another, for a total of 406 comparisons.

I used Wcopyfind to calculate a percentage overlap between each agreement pair. It reported the number of identical phrases that appear in each compared document (the “total match” score), as well as the percentage of the words in one document that appeared in the other document above a specified threshold. I defined this threshold, as the software suggests and similarly to prior research,<sup>144</sup> to include identical phrases of at least six words, with the shortest matchable phrase containing one hundred characters and a hundred-word minimum match to report similar language appearing in both documents.

The total match score is highly correlated with the length of each of the two agreements in the pair: the more words, the more likely those words appear in paired documents. Conversely, when a pair had one short agreement, it tended to have a low total match score. To adjust for this factor, a similarity score had to be devised that was not confounded by length. To do this, the log of the total match score was regressed on the log of the two agreements’ word lengths.<sup>145</sup> Residuals from this regression were therefore adjusted for word length.<sup>146</sup>

The data suggest that like agreements were treated similarly by CFIUS. Figure 2 consists of boxplots showing the similarity score for each agreement grouped according to case-pair type (membership in the OECD and partial or more ownership by a foreign sovereign). The boxes in the boxplot show the length from the 25 to 75 percent, or the “interquartile,” range. The “whiskers” (the extending bars) extend to the most extreme data point which is no more than 1.5 times the interquartile range from the box. *T*-tests showed, as I discuss below, that the four pair categories with 75-25

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143. See, e.g., Corley, *supra* note 139, at 471–77. WCopyFind is available for free downloading at <http://www.plagiarism.phys.virginia.edu/Wsoftware.html> (last visited Nov. 1, 2009).

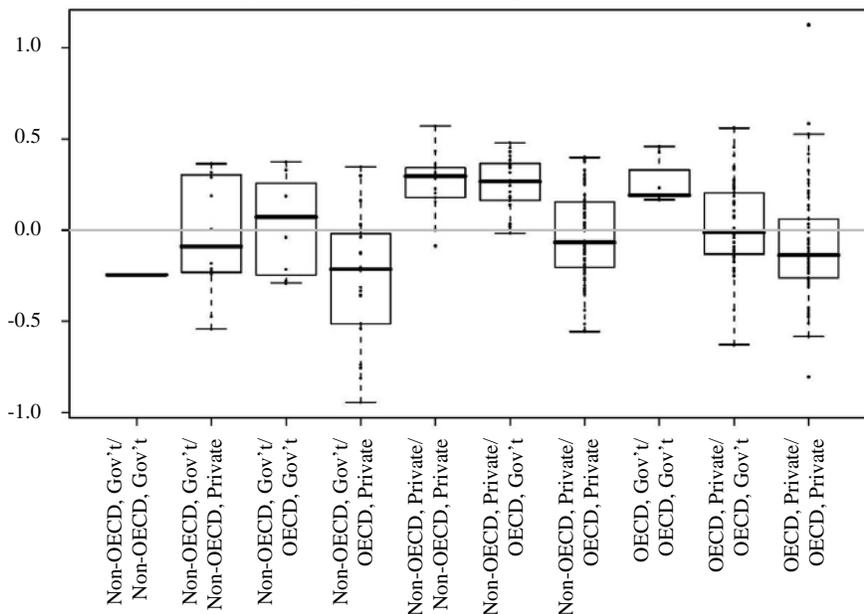
144. See, e.g., Corley, *supra* note 139, at 471.

145. I thank people at Wharton’s statistics department for helping me devise this adjustment method.

146. As a robustness check, rather than using the raw total match score, I used the log of the total match score divided by the minimum word length of the two agreements. Both approaches give qualitatively similar results, so for brevity I present only the results for the method discussed in the text.

boxes outside the mean should overlap significantly differently from the average overlap of the 406 pairs.

FIGURE 2. Similarity Score by Case Pairing



My principal hypothesis—that agreements involving like acquirers would contain similar content to one another—was supported by the data, though the small size of the sample makes some caution appropriate. This was the case for pairs of privately owned companies from non-OECD (or developing) countries and for state-owned companies from OECD countries. These pairs of agreements contained more alike content than the average agreement comparison. *T*-tests comparing the means of these groups with similar ownership characteristics (that is, government- or private-owned and OECD or non-OECD acquirers) to the overall group mean showed significant differences in these cases.<sup>147</sup>

But because there was only one pair of the most troubling acquisitions—involving state-owned, non-OECD companies—little can be said about the likeness of that pair vis-à-vis the rest of the pairings. Moreover, the most common sort of acquisitions—by privately owned, OECD companies—did not look particularly alike, but the fact that they

147. For some background on *t*-tests, see DAVID FREEDMAN, ROBERT PISANI & ROGER PURVES, *STATISTICS 490* (4th ed. 2007).

comprised such a large number of the 406 pairs means that they could not stray too far from the overall mean.

Unlike acquisitions present a somewhat different story from like acquisitions, however. The agreements I hypothesized as having very few words and phrases in common are those accompanying acquisitions by state-owned, non-OECD countries and those accompanying acquisitions by privately held, OECD countries. The former involve the prospect of government-controlled non-allies gaining control of portions of the telecommunications infrastructure; the latter permits that control by privately held companies based in rich, allied countries. And the percentage of agreements for these heterogeneous pairs was generally lower than the median. The difference was significant, a *t*-test showed.

While this suggests that unlike parties are indeed subject to unlike agreements, the data do not tell a perfectly consistent story. The surprising result involves the other unlike agreements—we would not necessarily predict that government-owned, OECD-based acquisitions would have above-average overlap with agreements involving acquisitions from privately owned corporations based in developing countries. However, there were above-median amounts of borrowing between these agreement pairs, and this difference was also significant. Possibly, these can be explained by some story about the likely similarity of agreements that are only somewhat, but not entirely, risky from a national security perspective. Or perhaps only further research and more data will reveal why this would be the case.

But overall, the agreements that look the most similar are those involving like sorts of acquirers from like sorts of countries. Moreover, some alternative explanations for similarity can be discarded. For example, the type of telecommunications provider acquired—satellite provider, business services provider, cellular provider, and so on—did not make a difference. Nor did some characteristics of the agreements themselves (other than word length), such as how complex they were on the Flesch-Kinkaid Reading Ease scale.<sup>148</sup>

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148. This scale predicts reading ease on a scale from 1 to 100 and predicts human interest in the reading material in question. See WILLIAM H. DUBAY, *THE PRINCIPLES OF READABILITY* 20–22, 50 (2004), available at [http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/1b/bf/46.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/bf/46.pdf). For a description of a considerable number of readability studies, as well as an overview of their development, see generally *id.* Some of the agreements were obtained from Westlaw and some from PDF files, but this difference in format also did not make a difference in their overlap.

## C. BOILERPLATE AND MODEST CONDITIONS

These differences should not obscure the fact that CFIUS agreements contain a lot of boilerplate, even though the Committee tailors its agreements, to a significant degree, based on the nature of the acquirer.<sup>149</sup> And the boilerplate often features only modest requirements that one would not expect to keep CEOs and investment bankers up at night.

Consider, in this regard, the agreement imposed on VSNL, an Indian telecommunications firm partly owned by the Indian government.<sup>150</sup> In 2004, the Indian company proposed to purchase an undersea cable connecting the United States, Europe, and Japan. This occasioned sharp attacks by a bidder that had previously engaged in failed negotiations over another property owned by the company selling the undersea cable, as well as arousing attention from both the press and Congress.<sup>151</sup>

Although the stage was set for rejection of the deal, or at the very least a tough mitigation agreement, none of this came to pass.<sup>152</sup> VSNL consummated the deal, and the ultimate mitigation agreement concluded by VSNL proved to be quite similar to the other mitigation agreements imposed on private companies based in allied countries. Sixty-seven percent of its content appeared in the mitigation agreement involving Clearcom,<sup>153</sup> a wireless provider acquired by a privately owned Spanish company, while 65 percent of its content appeared in a mitigation agreement involving Guam Telco,<sup>154</sup> a cellular provider purchased by a Japanese firm. Among non-OECD acquirers, 49 percent of the content of the VSNL agreement appeared in the agreement that accompanied the purchase of XO Communications,<sup>155</sup> a business services provider, by Telmex, the privately owned Mexican telephone monopoly, and 64 percent of the VSNL content appeared in the mitigation agreement involving

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149. A different plagiarism software program, Viper, was used to compare each individual agreement with the others. No matter where the acquiring party hailed from, and no matter who owned it, the agreements borrowed, at the median, somewhere between 55 and 80 percent of their content from the other published telecommunications agreements. On that analysis, with a slightly more opaque sort of software, the medians per group were 65 percent for non-OECD, government-owned companies; 79 percent for non-OECD, privately owned companies; 71 percent for OECD, government-owned companies; and 56 percent for OECD, privately owned companies.

150. VSNL Am. Inc., 19 F.C.C.R. 16555 (2004).

151. GRAHAM & MARCHICK, *supra* note 50, at 127–28.

152. VSNL, Am., 19 F.C.C.R. 16555 (authorizing the sale).

153. Transfer of Control of Licenses & Authorizations Held by Newcomm Wireless Servs., Inc. from Clearcom, L.P. to TEM P.R. Inc., 19 F.C.C.R. 15488 (2004) (grant of consent for transfer).

154. Verizon Commc'ns, Inc., 22 F.C.C.R. 6195 (2007).

155. Applications of XO Commc'ns, Inc., 17 F.C.C.R. 19212 (2007).

Cypress,<sup>156</sup> a business communications service provider purchased by a privately owned Bahrain corporation. The other agreements exhibited similar degrees of borrowing from one another, with the exception of some agreements that consisted only of very short letters essentially imposing no requirements on the foreign acquirers.

It is difficult to know how much boilerplate would turn an agreement from a tailored but standardized model into an entirely pro forma exercise, and the conclusion here is not meant to suggest that there is a magic percentage of overlap that turns an agreement from one into the other.<sup>157</sup> But one way of evaluating the extent of the mitigation agreement's boilerplate—or the agreement's “boilerplateness”—would be to consider whether it would run afoul of copyright laws. Courts have found violations of copyright for plagiarism encompassing as little as 1 percent<sup>158</sup> and 11 percent<sup>159</sup> of the printed work.<sup>160</sup> Gideon Parchomovsky and Kevin Goldman have suggested a liability rule of percent overlap for copyrighted work.<sup>161</sup> One plagiarism software package suggested that any documents showing more than 20 percent overlap suggest a “high risk” of plagiarism.<sup>162</sup>

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156. Transfer of Control Domestic & Int'l Section 214 Authorizations Held by Cypress Commc'ns Operating Co., LLC (FCC June 28, 2005) (grant of authorizations), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-05-1850A1.doc](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-05-1850A1.doc).

157. Indeed, in other contexts, 99 percent of an agreement might be like other agreements concluded by the same party, and only 1 percent different. But if that 1 percent included the price term, then we of course would not call the contracts identical; we would call them standard form contracts. For a discussion of boilerplate in these sorts of contracts, see, for example, Ben-Shahar & White, *supra* note 133, at 958–63.

158. See *Video-Cinema Films, Inc. v. Lloyd E. Rigler-Lawrence E. Deutsch Found.*, No. 04 Civ. 5332 (NRB), 2005 WL 2875327 (S.D.N.Y. Nov. 2, 2005) (holding a television programmer liable for copying less than 1 percent of a motion picture).

159. See *Meredith Corp. v. Harper & Row, Publishers, Inc.*, 413 F. Supp. 385 (S.D.N.Y. 1975) (finding plagiarism amounting to 11 percent of the copied work, as well as copying of topic sequence and other features, to constitute a copyright violation).

160. Perhaps unfortunately, the Supreme Court has not imposed a percentage similarity requirement on copyright infringement claims. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564–66 (1985) (holding that copying of an insubstantial portion of a book still qualified as copyright infringement when the defendant essentially copied the “heart of the book”).

161. Gideon Parchomovsky & Kevin A. Goldman, Essay, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1511 (2007) (proposing that “the lesser of fifteen percent or three hundred words may be copied without the permission of the copyright holder” and that “[t]he words need not appear consecutively (either in the original or in the copy), so long as the total number of duplicated words does not exceed the threshold”).

162. The instructions for running a report using Viper plagiarism software provide that an overall plagiarism rating of 21 percent or more means that the material runs a high risk of containing plagiarized material, and that in that case, the user needs to check the report very carefully. See, e.g., Viper Plagiarism Report Generated for VNSL Agreement (Aug. 2008) (on file with author).

Many of the agreements concluded by CFIUS, when considered in pairs, easily passed these threshold tests, and those that did not tended to be short letter agreements containing extremely unspecific commitments to continue the policies of the acquired company.

The large amount of boilerplate has been baked into the mitigation process. The Department of Defense, for example, has adopted templates to deal with acquisitions of defense contractors by foreign companies.<sup>163</sup> The Department of Justice has indicated that the network security agreements it requires of telecommunications providers have served as models for its CFIUS mitigation agreements.<sup>164</sup> A reading of the agreements, moreover, reinforces the notion that they tend to include standard terms, particularly if they are longer than simple letters recommitting the acquiring company to the same sort of relationships the acquired company used to have with the government.

The mitigation agreements analyzed tended to include some requirements that American citizens and facilities be available to assist the government when necessary, that private information be independently audited, and that the license holder do its best to comply with government rules and regulations.<sup>165</sup> These commitments are standard for network security agreements as well.<sup>166</sup>

And although some of the Department of Defense requirements might be onerous, in other cases, the templates look like nothing so much as form

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163. See *supra* note 123 and accompanying text (discussing NISPOM). CFIUS tends to wait to bless such transactions until the Department of Defense has concluded a NISPOM agreement that it believes it can live with. See GRAHAM & MARCHICK, *supra* note 50, at 72.

164. As the General Accounting Office, now the Government Accountability Office (“GAO”), reported in 2002, “The Justice Department modeled the agreement it negotiated on network security agreements it has used with some telecommunications companies. . . . While the agreement negotiated under the authority of Exon-Florio addressed many of the same issues as the network security agreements, the provisions were often less detailed.” GAO 2002 REPORT, *supra* note 103, at 10.

165. For examples of the requirements regarding the storage of data within the United States, the enablement of access to that data to U.S. law enforcement officials for the auditing of operations, and the imposition of compliance checks, see Verizon Commc’ns, Inc., 22 F.C.C.R. 6195, 6241 (2007) (“[A]ll Domestic Communications that are carried by or through the Domestic Communications Infrastructure shall pass through facilities under the control of the Domestic Companies that are physically located in the United States, and from which Lawfully Authorized Electronic Surveillance can be conducted pursuant to Lawful U.S. Process.”); *id.* at 6255 (“The Domestic Companies shall retain and pay for a neutral third party telecommunications engineer to audit its operations objectively on an annual basis.”); and *id.* at 6245 (“The Head of Security of the Domestic Companies, or a designee . . . , shall serve as the Security Officer with the primary responsibility for ensuring compliance with the Domestic Companies’ obligations under this Agreement, and shall be a resident citizen of the United States with an active security clearance . . .”).

166. Those agreements are also concluded by the Department of Justice.

letters. The Dubai Ports World mitigation agreement, for example, was embodied only in a “commitment letter” restating the firm’s commitments to various port security partnerships overseen by the DHS, with boilerplate language requiring Dubai Ports World to “take all reasonable steps to assist and support federal, state and local law enforcement agencies.”<sup>167</sup> Accordingly, while CFIUS is not a nonexistent obstacle for foreign acquisition, it is Congress, sitting in review of the Committee, that really drives American policy in this area.

These conclusions are not pressed too strongly on the basis of the empirical data here, and the limitations of the data are worth acknowledging. First, the content analysis is only of telecommunications sector agreements; other industry sectors involving the concerns of other Committee members may result in different outcomes. Moreover, we only have the set of agreements that the Committee did decide to act upon, which, because it is subject to selection bias—possibly some mergers were discouraged before an agreement had to be written, possibly CFIUS concluded some agreements but did not submit them to the FCC,<sup>168</sup> or possibly CFIUS approved some mergers sans agreements, but we simply do not know how often this might be the case<sup>169</sup>—means that we cannot

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167. Letter from Robert Scavone, Executive Vice President, P&O Ports N. Am., Inc. & Sultan Ahmed Bin Sulayem, Executive Chairman, Ports & Custom Free Zone Corp., to Stewart A. Baker, Assistant Sec’y for Policy, Planning & Int’l Affairs (Jan. 6, 2006) (on file with author). The other requirements imposed on Dubai Ports World were similarly unexciting. Dubai Ports World represented that its “current intent and plan is to operate any U.S. Facilities they own or control to the extent possible with the current U.S. Management structure.” *Id.* It also promised to “take all reasonable steps to assist and support federal, state and local law enforcement agencies . . . in conducting any lawful law enforcement activity related to any service provided in the U.S. by the Companies or their subsidiaries,” including “disclosure, if necessary, of information relating to the design, maintenance, or operation of the Companies’ U.S. facilities, equipment or services,” and the “prompt” provision of “any relevant records that may exist in the U.S., involving matters relating to foreign operational direction, if any, of U.S. facilities.” *Id.*

168. *See, e.g.*, Domestic Section 214 Authorization Granted, 23 F.C.C.R. 6794, 6794 (2008) (stating that the Department of Justice, the Federal Bureau of Investigation (“FBI”), and DHS withdrew their request for the FCC to defer action after taking time to consider national security issues); Lockheed Martin Corp., 17 F.C.C.R. 27732, 27763 (2002) (“Based on these statements and the commitments made by Intelsat, the Executive Branch has not filed comments or objections to the proposed transaction. Rather, the [FBI] states that, in reliance on representations made by Comsat and Intelsat in an October 15, 2002 letter, the FBI and the Department of Justice ‘have decided not to file an objection or other comments’ concerning the Applications filed in connection with the proposed transaction.”); Application of Orbital Commc’ns Corp., 17 F.C.C.R. 4496, 4507 (2002) (“[T]he Department of Justice and Federal Bureau of Investigation state that, based upon the representations made to them by the Applicants, they decided not to file an objection or other comments in this matter.”).

169. In 2007, the International Bureau of the FCC reported that the Commission processed 190 transfers of control or assignments. 2007 FCC INTERNAT’L BUREAU ANN. REP. 3, *available at*

draw much information from the twenty-eight telecommunications agreements about whom CFIUS targets and why. Instead, we can only analyze how CFIUS treats different acquirers when it does impose a mitigation agreement on a transaction, and our sample is small even then.<sup>170</sup> It is, in short, a means of characterizing the universe of CFIUS activity by looking at a small, industry-specific set of published cases—but, of course, citations studies and content analyses are all subject to these sorts of problems.<sup>171</sup>

#### D. CFIUS REVIEW

As we have seen, there is plenty of qualitative and some quantitative evidence that suggests that CFIUS review itself is not as onerous a process as some observers think. What explains the mildness of CFIUS review?

Much of the explanation proffered here focuses on Congress. CFIUS does not exercise strenuous review because review is not its primary responsibility. Instead, it is meant to operate as a congressional notification service. Some other factors may play a role as well.

For example, one problem with the bureaucratization of national security—the process of making it a responsibility of ordinary domestic regulators—is that it can overwhelm the regulator involved with an

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[http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DOC-279574A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-279574A1.pdf). In 2005, it processed 195 transfers of control or assignments. 2006 FCC INTERNAT'L BUREAU ANN. REP. 8, *available at* <http://www.fcc.gov/realaudio/presentations/2006/012006/ib.ppt>. Some of these may have involved license transfers to acquirers at least partially owned by foreign investors, but the FCC has not clarified how many such transfers were involved, nor do the annual reports of the International Bureau of the FCC indicate these statistics. Moreover, the Commission itself only published three mitigation agreements involving CFIUS in those years. Indeed, the FCC has said that some agreements that suffice for CFIUS purposes may not be included with its orders. *See, e.g.*, Bell Atl. N.Z. Holdings, Inc., 18 F.C.C.R. 23140, 23158 (2003) (“Executive Branch agencies involved here have no objection to a grant of the Transfer Applications or the Petition for Declaratory Ruling provided that the Commission conditions the grant on compliance with the terms of a network security agreement between the Department of Justice, Federal Bureau of Investigation, Department of Defense and Department of Homeland Security, and Pacific Telecom and MTC . . .”). Despite this lack of recordkeeping clarity, the FCC has promised to “accord deference to the expertise of Executive Branch agencies in identifying and interpreting issues of concern related to national security, law enforcement, and foreign policy.” Rules & Policies on Foreign Participation in the U.S. Telecomms. Market, 12 F.C.C.R. 23891, 23920 (1997).

170. Of course, in some cases, provided appropriate caution is exercised on the conclusions, this sort of research with small sample sizes can be extremely enlightening. For an example of an effective version of this sort of research, see Scott, *supra* note 135, at 1652–68 (examining eighty-nine cases dealing with contract indefiniteness).

171. For an overview of the potential of and problems with citations studies, see Zaring, *supra* note 135, at 308–12.

exorbitant number of potentially investigable transactions.<sup>172</sup> The Treasury Department, which chairs CFIUS, has been particularly susceptible to this problem since 9/11.<sup>173</sup> CFIUS, in broadening the investigation of national security transactions, has far more transactions to investigate than it appears to be able to address. Indeed, it launches inquiries into only a small percentage of the potentially investigable transactions that it sees. “[I]n 2006 there were approximately 10,000 mergers and acquisitions in the U.S., of which some 1730 were cross-border”;<sup>174</sup> CFIUS, with a small permanent staff and an ad hoc, interdepartmental process, managed to look at only 113—or 6.5 percent—of these transactions, blocking none of them.<sup>175</sup>

This unwillingness to interfere may also reflect the free trade commitments of the executive branch.<sup>176</sup> It may also reflect the omitted variables exemplified by the Treasury’s protest that the Committee is doing a good, but subtle, job.<sup>177</sup> When taken together, especially with the important role Congress plays here, these occasionally cross-cutting incentives probably explain much of the Committee’s actual practice.

#### IV. IMPLICATIONS OF THE CFIUS REGIME

##### A. CFIUS AND PRESIDENTIALISM

CFIUS is a challenge to those scholars who believe that the president is, and should be, the source of international policymaking. Even though

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172. See Zaring & Baylis, *supra* note 38, at 1415–17 (discussing the expansion of the Treasury Department’s anti-money laundering program).

173. See *id.* at 1394–1418 (discussing various expansions of the Treasury Department’s regulatory role following September 11, particularly as a result of the PATRIOT Act). In the context of money laundering prevention, the Treasury receives an overwhelming number—millions, in fact—of suspicious activity reports related to national security per year now that it requires banks to notify it in the case of possible terrorist financial transactions. *Id.* at 1415–16. Treasury’s Office of Foreign Assets Control has designated not just countries and state-owned corporations, but also the accounts of individuals, as susceptible to asset freezes; that job requires the office to monitor, once again, millions of relevant transactions. See *id.* at 1395–97.

174. Crocker, *supra* note 121, at 458.

175. *Id.*

176. See Warren H. Maruyama, *The Wonderful World of VRAs: Free Trade and the Goblet of Fire*, 24 ARIZ. J. INT’L & COMP. L. 149, 175–76 (2007) (noting that past administrations “(as is almost always the case with the U.S. executive branch) were much more in favor of free trade than the Congress”).

177. The criticism of CFIUS may be slightly misplaced due to problems of observation. The Committee claims to act often through informal deterrence, and those cautions are not matters of the public record—nor are many potentially onerous mitigation agreements.

the Constitution gives Congress the power to “regulate Commerce with foreign Nations,”<sup>178</sup> many have argued that the legislature should defer to the president’s primacy in setting foreign policy, particularly in matters of national security.

Cass Sunstein is particularly associated with this position. He and Eric Posner have argued that strong deference to executive discretion in matters of foreign relations is not only required but is also a good idea.<sup>179</sup> Sunstein has also suggested that *Chevron*-style deference is warranted for executive decisions to use force abroad.<sup>180</sup> He notes that, at least in the abstract, “national security fundamentalism has considerable appeal. The president is far better placed than Congress to act quickly and decisively to protect the citizenry.”<sup>181</sup> To be sure, Sunstein rejects the notion that the other branches have no role to play in offering executive guidance, but he does believe that courts should defer to executive interpretations of congressional ambiguity.<sup>182</sup>

In Elena Kagan’s view, presidential authority over administration in general is for the best. A former Clinton administration official, Kagan approvingly concluded in a well-known article that “President Clinton treated the sphere of regulation as his own, and in doing so made it his own, in a way no other modern President had done.”<sup>183</sup> He “convert[ed] administrative activity into an extension of his own policy and political agenda.”<sup>184</sup> Kagan celebrates this sort of “enhanced government[.]” through “executive[.] vigor,”<sup>185</sup> and she is not alone in her enthusiasm. Recent empirical work by Steven Croley has commented that the White House is a principal source of bureaucratic initiative.<sup>186</sup> Thomas Sargentich

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178. U.S. CONST. art. I, § 8, cl. 3.

179. See Posner & Sunstein, *supra* note 2, at 1198–1207 (preferring *Chevron*-style deference for those executive interpretations of the law that do make it into court).

180. Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2670–71 (2005).

181. Cass R. Sunstein, *Monkey Wrench*, LEGAL AFF., Sept.–Oct. 2005, at 36, 37.

182. See *id.* at 37–38.

183. Kagan, *supra* note 35, at 2281.

184. *Id.* at 2282. See also David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 234–57 (describing an “administrative nondelegation doctrine,” arguing for the benefits of an approach to decisionmaking involving high-level government officials rather than low-level bureaucrats).

185. See Kagan, *supra* note 35, at 2342.

186. Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 883 (2003) (“[T]he White House clearly has used rulemaking review to put its own mark on particular agency rules increasingly often over the course of the past two decades, and at an accelerated pace during the Clinton administration.”). As a descriptive matter, presidentialists tend to locate the positive enhancements of the president’s role in the domestic administrative state in a series

characterized the most awe-inspired and enthusiastic of the presidentialists as proponents of a “presidential mystique.”<sup>187</sup>

Other scholars have concluded that presidential power inevitably expands, both generally and more specifically in the arena of foreign affairs.<sup>188</sup> Further, critics of executive power in national security matters tend to assume that, as a descriptive matter, the executive calls the shots. Derek Jinks and Neal Katyal, for example, have warned that Congress’s role in constraining the executive might “wither” in foreign relations law unless the courts act to protect it.<sup>189</sup>

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of executive orders. President Reagan’s 1981 executive order on regulatory review required agencies within the executive branch to run their draft regulations by the White House’s Office of Management and Budget (“OMB”) before promulgating them. Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,194 (Feb. 17, 1981). This was a sea change in the structure of the federal bureaucracy that marked the beginning of ever-greater amounts of presidential control over it. See Croley, *supra*, at 824–25. The Clinton administration’s cognate executive order, No. 12,866, underscored the need for the OMB to review particularly significant regulatory action on a cost-benefit plan and adopted an annual regulatory planning process. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); Croley, *supra*, at 826–29. President George W. Bush passed a subsequent executive order that largely retained these elements of presidential supervision and indeed brought even more agencies into the planning process. See Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007) (amending Exec. Order No. 12,866). This order was revoked by President Barack Obama. See Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009).

187. Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 4 (2007). Other critics of the presidentialist view exist, of course. See, e.g., Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1263 (2006) (arguing that presidential administration has led to an “unwarranted embrace of an unjustified antiregulatory mission”); Cynthia R. Farina, *The “Chief Executive” and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 179 (1997) (decrying the “cult of the Chief Executive”); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 200 (1995) (“If bureaucratic accountability to elected politicians is to be used as a structural mechanism aimed at achieving direct responsiveness to public opinion, it would probably make more sense to intensify the influence that Congress—especially the House—has over the agencies. Members of Congress are eligible for reelection indefinitely; a common observation of the House is that its members are in a constant election campaign.”).

188. See William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 517 (2008) (“The President’s power is also enhanced by the vast military and intelligence capabilities under his command. In his roles as Commander-in-Chief and head of the Executive Branch, the President directly controls the most powerful military in the world and directs clandestine agencies such as the Central Intelligence Agency and National Security Agency. That control provides the President with immensely effective, non-transparent capabilities to further his political agenda . . .” (footnote omitted)). However, Lisa Schultz Bressman and Michael Vandenbergh offer a different perspective that specifically critiques and qualifies the efficacy of executive regulatory control with regards to the Environmental Protection Agency. See Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 70–76 (2006).

189. Derek Jinks & Neal Kumar Katyal, Debate, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1276 (2007) (“Congress already has to fear . . . that the executive will distort its statutes to

The national security, presidentialist school has generally been popular in the judiciary, which tends to avoid national security matters or, at best, to review decisions very deferentially. Judges have opined that “determinations regarding national security are matters that courts acknowledge are generally beyond their ken”<sup>190</sup> and that foreign affairs emergencies may require judicial deference even on matters of constitutional protection.<sup>191</sup> More recently, Gregory Maggs concluded that “the Rehnquist Court generally did not interfere with the governmental units that serve as the guardians of national security.”<sup>192</sup>

But what if the presidentially directed institutions that apply national security law took their cues from Congress as often as they took them from the executive branch? The premise of presidential control (essentially a descriptive claim that the president completely controls this area of administration) would have to be qualified—a change that would please both proponents of divided government and observers concerned that the level of executive discretion in national security has recently led to a number of bad outcomes.

It is not clear that, as a matter of institutional design, presidential domination of the definition of national security holds true in foreign investment. Although CFIUS has had its share of impacts on deals and, perhaps even more often, has played a role in deterring would-be acquirers before a deal is even consummated, the Committee rarely imposes its will on foreign investors and almost never actually blocks transactions.<sup>193</sup> Its real purpose, at least as amended, appears to be serving as a congressional notification service: Congress sits in review of CFIUS and objects most strenuously—and at least as frequently and effectively as the Committee itself—to the consummation of foreign investments. This important congressional role in what would seem to be the heart of presidential discretion is particularly surprising, suggesting that the thesis of presidential supremacy in foreign affairs needs to be qualified.

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permit activities that it did not intend. But what stops that risk from flowering today is the courts . . . .” (footnote omitted).

190. See, e.g., *Kaufman v. Mukasey*, 524 F.3d 1334, 1340 (D.C. Cir. 2008).

191. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (recognizing the necessity of congressional emergency powers, for “while the Constitution protects against invasions of individual rights, it is not a suicide pact”).

192. Gregory E. Maggs, *The Rehnquist Court’s Noninterference with the Guardians of National Security*, 74 *GEO. WASH. L. REV.* 1122, 1123 (2006).

193. See, e.g., *supra* tbl.

## B. CFIUS AND REALISM IN INTERNATIONAL AFFAIRS

Many scholars presume—and prefer—executive discretion in matters of national security and international law. The claim is twofold: the executive occupies a paramount position in international relations, and when the executive makes decisions about the interests of the country in foreign affairs, neither international law nor other domestic institutions cabin those decisions. CFIUS is not a creature of international law (although it may help international lawyers discern what countries mean when they invoke national security concerns). However, the way it proceeds is a challenge to those who presume that law does not bear on international disputes and that states are unitary actors who speak through their executives—they include realist international relations scholars and the international lawyers who agree with them.

These scholars, including Jack Goldsmith and a number of coauthors, have suggested that real, binding international legal obligations rarely exist in any context and are irrelevant, at least as far as the law is concerned, in matters of national security. This approach is rather antilaw, or at least anti-one-kind-of-law, for it characterizes purported international legal obligations as barely obligations at all, except perhaps, at best, as a mechanism that facilitates useful coordination when it is in the interest of states to do so.<sup>194</sup> These scholars have been particularly critical of the variant of international law embodied in custom rather than treaties,<sup>195</sup> but they have evinced plenty of skepticism about the value of treaties as well.<sup>196</sup>

Additionally, there is a rich tradition of skepticism in the social science literature. A primary school in international relations, the rational choice realists, have always suspected that international law is little more than a relatively hollow exercise in labeling by hopeful academics and other hangers-on—a position that was articulated in 1960 by Hans

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194. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3, 13 (2005) (explaining that international law arises from states acting to maximize their own interests, and that “under [that] theory, international law does not pull states toward compliance contrary to their interests, and the possibilities for what international law can achieve are limited by the configurations of state interests and the distribution of state power”).

195. See *id.* at 42 (arguing that state self-interest, rather than a sense of legal obligation, accounts for compliance with customary international law principles).

196. See, e.g., Jack Goldsmith & Jeremy Rabkin, Editorial, *A Treaty the Senate Should Sink*, WASH. POST, July 2, 2007, at A19 (arguing that the United States should not surrender sovereignty in a treaty because an international tribunal might be hostile to U.S. interests).

Morgenthau<sup>197</sup> and has been reinforced by many others since then.<sup>198</sup> Realism and its sympathizers in the legal community view states as self-interested unitary actors of varying strengths locked in an anarchic struggle to survive.<sup>199</sup>

The realist insight has affected international law itself, which typically includes national security exemptions in those treaties that govern international economic relations. The World Trade Organization (“WTO”) and the North American Free Trade Agreement (“NAFTA”), for example, permit countries to depart from their treaty obligations in cases where national security is at risk.<sup>200</sup> Additionally, bilateral investment treaties often have “essential security” exceptions.<sup>201</sup> The result is that scholars like Harold Koh and John Yoo have espied almost complete executive control over whether to permit foreign investments to move forward.<sup>202</sup> Such scholars dismiss the domestic and international impacts of the growing legalization of international relationships.<sup>203</sup>

CFIUS, as it actually operates, challenges this antilegalist perspective. The Committee exemplifies how actors outside of the executive branch can set national security policy, regardless of how that branch might do so if it had the unfettered discretion that is often presumed. Furthermore, the legal process is lawyered up,<sup>204</sup> meaning that even if that process takes place before an executive branch committee with no obligations to precedent or

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197. See HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 275–311 (3d ed. 1960) (arguing that international law has no influence independent of state power relationships).

198. See WALTZ, *supra* note 37, at 88 (stating that “[i]nternational systems are decentralized and anarchic”). See generally E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS* (1954) (likening international law to types of primitive law such as Eskimo law, with weak enforcement, self-help, and a lack of delegation to officials with authority).

199. See John J. Mearsheimer, *The False Promise of International Institutions*, *INT’L SECURITY*, Winter 1994/1995, at 5, 7. Many realists argue that international institutions have no effect on competition between states. See John J. Mearsheimer, *A Realist Reply*, *INT’L SECURITY*, Summer 1995, at 82, 82 (“[Realists] believe that institutions cannot get states to stop behaving as short-term power maximizers. . . . [I]nstitutional outcomes invariably reflect the balance of power. Institutions, realists maintain, do not have significant independent effects on state behavior.”).

200. See *infra* notes 210, 212 and accompanying text.

201. See William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 *VA. J. INT’L L.* 307, 311 (2008).

202. Koh & Yoo, *supra* note 35, at 734–42.

203. See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (describing the importance of new government actors in global governance, commenting on the proliferation of government networks, and exploring their advantages and disadvantages).

204. The mere presence and attention of a large number of lawyers creates a kind of “self-policing” effect.

treaty, it has nevertheless infected even the putatively lawless region of national security.

Anne-Marie Slaughter has recognized that substate actors have become increasingly responsible for setting international governance standards, especially in areas of economic and technical regulatory harmonization—which are sometimes called “low politics.”<sup>205</sup> For example, financial regulatory harmonization—the convergence of technical banking and accounting standards across countries and stock exchanges—has been left to the exchanges, accountants, and regulatory agencies to work out for themselves and has been kept out of formal treaties and away from diplomats.<sup>206</sup> However, where American investment law implicates national security, Slaughter’s perspective also seems to apply even though national security is the quintessential subject of high politics.

Others, such as Phillip Trimble, have warned that approaching international law, as realists do, in a way that is “too isolated from domestic law and politics,” can be unhelpful.<sup>207</sup> Jack Goldsmith has recently written on the legalization of war within the executive branch of the Bush administration, in which he served, suggesting that it was a substantial constraint on the work of the branch.<sup>208</sup>

To some degree, CFIUS as it actually works does not challenge the realist concept that treaties, and especially custom, do not constrain states—but it changes the focus of the identification of the state interest away from the executive and adds a legalistic process to discern that interest. CFIUS is a case study of the important role domestic actors and regulatory policy can play in setting international policy, even in such high

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205. SLAUGHTER, *supra* note 203, at 36–64. For a discussion of the typical distinctions made between high and low politics, see Christopher A. Whytock, *A Rational Design Theory of Transgovernmentalism: The Case of E.U.-U.S. Merger Review Cooperation*, 23 B.U. INT’L L.J. 1, 29–30 (2005). For some interesting examples using the distinction, see Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649, 670–71 tbl.1 (2006) (presenting entries in the neofunctionalist column that describe shifts from low politics to high politics under certain conditions), and J. H. H. Weiler, *The Geology of International Law—Governance, Democracy and Legitimacy*, 64 HEIDELBERG J. INT’L L. 547, 550 (2004) (“The regulatory layer [in international law] is distinct from its predecessors in a variety of ways: Its subject matters tend to be away from what traditionally was considered high politics and more towards what was traditionally considered low politics.”).

206. See David Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, 5 CHI. J. INT’L L. 547, 552 (2005).

207. Phillip R. Trimble, Essay, *The Plight of Academic International Law*, 1 CHI. J. INT’L L. 117, 123 (2000).

208. See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 90–91 (2007).

politics matters as international relations. In so doing, it offers a challenge to those academics who think that legal and domestic structural relationships are irrelevant to international policy.

### C. CFIUS AND THE INTERNATIONAL LEGAL DEFINITION OF NATIONAL SECURITY

National security, or its typical international treaty variant “essential security,” is a term that few international lawyers have dared to define, although it is the excuse commonly used to avoid a variety of legal obligations. Although, since the onset of the war on terror, national security law has assumed prominence,<sup>209</sup> it is still the subject of little international law scholarship. Can CFIUS’s practice help define the outer bounds of this term?

The answer is important. Treaty after treaty contain requirements that can be breached in the interest of national security. For example, NAFTA Article 2102 contains an explicit national security exception.<sup>210</sup> The U.S. Department of State has released a formal policy statement for its bilateral investment treaties (“BITs”), positing that “the United States Government preserves its right to protect its essential security interests,” regardless of its other investment treaty obligations,<sup>211</sup> and Article XXI of the General Agreement on Tariffs and Trade (“GATT”) broadly permits a state to take “any action which it considers necessary for the protection of its essential security interests,” regardless of the trade rules set forth in the treaty.<sup>212</sup>

These exceptions are infrequently invoked, perhaps thankfully.<sup>213</sup> But

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209. See Elizabeth A. Cheney, *Introduction to Special Project: National Security*, 58 VAND. L. REV. 1623, 1624 (2005) (“The ‘policy and process’ of U.S. national security has evolved significantly throughout this country’s history, particularly in the years since September 11.”). See also Winston P. Nagan, FRSA & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT’L L. 375, 382–401 (2004) (examining historically significant national security doctrines and engaging in a comparative approach of the national security law formulated by various countries). See generally Tung Yin, *The Impact of the 9/11 Attacks on National Security Law Casebooks*, 19 ST. THOMAS L. REV. 157 (2006) (discussing the extent of coverage in national security law and antiterrorism casebooks with regard to the war on terror and commenting on the increase in course offerings at law schools dealing with national security law).

210. North American Free Trade Agreement, U.S.-Can.-Mex., art. 2102, Dec. 17, 1992, 32 I.L.M. 605 (1993).

211. *Bilateral Investment Treaties with Panama, Senegal, Haiti, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt and Grenada: Hearing Before the S. Comm. on Foreign Relations*, 99th Cong. (1988).

212. General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 55 U.N.T.S. 194, available at [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf) [hereinafter GATT].

213. See, e.g., GATT Panel, United States—Trade Measures Affecting Nicaragua 1–3 (Oct. 13,

other international institutions have produced their own cautious judgments on what might constitute national security. For example, the European Court of Human Rights has affirmed that the European Convention's "Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate."<sup>214</sup> The International Covenant on Civil and Political Rights contains a similar provision.<sup>215</sup> Scholars such as William Burke-White, Andreas von Staden, Susan Rose-Ackerman, and Benjamin Billa have considered how to interpret these provisions, raising questions about whether they even *can* be interpreted or if they are instead entirely discretionary and thus need no interpretation.<sup>216</sup>

National security, as a term, matters in many other contexts. Domestically, the interests of national security exempt the United States from the requirements of the Freedom of Information Act,<sup>217</sup> the Federal Tort Claims Act,<sup>218</sup> and even the APA.<sup>219</sup> Regarding economic regulation, it is worth noting that Congress's constitutional authority to regulate trade with foreign nations has not prevented the president from exercising considerable influence on, for example, what can be exported and to

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1986), available at <http://sul-derivatives.stanford.edu/derivative?CSNID=91240197&mediaType=application/pdf> (reporting on the United States' invocation of GATT Article XXI in 1985 to justify its trade embargo on Nicaragua). See also Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365, 375 (2003) (discussing in detail this particular invocation in 1985); *U.S. Won't Offer Trade Testimony on Cuba Embargo*, N.Y. TIMES, Feb. 21, 1997, at A1 (reporting on how the United States made a similar argument in 1996 when its passage of a new set of Cuba sanctions in the Helms-Burton Act occasioned a dispute with Europe).

214. *Klass v. Germany*, 2 Eur. Ct. H.R. (ser. A) at 232 (1978).

215. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 4(1), U.N. Doc. A/RES/2200 (Dec. 16, 1966).

216. See Burke-White & von Staden, *supra* note 201, at 337–68 (inquiring into how much freedom these clauses give states to take action that would otherwise breach a BIT in response to extraordinary circumstances); Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 N.Y.U. J. INT'L L. & POL. 437, 489–93 (2008) (concluding that international law does not authorize states to read into treaties a completely open-ended national security exception and that national security exceptions must be interpreted in light of specific treaties).

217. 5 U.S.C. § 552(b)(1), (7) (2006) (exempting matters that are authorized by executive order to be kept secret in the interests of national security or foreign policy, as well as information compiled by law enforcement that could endanger individuals or disclose the confidential source to an investigation by a national security agency).

218. 28 U.S.C. § 2680(j) (2006) (exempting "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war"). For a useful overview of the complications created in courts by sovereign immunity, see Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 602–06 (2003).

219. 5 U.S.C. § 553(a)(1) (providing that notice and comment procedures do not apply to regulations involving "a military or foreign affairs function of the United States").

whom.<sup>220</sup> Under the Export Administration Act of 1979 (“EAA”),<sup>221</sup> the president has the “ability to block most exports to certain nations or to control the shipment of specific technologies and goods to any country. This power provides the President with an effective weapon for economic warfare, one he can use unhindered.”<sup>222</sup> The justification for the president’s responsibility here also lies in his control over national security.

What does the term national security mean to the United States? Generalizations require some caution, but if CFIUS can provide insight into what the United States deems important about its national security, one must distinguish between the legal principles CFIUS must apply—which do not define national security at all (quite intentionally)—and the practice of the Committee, as evidenced by its own work and its dealings with Congress. This practice suggests that national security can best be implemented in institutions staffed by American citizens, with access rights given to American law enforcement and intelligence agencies. And although it is undoubtedly related to protectionist sentiments, Congress appears to believe, perhaps more so than does the executive, that national security requires the domestic sourcing of some industrial goods and the domestic ownership of some natural resource extractors. Defense contractors, raw materials providers, and high-technology industries are all particularly likely to be included in this encompassing view of what national security means in economic terms.

While all of this is contingent on the specific interpretations employed by those in office within the various branches, it does provide some evidence of how CFIUS and other executive agencies might define national security and identify some limits on the term in the future. As we have

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220. The first export controls during peacetime were instituted in response to the development of the Soviet Bloc in Eastern Europe with the enactment of the Export Control Act of 1949. *See* IAN F. FERGUSSON ET AL., CONG. RESEARCH SERV., REPORT NO. RL30169, EXPORT ADMINISTRATION ACT OF 1979 REAUTHORIZATION 2 (2002). Since then, Congress has renewed the controls in various forms of legislation, but the most recent, the Export Administration Act of 1979, expired in August 2001. *Id.* at 3–4. However, the president has extended his control to limit exports up through August 17, 2010, using the authority granted to him in IEEPA. *See* Continuation of Emergency Regarding Export Control Regulations, 74 Fed. Reg. 41,325 (Aug. 13, 2009). *See* Executive Order No. 13,222, 66 Fed. Reg. 44,025, 44,025 (Aug. 17, 2001), for the original declaration of a national emergency because of the “unusual and extraordinary threat to the national security, foreign policy, and economy of the United States” given the “expiration of the Export Administration Act of 1979,” therefore enabling the president to limit and control imports and exports.

221. Export Administration Act (EAA) of 1979, Pub. L. No. 96-72, 93 Stat. 503.

222. Koh & Yoo, *supra* note 35, at 747. The tools for implementing export controls include the Commodities Control List, created and maintained by the Department of Commerce, which limits where potentially sensitive goods and technologies can be transported. *Id.* at 746–47.

seen, the idea that limits on national security can be discerned has implications for an important array of domestic, international, and legal obligations.

## V. CONCLUSION

In the final part of this Article, I have considered the implications of what the actual operation of America's foreign investment approval regime means for a variety of theories about domestic administrative law and international legal obligation. CFIUS matters not just to Wall Street lawyers and foreign governments. The way it works—and the way that Congress controls it—also offers insights into themes that go to the heart of the organization of the administrative state and the nature of international legal obligations. These are big implications to come from a small and obscure government committee that few know much about. But as we have seen, CFIUS is more than just a peculiar institution with foreign investment oversight responsibilities. It may also represent a different approach to formulating controlling policymaking in national security.