

# INCORPORATING THE THIRD BRANCH OF GOVERNMENT INTO U.S. NATIONAL SECURITY REVIEW OF FOREIGN INVESTMENT

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## I. INTRODUCTION

In March 2012, the Ralls Corporation (Ralls), a Delaware corporation owned by a private Chinese company, Sany Group (Sany), bought four wind farms in Oregon.<sup>1</sup> Planning to construct its wind turbines<sup>2</sup> on the farms and demonstrate their “quality and reliability” to the U.S. wind energy industry,<sup>3</sup> the company believed in its ability to bring renewable energy to the United States and to create jobs for American workers.<sup>4</sup>

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1. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 304 (D.C. Cir. 2014).

2. A turbine is a windmill-like apparatus sitting atop a tower rising from the ground. Brief for Appellant at 6 n.2, *Ralls Corporation v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296 (D.C. Cir. 2014) (No. 13-5315).

3. *Ralls Corp.*, 758 F.3d at 304. The company’s products were well received in the American market—the company also helped develop similar wind energy projects in west Texas. Richard A. Kessler, *Chinese-Owned Ralls in Texas Project*, RECHARGE (Sept. 30, 2013), <http://www.rechargenews.com/wind/americas/article1339062.ece>.

4. See Amy S. Josselyn, Comment, *National Security at All Costs: Why the CFIUS Review Process May Have Overreached Its Purpose*, 21 GEO. MASON L. REV. 1347, 1347 (2014) (discussing Ralls’s plans to build new wind turbines on Oregon farms to demonstrate their quality and reliability compared to competitors in the region and Ralls’s plan to provide jobs to American workers).

However, following a national security review by the Committee on Foreign Investment in the United States (CFIUS), Ralls received an order from President Obama commanding the company to divest its acquisition of the wind farms.<sup>5</sup> Other than citing a broad concern for “national security,” the U.S. government refused to divulge the basis of its concern.<sup>6</sup>

The Foreign Investment and National Security Act of 2007 (FINSA), a federal statute little known outside the merger and acquisition circle, controls the fate of foreign firms seeking to invest in the United States.<sup>7</sup> The statute authorizes the President, acting through CFIUS, to review, suspend or prohibit a foreign transaction “that threatens to impair the national security.”<sup>8</sup> The statute does not define “national security,” but provides several general factors such as the possibility that a foreign company may obtain sensitive technology or may dominate an industry deemed critical to national defense.<sup>9</sup>

Nor does the statute require the President to provide even a scant explanation to an investor as to why a particular transaction may threaten national security.<sup>10</sup> In the *Ralls* case, some experts attribute CFIUS’s decision to the wind farms’ proximate location to a military base.<sup>11</sup> Others hazard a guess on a perceived threat from the rising economic power of China

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5. *Id.* at 1349.

6. *See Ralls Corp.*, 758 F.3d at 306 (stating the President issued an order prohibiting Ralls’s acquisition of the Oregon wind farms after determining the acquisition posed national security concerns, but neither the President nor CFIUS provided Ralls notice of the evidence relied upon for the President’s determination).

7. *See* Jill Priluck, *The Mysterious Agency That Can Block a Global Merger*, REUTERS (July 8, 2013, 1:32 PM), <http://blogs.reuters.com/great-debate/2013/07/08/the-mysterious-agency-that-can-block-a-global-merger> (explaining that in 2007 FINSA amended CFIUS by adding additional national security reviews for business deals involving the control of U.S. firms by a foreign entities).

8. Foreign Investment and National Security Act of 2007, 50 U.S.C. APP. § 2170(b), (d) (2012).

9. § 2170(f); Josselyn, *supra* note 4, at 1348.

10. *See* § 2170.

11. *See* Josselyn, *supra* note 4, at 1358-59 (concluding that in at least three other instances, CFIUS thwarted foreign acquisitions of U.S. mining operations, at least in part because they were too close to military bases, and speculating that proximity to a military base was likely the reason the President thwarted Ralls’s wind farm project).

and the U.S. government's attempt to protect U.S. energy from foreign control.<sup>12</sup> While one would think that these factors explain CFIUS's decision, other decisions caught investors by surprise.<sup>13</sup> In July 2012, CFIUS cleared a Chinese company's acquisition of Canada-based petroleum company Nexen.<sup>14</sup> The Chinese state-owned petroleum giant CNOOC tendered a \$15.1 billion cash offer to acquire Nexen, including its offshore oil fields in the Gulf of Mexico.<sup>15</sup> One of the fields is less than fifty miles from the Naval Air Station Joint Reserve Base at Belle Chasse, Louisiana and near subsea telecommunications cables.<sup>16</sup> The deal presents almost the same security sensitive features as the Ralls acquisition, namely, a Chinese company acquiring U.S. energy assets located near a military base, yet it finally went through.<sup>17</sup> CNOOC, a traditional state-owned enterprise, should have undergone more scrutiny under FINSA's expressed concerns for a "foreign government-controlled transaction" than Sany-owned Ralls, a representative of China's private sector.<sup>18</sup>

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12. Stephen Heifetz & Michael Gershberg, *Why Are Foreign Investments in Domestic Energy Projects Now Under CFIUS Scrutiny?*, 3 HARV. BUS. L. REV. 203, 203-04 (2013).

13. See, e.g., *Recent CFIUS Clearances Are Instructive for Foreign Investments in the United States*, ORRICK (Feb. 19, 2013), <https://www.orrick.com/Events-and-Publications/Documents/Recent-CFIUS-Clearances-Are-Instructive-for-Foreign-Investments-in-the-US.htm> (discussing the CFIUS clearance of acquisitions by parties that are owned by Chinese investors).

14. *Id.*

15. See *id.* (stating CNOOC purchased Nexen, which had oil production operations and reserves in the Gulf of Mexico).

16. *Id.*

17. Compare *Recent CFIUS Clearances Are Instructive for Foreign Investments in the United States*, *supra* note 13 (stating the government approved CNOOC's acquisition of Nexen, a petroleum company with deepwater fields less than fifty miles away from a naval air station), with Josselyn, *supra* note 4, at 1361-62 (noting that President Obama required Ralls to divest from their wind farm project, which had three project sites within seven miles of restricted airspace and a bombing zone associated with a naval air station).

18. FINSA defines "foreign government-controlled transaction" as a transaction that "could result in the control of any person engaged in interstate commerce in the United States by a foreign government or an entity controlled by or acting on behalf of a foreign government." 50 U.S.C. APP. § 2170(a)(4) (2012). Such types of transactions

Under the name of “national security,” the executive branch does not offer a procedure to explain its rationale or to give a chance for the affected investors to rebut.<sup>19</sup> FINSA explicitly exempts the President’s “findings and actions” from judicial review.<sup>20</sup> Confused and baffled by the decision, Ralls sued CFIUS and the President in federal court, challenging the constitutionality of the judicial review ban.<sup>21</sup> The Court of Appeals for the D.C. Circuit asserted jurisdiction over Ralls’s procedural due process claim despite the no-judicial-review language in FINSA.<sup>22</sup> The court held that the President’s decision deprived Ralls’s property interest without due process of law.<sup>23</sup> For the first time, a foreign investor challenged the no-judicial-review provision of FINSA in any federal court, raising thorny questions concerning the fundamental fairness of the national security review process.<sup>24</sup> Although U.S. officials

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automatically prompt CFIUS to skip the initial review process and to begin a thorough investigation. § 2170(b)(1)(B). For an introduction of CNOOC, see *Stock: CNOOC, Ltd., WIKINVEST*, [http://www.wikininvest.com/stock/CNOOC%2C\\_Ltd.\\_\(CEO\)](http://www.wikininvest.com/stock/CNOOC%2C_Ltd._(CEO)) (last visited Feb. 8, 2016); for an introduction of Sany, see *Sany Company Profile*, SANY (last visited Feb. 8, 2016), <http://en.sanygroup.com/about/group/group.html>.

19. See Priluck, *supra* note 7 (arguing that CFIUS’ lack of transparency threatens to harm U.S. business interests by holding back foreign investors from bidding).

20. § 2170(e).

21. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 926 F. Supp. 2d 71, 81 (D.D.C. 2013). For a discussion on the strategic importance of the case see Len Bracken, *Suit Filed Against CFIUS Order Seen as Trial Balloon in National Security Law*, BLOOMBERG (Oct. 11, 2012) (contending that *Ralls* set a “well-picked trial balloon” to test whether a CFIUS order is subject to judicial review) and Carl Valenstein, Rebecca Hartley & Raechel Keay Anglin, *D.C. Circuit Decision in Ralls Corp. v. CFIUS May Provide a Peek Behind the Government’s CFIUS Curtain*, MORGAN LEWIS (July 21, 2014), <http://www.morganlewis.com/pubs/dc-circuit-decision-in-ralls-corp-v-cfius-may-provide-a-peek/> (explaining that the holding of the case, although very important, is a very narrow decision, because CFIUS and the President can still rely on classified information to reach an unfavorable decision to Ralls).

22. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 304, 307 (D.C. Cir. 2014).

23. *Id.* at 325.

24. During an interview with an International Trade Reporter journalist, an anonymous source expressed confusion about the Presidential Order, pointing out that hundreds of wind towers are located in the same area, “most of which have been built by foreign firms, using foreign technology and foreign investment funding.” Bracken, *supra* note 21.

have repeatedly proclaimed that the United States encourages foreign investment,<sup>25</sup> the lack of transparency in the reviewing process argues just the opposite.<sup>26</sup> Ralls Corporation's board declared that the reason to sue was not about the monetary loss,<sup>27</sup> but about "dignity"<sup>28</sup> and the stigmatizing effect of the President's decision on the corporation's reputation.<sup>29</sup>

This Comment argues that judicial review is constitutionally mandatory in protecting individual rights and in bringing necessary checks and balances to the national security review process. Starting with this introduction, the Comment first recapitulates the history of the presidential power in foreign investment in Part II, and evaluates the *Ralls* case and its constitutional challenges to FINSA's no-judicial-review provision in Part III. In Part IV, the Comment explores the scope of judicial review from the perspectives of constitutional rights, reviewability of antitrust concerns, and administrative procedure. In Part V, the Comment ventures into a larger picture by comparing FINSA with other transnational statutes that face similar constitutional issues, and conjectures how courts will interpret FINSA's no-judicial-review provision. Part

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25. See, e.g., Neil S. Wolin, Deputy Secretary of the U.S. Treasury, Remarks at the Singapore Exchange (May 20, 2011), <http://www.treasury.gov/press-center/press-releases/Pages/tg1186.aspx> (stating the United States has encouraged foreign investment for decades); *U.S. Lays Out Welcome Mat for International Investors*, U.S. DEPT OF STATE (Jan. 8, 2015), <http://iipdigital.usembassy.gov/st/english/article/2015/01/20150108312751.html> (making it clear to international investors that the United States is open for business).

26. See Priluck, *supra* note 7 (arguing that CFIUS does not explain their opinions, companies cannot challenge CFIUS decisions, and that the interest of national security is not an acceptable rationale for the lack of CFIUS transparency).

27. Ralls incurred more than \$20 million in direct economic loss from the divestment. Patrick Smith, *Judge Calls an End to Ralls' Obama Challenge*, WIND POWER MONTHLY (Oct. 10, 2013), <http://www.windpowermonthly.com/article/1215832/judge-calls-end-ralls-obama-challenge>.

28. See *Suing President Obama Sany fights for Dignity*, SANY (Nov. 16, 2012), [http://www.sanygroup.com/en-us/news/34262\\_for\\_news\\_text.htm](http://www.sanygroup.com/en-us/news/34262_for_news_text.htm) (stating the company's dignity is more important than money).

29. Interview with Yang Lan Xiang Wenbo, SANY CEO, *Ralls's Success in Suing the American President*, YOUTUBE (Aug. 31, 2014), <https://www.youtube.com/watch?v=UVnAXJA0fdE> [hereinafter Interview with Yang Lan].

VI discusses the policy purpose of judicial review in shielding CFIUS review from politicization. Finally, the Comment concludes with the suggestion to incorporate the third branch of government into the national security review process.

## II. THE HISTORY OF FINSA AND THE EXECUTIVE POWER

It is a well-settled notion that foreign investment plays a vital role in the American economy, but the path of the United States' open investment policy has endured several pushbacks.<sup>30</sup> The fear that foreign entities could control "strategic" U.S. industries has prompted a few legislative attempts to block foreign mergers and acquisitions.<sup>31</sup> This part discusses the history of the CFIUS review corresponding to the perceived threat of "national security" and the current procedure of the CFIUS review and investigation.

### A. *The Evolution of the CFIUS Review: From Exon-Florio to FINSA*

Fearing that Arab petrodollar investment might take over key U.S. industries, President Gerald Ford issued Executive Order 11858, which created the Committee on Foreign Investment in the United States (CFIUS) in 1975.<sup>32</sup> The committee originally served to monitor the impact of foreign direct investment into the United States.<sup>33</sup> Congress also enacted the International Economic Emergency Powers Act

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30. See generally EDWARD GRAHAM & DAVID MARCHICK, INST. FOR INT'L ECON., US NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 33 (2006) (explaining the growth of foreign direct investment over the past thirty years and the resulting political turbulence caused by real or perceived threats of foreign investment).

31. See Maira Goes De Moraes Gavioli, *National Security or Xenophobia: The Impact of the Foreign Investment and National Security Act ("FINSA") in Foreign Investment in the U.S.*, 2 WM. MITCHELL L. RAZA J. 1, 2-3 (2011) (positing that Congress passed FINSA, a federal statute allowing the President to block or suspend transactions involving foreign investments presenting national security risks, in reaction to concern over a United Arab Emirates government company acquiring the rights to manage six U.S. ports in 2005).

32. Josselyn, *supra* note 4, at 1351.

33. Goes De Moraes Gavioli, *supra* note 31, at 6.

(IEEPA) in 1977, which authorized the President to investigate and prohibit any transaction involving a foreign country or a foreign national subject to U.S. jurisdiction.<sup>34</sup> However, the IEEPA requires the President to declare a national emergency in response to an “unusual and extraordinary threat” posed by the country or transaction.<sup>35</sup> In fact, Presidents have generally avoided using this power to block foreign transactions – it would amount to “a hostile declaration against the country involved.”<sup>36</sup>

In the 1980s, the national security concern shifted to America’s competitiveness in emerging technology sectors due to the Japanese investment in fields like semiconductors.<sup>37</sup> Congressman Florio of New Jersey proposed the Exon-Florio Amendment to the Defense Production Act of 1950 as a part of the Omnibus Trade and Competitive Act of 1988.<sup>38</sup> The Amendment essentially gave the President similar powers as IEEPA, but obviated the need to first declare a national emergency.<sup>39</sup> The amendment also delegated the President’s initial review, decision-making authorities, and investigative responsibilities to CFIUS, the interagency committee established by President Ford’s presidential order in 1975.<sup>40</sup> After CFIUS completed its investigation, the committee made its recommendations to the President.<sup>41</sup> The President then had the discretion to block the sale of a U.S.-owned company to a foreign-funded entity if the President found “credible evidence” that “leads the President to believe that the foreign interest

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34. International Emergency Economic Powers Act, Pub. L. No. 95-223, §§ 202-03, 91 Stat. 1625, 1626 (1977) (codified as amended at 50 U.S.C. § 1702 (2011)).

35. Josselyn, *supra* note 4, at 1351.

36. *Id.*

37. *Id.*

38. See Goes De Moraes Gavioli, *supra* note 31, at 7 (explaining that Congress named Exon-Florio after its primary sponsors, John Exon and James Florio).

39. Josselyn, *supra* note 4, at 1351-52.

40. GRAHAM & MARCHICK, *supra* note 30, at 34; Goes De Moraes Gavioli, *supra* note 31, at 8.

41. See *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 303 (D.C. Cir. 2014) (stating that if CFIUS concludes that a transaction should be suspended or prohibited, CFIUS must send a report to the President that includes CFIUS’s recommendation regarding the transaction).

exercising control might take action that threatens to impair the national security” and no other provisions of law, other than IEEPA, “in the President’s judgment provide adequate and appropriate authority.”<sup>42</sup>

Other than granting greater flexibility to the President than IEEPA, Exon-Florio differs from IEEPA by explicitly exempting the President’s “findings” from judicial review,<sup>43</sup> even though IEEPA deals with more urgent situations entailing “unusual and extraordinary threat” and declaration of “a national emergency.”<sup>44</sup>

The Exon-Florio Amendment does not define “national security,” but lists several factors for CFIUS and the President to consider in determining whether a transaction poses a threat to national security:

- (1) domestic production needed for projected national defense requirements;
- (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;

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42. 50 U.S.C. APP. § 2170(d) (2012).

43. *Compare* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425 (1988) (codified as amended at 50 U.S.C. APP. § 2170 (2012)) (amended 1992 and 2007) (“The provisions of subsection (d) of this section shall not be subject to judicial review.”), *with* 50 U.S.C. § 1702(c) (2012) (“In any judicial review of a determination made under this section, if the determination was based on classified information (as defined in section 1(a) of the Classified Information Procedures Act) such information may be submitted to the reviewing court *ex parte* and *in camera*.”). Judicial review has been granted to a variety of claims challenging the government’s actions under IEEPA. *See, e.g.*, *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 975 (9th Cir. 2012) (challenging government’s designation of a terrorist organization); *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64, 68 (D.D.C. 2008) (challenging government’s designation of a terrorist organization); *Milena Ship Mgmt. Co. v. Newcomb*, 804 F. Supp. 846, 850 (E.D. La. 1992) (complaining about government’s action in blocking private vessels and bank accounts).

44. *Compare* 50 U.S.C. § 1701(b) (2012) (granting the President power to deal with unusual and extraordinary threats for which a national emergency has been declared), *with* 50 U.S.C. APP. § 2170(d)(1) (2012) (granting the President power to suspend or prohibit transactions that merely threaten to impair national security).

- (3) the control of domestic industries and commercial activity by foreign citizens as it affects U.S. capability and capacity to meet national security requirements;
- (4) the potential effects of the transaction on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; and
- (5) the potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security.<sup>45</sup>

In addition, the President and CFIUS can consider such other factors as they “may determine to be appropriate.”<sup>46</sup>

Two events sparked further changes after the terrorist attacks on September 11, 2001.<sup>47</sup> The first case involved Chinese oil company CNOOC offering to buy California-based Unocal.<sup>48</sup> The other case involved a UAE-government-controlled company, Dubai Ports World, buying P&O Steam Navigation Company, which manages several U.S. ports.<sup>49</sup> Regarding the CNOOC-Unocal transaction, Congress raised concerns that the Chinese government might control the American oil industry.<sup>50</sup> For the Dubai Ports World acquisition, Congress raised concerns that the Arabic company might turn U.S port operations into an “operational and financial base” for terrorist attacks similar to those on September 11, 2001.<sup>51</sup>

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45. 50 U.S.C. APP. § 2170(f) (2012).

46. *Id.*

47. *See* Josselyn, *supra* note 4, at 1353-54 (stating that post-9/11 concerns prompted Congress to take an “increasingly active and direct role in the CFIUS review process, starting with its intervention in two high-profile foreign acquisitions”).

48. *Id.* at 1353.

49. *Id.* at 1354.

50. *See id.* at 1353 (discussing Congress’s concerns that the CNOOC-Unocal transaction may have been motivated by the Chinese government’s desire to control the American oil industry).

51. *See id.* at 1354 (explaining that because the UAE had been an operational and financial base for 9/11 hijackers, putting Dubai Ports World in charge of U.S. port operations could result in a similar terrorist base being established).

After those two political storms, Congress passed FINSA in 2007, which did not change the basic structure of Exon-Florio,<sup>52</sup> but expanded the concept of “national security” and increased Congress’s involvement in the process.<sup>53</sup> FINSA added additional factors to national security considerations, including the effect on “critical infrastructure,” such as “major energy assets,” critical technologies, and whether a transaction is a foreign government-controlled transaction.<sup>54</sup> FINSA defines “critical infrastructure” as those so vital that its destruction “would have a debilitating impact on national security.”<sup>55</sup> Criticized for its vagueness, FINSA’s implementation regulation does not provide further guidance, because the undefined concept gives CFIUS more flexibility.<sup>56</sup> FINSA’s conception of national security has gone beyond the sectors related to the defense industry or weapon technologies by incorporating the energy industry and critical infrastructure.<sup>57</sup>

FINSA also inherited and expanded Exon-Florio’s no-judicial-review provision, thus precluding judicial review of the President’s actions “to suspend or prohibit any covered transaction that threatens to impair the national security” and the President’s findings of “credible evidence” that leads him “to believe that the foreign interest exercising control might take action that threatens to impair the national security.”<sup>58</sup>

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52. Kathleen A. Scott, *The Committee on Foreign Investment in United States*, 240 N.Y.L.J. No. 11 (July 16, 2008).

53. See Josselyn, *supra* note 4, at 1354-55 (stating that the concept of “national security” will expand to include issues related to homeland security and critical infrastructure, and that Congress “must review all ‘covered transaction[s]’ for national security concerns”).

54. 50 U.S.C. APP. § 2170(f)(6)-(8) (2012).

55. § 2170(a)(6).

56. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 70705 (to be codified at 31 C.F.R. pt. 800) (“This approach allows the committee to fully address the national security concerns that a particular transaction may raise, rather than identifying certain sectors in which foreign investment is prohibited, restricted, or discouraged.”).

57. See Josselyn, *supra* note 4, at 1353, 1355 (suggesting that the Exon-Florio Amendment—FINSA’s precursor—limited its focus to the defense industry and weapon technologies).

58. § 2170(d)(1), (d)(4)(a), (e).

*B. The Procedure of the CFIUS Review and Investigation*

The President delegates his initial review and investigative powers to CFIUS, so the process is alternatively called a CFIUS review.<sup>59</sup> The interagency committee is composed of several department heads, including the Secretaries of Treasury, Homeland Security, Commerce, Defense, the Secretary of State, the Attorney General of the United States, the Secretaries of Energy and Labor, the Director of National Intelligence, and any other officers that the President determines appropriate.<sup>60</sup>

CFIUS's review may be prompted by the contractual parties' voluntary notification or a CFIUS member's initiation.<sup>61</sup> The review considers the same factors as the President in determining whether security concerns exist.<sup>62</sup> FINSA requires CFIUS to complete the review within 30 days.<sup>63</sup>

If the review clears national security concerns, there is no need to conduct an investigation.<sup>64</sup> The CFIUS chairperson must transmit a certified notice of the committee's determinations to Congress.<sup>65</sup> However, if CFIUS identifies a potential problem, it will start an investigation to determine what efforts the acquirer needs to take to mitigate the concerns.<sup>66</sup> Most investors withdraw their bids at the CFIUS review stage if the entity

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59. GRAHAM & MARCHICK, *supra* note 30, at 34.

60. § 2170(k)(2) (displaying the interagency of CFIUS members).

61. § 2170(b)(1)(C)(i), (b)(1)(D).

62. *See* § 2170(b)(1)(A)(i)-(ii), (f) (detailing that the President, acting through the Committee, shall consider ten factors to determine a transaction's effects on national security).

63. § 2170(a)(1), (b)(1)(A), (b)(1)(E).

64. *Cf.* § 2170(b)(2)(A)-(B) (detailing that CFIUS will immediately conduct an investigation if the transaction threatens to impair national security).

65. § 2170(b)(3)(A).

66. *See* § 2170(b)(2)(A)-(B)(I) (describing that CFIUS will begin an investigation if transaction threatens national security). *See generally* COMM. ON FOREIGN INV. IN THE U.S., ANNUAL REPORT TO CONGRESS 20 (2013), <https://www.treasury.gov/resource-center/international/foreign-investment/Documents/2013%20CFIUS%20Annual%20Report%20PUBLIC.pdf> (highlighting the mitigation measures imposed by CFIUS in the 2012 reporting period).

expresses an adverse opinion, even though the ultimate power to prohibit any transaction falls to the President.<sup>67</sup>

CFIUS must submit an annual report to Congress on all of its reviews and investigations.<sup>68</sup> The reports contain basic information about the parties in a certain transaction; however, CFIUS also makes classified reports to Congress about the nature of the business, any decision or action by the President, analysis of trend in filings, investigations, and potential adverse effects of the proposed transaction.<sup>69</sup> CFIUS can make public an unclassified version of the report that provides general statistics on transactions by business sectors and by country, as well as general examples of mitigation measures and national security concerns.<sup>70</sup>

Foreign investors can submit evidence on their behalf during the initial voluntary-notice filing period and present their cases during follow-up conversations with CFIUS, but after the initial review, the officials are under no obligation to reveal to the affected company what evidence was used for the basis of the determination, irrespective of whether the information is classified or not.<sup>71</sup> Nor does an investor have an opportunity to rebut the evidence.<sup>72</sup>

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67. *See id.* at 3, tbls. 1-2 (noting that among all notices submitted to CFIUS from 2008 to 2012, thirty-two withdrew during the initial review period, thirty-eight withdrew during the investigation period, and only one reached the President's desk).

68. § 2170(m)(1).

69. § 2170(m)(2) (2014).

70. § 2170(m)(3)(B) (2014). *See generally* COMM. ON FOREIGN INV. IN THE U.S., *supra* note 66 (outlining statistics, mitigation measures, and national security concerns for the 2012 reporting period).

71. *See* § 2170(a)(3), (b)(5)-(7), (c) (stating that foreign investors are entitled to submit evidence and receive the results of CFIUS's investigation but omitting that foreign investors are entitled to be notified of the evidence CFIUS used to reach their conclusion).

72. *See* § 2170(a)(3), (e) (2014) (explaining that foreign investors cannot rebut a finding from CFIUS in a judicial proceeding).

III. “UNCHARTED WATERS”: THE *RALLS* CASE AND ITS  
CHALLENGES TO FINSA’S NO-JUDICIAL-REVIEW  
PROVISION

Ralls Corporation broke new ground in challenging the CFIUS process in a U.S. court.<sup>73</sup> The case “opened a crack” in CFIUS and the President’s secret national security review process and cast doubts on FINSA’s constitutionality.<sup>74</sup> Thus, the *Ralls* case deserves careful evaluation. This section discusses this case and the constitutional framework that Ralls uses to challenge the no-judicial-review provision.

A. *The Ralls Case*

Ralls Corporation purchased four wind farms (Butter Creek Projects) in north-central Oregon from Terna Energy USA Holding Corporation (Terna), a Delaware corporation owned by Terna Energy SA, a Greek company.<sup>75</sup> The Butter Creek Projects are located in or near restricted air space and a bombing range.<sup>76</sup> After the U.S. Navy expressed concerns about the potential conflict between the wind turbines and the military aircraft training, Ralls moved the project to a new location and alleviated the training concerns of the Navy.<sup>77</sup> Ralls also received approval from the Federal Aviation Administration, which found no hazard for “military operations, readiness and testing.”<sup>78</sup> According to Ralls’s appellate brief, hundreds of other projects are located in the same general vicinity as the Butter Creek Projects, and dozens, if not hundreds, of those projects are owned by foreign investors.<sup>79</sup>

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73. See Bracken, *supra* note 21 (stating that Ralls Corporation’s civil complaint to test whether a CFIUS order was subject to judicial review was a “trial balloon”).

74. See David McLaughlin, *Chinese-Owned Ralls Can Question U.S. on Project Denial*, BLOOMBERG (July 15, 2014, 3:16 PM), <http://www.bloomberg.com/news/2014-07-15/chinese-owned-firm-can-question-u-s-on-project-denial.html> (restating the court’s position that FINSA’s lack of process is a constitutional violation).

75. Brief for Appellant, *supra* note 2, at 1, 7-8.

76. *Id.* at 6.

77. *Id.* at 8.

78. *Id.* at 7.

79. *Id.* at 6.

After CFIUS independently learned about the transaction,<sup>80</sup> Ralls submitted a notice to CFIUS informing the agency about Ralls's acquisition and explaining why Ralls believed the transaction had nothing to do with national security.<sup>81</sup> CFIUS determined that Ralls's acquisition of the project posed a threat to national security, and on July 25, 2012, CFIUS issued a mitigation order asking Ralls to cease all access to the project sites.<sup>82</sup>

Five days later, CFIUS initiated an investigation.<sup>83</sup> In the meantime, CFIUS prohibited Ralls from selling the assets without first removing all items, including the concrete foundations, from the Butter Creek Projects sites.<sup>84</sup> On September 13, CFIUS ended the investigation and submitted a report to the President requesting his decision.<sup>85</sup>

The President issued an *Order Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation* stating “[t]here is credible evidence that leads [the President] to believe that Ralls . . . might take action that threatens to impair the national security of the United States . . . .”<sup>86</sup> The order required Ralls, among others, to “divest itself of all interests in the Project Companies, their assets and their operations within ninety days of the Order . . . .”<sup>87</sup> CFIUS presented neither any

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80. Richard J. Burke & Ziad Haider, *Ralls' Lessons to Investors on CFIUS Deal Reviews*, LAW360 (June 18, 2014, 10:15 PM), <http://www.law360.com/articles/548874/ralls-lessons-to-investors-on-cfius-deal-reviews>.

81. Brief for Appellant, *supra* note 2, at 8; *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 305 (D.C. Cir. 2014).

82. *Ralls Corp.*, 758 F.3d at 305.

83. *Id.*

84. *Id.*

85. *Id.*

86. Order Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 77 Fed. Reg. 60,281, 60,281 (Sept. 28, 2012).

87. *Id.* The order required that Ralls remove all items listed in the notice filed with CFIUS including “all items, structures, or other physical objects or installations of any kind (including concrete foundations) that [Ralls] stockpiled, stored, deposited, installed, or affixed thereon.” *Id.* at 60,281-82. In addition, the Order prohibited Ralls from accessing the site or selling, transferring, or facilitating the sale or transfer of “any items made or otherwise produced by the Sany Group to any third party for use or installation at the [project site].” *Id.* at 60,282.

evidence supporting its findings nor an opportunity for Ralls to rebut.<sup>88</sup> Sany's president, Xiang Wenbo, said on a popular Chinese talk show that he could not understand why the transaction threatens U.S. national security when the previous owner was also a foreigner.<sup>89</sup>

Ralls filed suit against CFIUS and the President in federal district court in Washington, D.C.<sup>90</sup> The complaint challenged the CFIUS order under the APA and the President's actions as *ultra vires*,<sup>91</sup> and that the actions taken constituted a violation of the Fifth Amendment Due Process clause and Fourteenth Amendment Equal Protection clause.<sup>92</sup> In March 2013, the court first dismissed Ralls's *ultra vires* and equal protection claims; it cited the no-review provision in finding that it lacked jurisdiction to hear those claims.<sup>93</sup> In the October of the same year, the court dismissed Ralls's due process claim on the ground that the presidential order did not deprive Ralls of a constitutionally protected property interest.<sup>94</sup> The district court also determined that, even if Ralls had a constitutionally protected property interest, CFIUS and the President had given Ralls opportunities to submit evidence in its favor.<sup>95</sup>

The Court of Appeals for the D.C. Circuit reversed the lower court's no-jurisdiction determination and remanded the case to the lower court for further proceedings.<sup>96</sup> The court held that no

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88. *Ralls Corp.*, 758 F.3d at 306.

89. Interview with Yang Lan, *supra* note 29.

90. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 926 F. Supp. 2d 71, 71-99 (D.D.C. 2013), *rev'd*, 758 F.3d 296 (D.C. Cir. 2014).

91. *Id.* "When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority." *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996).

92. *Ralls Corp.*, 926 F. Supp. 2d at 81.

93. *See id.* at 86, 92 (stating that the finality provision under section 721 bars the Court's review).

94. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 987 F. Supp. 2d 18, 32 (D.D.C. 2013), as amended (Oct. 10, 2013), *rev'd*, 758 F.3d 296 (D.C. Cir. 2014).

95. *Id.*

96. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 302 (D.C. Cir. 2014) (citing *Ungar v. Smith*, 667 F.2d 188, 193 (D.C.Cir.1981) and *Johnson v. Robison*, 415 U.S. 361, 366-67).

clear and convincing evidence showed that Congress intended to preclude the courts from hearing Ralls's due process claim.<sup>97</sup> The court reasoned that a clear legislative intent is required given the "constitutional danger" inherent in denying the forum to vindicate constitutional rights.<sup>98</sup> On the merits of the case, the circuit court upheld the procedural due process challenge because the Presidential Order failed to provide Ralls the factual premises of his decision or an opportunity for Ralls to address his concerns.<sup>99</sup> The circuit court held that the President should at least provide Ralls access to the unclassified information used to prohibit the transaction.<sup>100</sup>

Following the remand of the case, the district court ordered the government to give Ralls access to all the unclassified materials and unclassified evidence underlying the divestment decision.<sup>101</sup> The government also had to submit "points and authorities" explaining any reasons for withholding any documents.<sup>102</sup> Besides having an opportunity to file an opposition to the privileged documents, the court stated that Ralls would have a chance to rebut or respond to the evidence.<sup>103</sup> Then the President would reconsider the record in its entirety and could reaffirm, rescind, or revise the decision in any way.<sup>104</sup> In October 2015, Ralls and the U.S. government settled the case under confidential terms.<sup>105</sup>

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97. *Id.* at 311.

98. *Id.* at 308.

99. *See id.* at 319 (concluding due process requires "at the least, that an affected be informed of the official action, be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence").

100. *Id.* at 320.

101. Rossella Brevetti, *Wind Farm Order to Stay While Court Tells CFIUS to Provide Unclassified Material*, BLOOMBERG (Nov. 7, 2014).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Ralls Settles National Security Dispute with Obama*, WIND POWER MONTHLY (NOV. 15, 2015), <http://www.windpowermonthly.com/article/1371596/ralls-settles-national-security-dispute-obama>.

*B. Ralls's Constitutional Challenges to the No-Judicial-Review Provisions*

Claimants have traditionally challenged the constitutionality of no-review provisions in two ways: on their face or as-applied.<sup>106</sup> The former challenges the constitutionality of the statute in all circumstances.<sup>107</sup> The latter typically argues on a narrower ground that the no-review provision cannot prevent courts from adjudicating constitutional claims.<sup>108</sup> The Court of Appeals in the *Ralls* case took the as-applied approach.<sup>109</sup>

By CFIUS's interpretation, FINSA's no-review language precluded all of Ralls's challenges to the Presidential Order, including Ralls's due process claim challenging the procedure that the President followed in reaching his conclusions.<sup>110</sup> Ralls successfully defeated this interpretation.<sup>111</sup> The company contended that the no-review provision must be construed to permit constitutional challenges, such as a due process claim, unless Congress has explicitly expressed otherwise.<sup>112</sup>

Ralls analogized FINSA to two other statutes that had been challenged in the courts.<sup>113</sup> The first statute, the Micronesian Claims Act of 1971 (MCA), created the Micronesian Claims Commission to administer a \$5 million fund to Micronesians injured during World War II.<sup>114</sup> The MCA provides that the Commission's disbursement actions "shall be final and conclusive for all purposes, notwithstanding any other provision of law to the contrary and not subject to review."<sup>115</sup> A claimant

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106. Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 657 (2010).

107. *Id.* at 657, 672.

108. *Id.* at 657.

109. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 310 (D.C. Cir. 2014).

110. *Id.*

111. *Id.* at 311.

112. Brief for Appellant, *supra* note 2, at 23.

113. *Ralls Corp.*, 758 F.3d at 309.

114. *Id.*

115. *Id.*

alleged that “his right to fair hearing” was “abridged by the Commission’s reliance upon ‘secret’ extra-record evidence.”<sup>116</sup> The D.C. Circuit Court held that the statutory ban does not bar constitutional claims and no “clear and convincing” evidence showed that Congress intended to bar judicial review of such claims.<sup>117</sup>

Similarly, a claimant in another case complained about the then-functioning Office of Alien Property (OAP) for return of property seized during World War II.<sup>118</sup> Despite that the governing statute declared that all OAP claim decisions are “final” and “not subject to review by any court,” the D.C. Circuit Court ruled that the no-review provision did not bar constitutional claims.<sup>119</sup>

The Court of Appeals sided with *Ralls*, holding that FINSA’s judicial review ban is sufficiently similar to the no-review provisions in the two statutes and, thus, the court had jurisdiction over *Ralls*’s due process claim.<sup>120</sup>

#### IV. THE SCOPE OF JUDICIAL REVIEW

The *Ralls* case successfully opened the courts’ gates in a quintessential constitutional claim: procedural due process.<sup>121</sup> This section evaluates and expands this claim and proposes two other legal arguments why foreign investors should have access to U.S. courts under FINSA.

##### A. *Ralls*’s Strategy: The Jurisdiction Over Constitutional Rights

An unbroken line of cases has confirmed that U.S. courts have jurisdiction over constitutional rights even in areas of foreign relations that are traditionally delegated to Congress

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116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 311.

121. U.S. CONST. amend. V. (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”); *see also Ralls Corp.*, 758 F.3d at 311-12 (concluding statutory language does not bar *Ralls*’s procedural due process claim).

and the President.<sup>122</sup> In the seminal case *Dames & Moore v. Regan*, the Supreme Court acknowledged that the President's executive agreement with Iran could terminate American citizens' legal proceedings against the Iranian government in American courts<sup>123</sup> but noted the agreement could not foreclose American citizens' takings claims in domestic courts if they could not recover the claim in the international tribunal.<sup>124</sup>

Constitutional protections also extend to aliens,<sup>125</sup> and even to alleged enemy combatants in a war context.<sup>126</sup> In *Boumediene*, the Supreme Court struck down an entire act that prevented war detainees from asserting their habeas corpus

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122. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 721, at 230 (1986) [hereinafter RESTATEMENT OF FOREIGN RELATIONS LAW] ("Any exercise of authority by the United States in the conduct of foreign relations is subject to the Bill of Rights and other constitutional restraints protecting individual rights."). The Restatement synthesized the rule from several cases. *See, e.g.*, *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (striking down act of Congress depriving person of U.S. citizenship for voting in foreign elections); *Perez v. Brownell*, 356 U.S. 44, 58 (1958) (noting that constitutional restrictions "apply with equal vigor when that body seeks to regulate our relations with other nations"); *Reid v. Covert*, 354 U.S. 1, 5 (1957) (rejecting the idea that the United States can act against citizens abroad without the limit of the Bill of Rights).

123. *Dames & Moore v. Regan*, 453 U.S. 654, 663-64 (1981); *see also* Barbara Budros, *The Former American Hostages' Human Rights Claims Against Iran: Can They Be Waived?*, 4 HOUS. J. INT'L L. 101, 124, 131 n.183 (1981) (noting that the *Dames & Moore* court could not find any authority supporting presidential power to abrogate human rights claims).

124. *Dames & Moore*, 453 U.S. at 688.

125. RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 122, § 722, reporter note 3 (citing *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (right to just compensation for taking of property); *Wong Wing v. United States*, 163 U.S. 228 (due process of law); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (equal protection)).

126. *See Boumediene v. Bush*, 553 U.S. 723, 792 (2008) (striking down Military Commissions Act denying federal courts of jurisdiction to hear habeas corpus actions); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding that an enemy combatant deserves a meaningful opportunity to contest the factual basis for his detention before a neutral decision maker); *Rasul v. Bush*, 542 U.S. 466 (2004) (recognizing that habeas statute confers a right to judicial review of the legality of detention of aliens in a territory in which the United States exercises plenary and exclusive jurisdiction); *Ex parte Milligan*, 71 U.S. 2, 3 (1866) (noting military tribunals could not try civilians in areas where civil courts were open, even during times of war). *But see Ex parte Quirin*, 317 U.S. 1, 48 (1942) (denying the habeas petition of Nazi saboteurs during the World War II).

rights in federal courts.<sup>127</sup> As one scholar has said, the case marked the first time the Supreme Court declared unconstitutional a joint action of Congress and the President “on a military matter during a time of military conflict.”<sup>128</sup> Additionally, the decision reflected the courts’ changed understanding of the concepts of “sovereignty, rights, and judicial review.”<sup>129</sup> *Boumediene* marked the courts’ appreciation that “[s]overeigns no longer enjoy absolute supremacy within their own borders,” and that sovereigns are subject to “the limits of inalienable human rights.”<sup>130</sup>

As courts have repeatedly noted, national security and foreign relations are not “talismanic incantation[s]” to unlimited executive power.<sup>131</sup> Even the phrase “war power” cannot automatically obviate the constitutional limitations safeguarding individual liberties.<sup>132</sup> The most recent examples involve due-process challenges of the U.S. government’s “No Fly” list, under which a traveler denied boarding can file a complaint with the Department of Homeland Security; <sup>133</sup> however, the government is not required to provide travelers with any reasons for inclusion on the list or a hearing where they might protest the government’s designation.<sup>134</sup> A number of travelers have successfully sued the government for depriving their

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127. David D. Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2008 CATO SUP. CT. REV. 47, 47 (2008).

128. *Id.* at 47-48.

129. *Id.* at 56.

130. *Id.* at 57-58.

131. *United States v. Robel*, 389 U.S. 258, 263 (1967); Daniel H. Joyner, *The Enhanced Proliferation Control Initiative: National Security Necessity or Unconstitutionally Vague?*, 32 GA. J. INT’L & COMP. L. 107, 121 (2004).

132. *Robel*, 389 U.S. at 263.

133. See JARED P. COLE, CONG. RESEARCH SERV., TERRORIST DATABASES AND THE NO FLY LIST: PROCEDURAL DUE PROCESS AND HURDLES TO LITIGATION 1 (2015), <https://www.fas.org/sgp/crs/homesecc/R43730.pdf> (explaining that after September 11, 2001, the government maintains the “No Fly” list to identify commercial airline travelers who pose threats to aviation safety, and persons on this list are prohibited from air travel).

134. *Id.* at 8.

liberty interest in international travel and reputation without due process of law.<sup>135</sup>

For foreign investors, the pertinent constitutional claim is Fifth Amendment procedural due process,<sup>136</sup> which provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”<sup>137</sup> A right to property is no less important than the right of habeas corpus alleged in *Boumediene* and the right of travel alleged in the No-fly list cases. The legacy of property rights in American law dates back to the founding of the nation.<sup>138</sup> As James Madison once stated, “the protection of different and unequal faculties of acquiring property” is “the first object of [g]overnment.”<sup>139</sup> In the same line of thought, Judge Loren Smith argued, “property includes all of the fundamental aspects of the integrity of the human person, life, liberty and property . . . .”<sup>140</sup>

To claim a violation of procedural due process, case law suggests that two conditions must be met. First, the courts must inquire “whether the plaintiff has been deprived of a

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135. See, e.g., *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012) (granting jurisdiction over plaintiff’s First and Fifth Amendment challenges); *Latif v. Holder*, 28 F. Supp. 3d 1134, 1161-62 (D. Or. June 24, 2014) (holding the government must fashion new procedures that provide due process protection without sacrificing national security).

136. Brief for Appellant, *supra* note 2, 32-33.

137. U.S. CONST. amend. V.

138. See U.S. CONST. amend. V; Donald J. Kochan, *The Property Platform in Anglo-American Law and the Primacy of the Property Concept*, 29 GA. ST. U. L. REV. 453, 479-80 (2013) (discussing James Madison’s role in expanding the significance of property).

139. THE FEDERALIST NO. 10, at 58 (James Madison).

140. Loren Smith, *Life, Liberty, & Whose Property?: An Essay on Property Rights*, 30 U. RICH. L. REV. 1055, 1056.

[constitutionally] protected interest.”<sup>141</sup> If so, the test entails the second question, “What process is due?”<sup>142</sup>

### 1. Protected Interest in Property and Liberty

The D.C. Circuit Court confirmed that Ralls gained a fully vested property interest because the state law recognized that interest.<sup>143</sup> The court also rejected the government’s rationale that Ralls’s property interest is contingent on CFIUS review, noting that the federal government “cannot evade the due process protections afforded to state property by simply ‘announcing that future deprivations of property may be forthcoming.’”<sup>144</sup> Given the particular circumstances of Ralls, which did not notify CFIUS until it had completed the transaction, this holding left many wondering whether it applied to other foreign acquisitions in which the CFIUS review began before a foreign investor completely acquired the interest.<sup>145</sup> The *Ralls* court adopted a very broad concept of property interest, which hinged on the understanding of “entitlement.”<sup>146</sup> That is

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141. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999); *see also* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 886 (2000) (“[A] claimant must have an interest in ‘property’ . . . before we move on to ask whether the state has ‘deprived’ such a person of this interest without ‘due process of law.’”).

142. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *see also Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 59 (“Only after finding the deprivation of a protected interest do we look to see if the State’s procedures comport with due process.”).

143. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 315-16 (D.C. Cir. 2014) (citing *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 163-64 (1998); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985)).

144. *Id.* at 316.

145. Compare Ivan A. Schlager et al., *Court Finds CFIUS Violated Ralls Corporation’s Due Process Rights*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (July 17, 2014), <http://www.skadden.com/insights/court-finds-cfius-violated-ralls-corporations-due-process-rights> (contending foreign investors need to close the transactions before notifying CFIUS in order to evoke the due process protection), with Mark E. Plotkin et al., *Update On CFIUS Developments: Perspectives on the U.S. Court of Appeals Decision in Ralls - Committee on Foreign Investment in the United States*, NAT’L L. REV. (July 19, 2014), <http://www.natlawreview.com/article/update-cfius-developments-perspectives-us-court-appeals-decision-ralls-committee-for> (explaining that due process protection applies to all parties before CFIUS, regardless of whether a transaction has been completed or not).

146. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

to say, as long as foreign investors gained legal entitlement to the property under state law, they gained vested property rights, whether there was a pending CFIUS review or not.<sup>147</sup>

Foreign investors can also assert a right to their liberty interests to acquire property.<sup>148</sup> Case law describes liberty interests in very broad strokes, such as the “right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience,” essentially almost any right to “orderly pursuit of happiness by free men.”<sup>149</sup> As to the interdependence between an individual’s right to liberty and to property, one excerpt described the Supreme Court’s position:

Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation is in truth, a “personal” right. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.<sup>150</sup>

Foreign investors could also assert a liberty interest in reputation, as some of the plaintiffs did in the No-fly list cases.<sup>151</sup> For a liberty interest in reputation to trigger due process, the claimant needs to show: (1) “the public disclosure of a stigmatizing statement by the government, the accuracy of which is contested,” and (2) “the denial of ‘some more tangible interest’ . . . or the alteration of a right or status recognized by

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147. *Ralls Corp.*, 758 F.3d at 316.

148. Reply Brief for Appellant at 15, *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, 758 F.3d 296 (D.C. Cir. 2014) (No. 13-5315).

149. *Roth*, 408 U.S. at 572.

150. Kochan, *supra* note 138, at 480 n.94 (citing *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972)) (ellipses omitted).

151. *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014); *Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119, 1129 (W.D. Wash. 2005).

state law.”<sup>152</sup> On the first requirement, a prohibited foreign acquisition is often labeled as a threat to U.S. national security; e.g., in the *Ralls* case, the company sued the U.S. government out of the concern that the presidential order stigmatized the company with potential espionage threats, which could hurt the company’s business future in the United States and other parts of the world.<sup>153</sup> On the requirement of the denial of a tangible interest, the *Ralls* court has already held that Ralls’s property right under state law was deprived.<sup>154</sup> In that vein, foreign businesses should have no difficulties satisfying the test, so they should be able to assert a liberty interest in reputation.

## 2. What Process Is Due

If a court finds a government has deprived a foreign investor of constitutionally protected property and liberty interests, a court will look at whether the government has provided due process.<sup>155</sup> Courts normally balance due process in national security contexts with the *Mathews v. Eldridge* test.<sup>156</sup> The test requires courts to balance three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>157</sup>

However, this test stumbled into problems in FINSA because courts do not know exactly what the “government interest” is without carefully examining the executive branch’s

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152. *Ulrich v. City & Cnty. of S.F.*, 308 F.3d 968, 982 (9th Cir. 2002).

153. Interview with Yang Lan, *supra* note 29.

154. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 315 (D.C. Cir. 2014).

155. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999).

156. *Ralls Corp.*, 758 F.3d at 317-18; *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); COLE, *supra* note 133, at 12.

157. *Mathews*, 424 U.S. at 335.

substantive decision.<sup>158</sup> As commentators have pointed out, a mechanical application of the *Mathews* test will almost always lead a court to conclude that national security interests outweigh private interests, as the district court did in the *Ralls* case.<sup>159</sup> On the other hand, the D.C. Circuit Court applied a simpler standard of due process in the CFIUS context, which does not involve any balancing of interests, but instead requires the government to provide the unclassified evidence on which the officials relied and an opportunity to rebut the evidence.<sup>160</sup> However, to decide which evidence is classified, a court will still likely need to review some of the classified information, as courts did in reviewing the government's designation of the "No-fly" list and other terrorist organizations.<sup>161</sup> The current, broad judicial-review ban in FINSA exempts the President's actions and findings from judicial scrutiny. No matter what the standard of due process the courts adopt, it is almost impossible for courts to balance the different interests required by the *Mathews* test or examine whether certain evidence is classified or not without looking at the substantive decision of the executive branch. This might warrant a legislative change in the no-judicial-review provision to allow more reviewability.

### B. Antitrust Review

FINSA's concept of national security precipitates a strong argument for judicial reviewability of executive decisions. A useful analytical framework for the CFIUS process has been

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158. Josselyn, *supra* note 4, at 1378.

159. *Id.*

160. *Ralls Corp.*, 758 F.3d at 319.

161. See *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 984 (9th Cir. 2012) (reviewing evidence in camera and ex parte); *Latif v. Holder*, 28 F. Supp. 3d 1134, 1162 (D. Or. 2014) (holding the nature and extent of classified information must be reviewable to courts); *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 660 (N.D. Ohio 2010) ("If declassification or summarization of classified information is insufficient or impossible, then KindHearts' counsel will obtain an adequate security clearance to view the necessary documents, and will then view these documents *in camera*, under protective order, and without disclosing the contents to KindHearts . . ."); Josselyn, *supra* note 4, at 1378.

proposed and contains guidelines<sup>162</sup> based on FINSA: (1) denying foreign access to critical suppliers when a foreign acquisition “could result in control . . . by a foreign government or an entity controlled by or acting on behalf of a foreign government”;<sup>163</sup> (2) preventing “leakage” on “sales of military goods, equipment or technology”;<sup>164</sup> and (3) obstructing “sabotage and espionage” in transactions involving “critical infrastructure,” such as “systems and assets . . . so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.”<sup>165</sup>

The necessity of denying foreign acquisition of critical suppliers protects the United States from over-dependence on foreign entities.<sup>166</sup> This requires an analysis of the targeted suppliers’ degree of concentration.<sup>167</sup> The concern of leaking military goods and technologies also hinges on how broadly the goods or technology are available; if alternative sources exist, there is no such thing as “leakage.”<sup>168</sup>

Additionally, FINSA’s national security concept has been stretched to include U.S. technology leadership and U.S. control of its energy resources, e.g., renewable energy, the issue that might have derailed the Ralls acquisition.<sup>169</sup> A fundamental concern in an energy or high-tech transaction is whether the transaction may result in foreign dominance of the industry or U.S. dependence on the foreign interest in resources or technology.<sup>170</sup>

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162. Theodore H. Moran, *Three Threats: An Analytical Framework for the CFIUS Process*, 4 (Peterson Inst. Int’l Econ., Policy Analyses in Int’l Econ. Ser. No. 89, 2009); Josselyn, *supra* note 4, at 1358.

163. Moran, *supra* note 162, at 4 (citing 50 U.S.C. APP. § 2170(a)(4) (2012)).

164. *Id.* (citing 50 U.S.C. APP. § 2170(f)(4) (2012)).

165. *Id.* (citing 50 U.S.C. APP. § 2170(a)(6), (b)(6), (f)(2) (2012)).

166. *Id.* at 12-13.

167. *Id.*

168. *Id.* at 21.

169. *See, e.g.*, Heifetz & Gershberg, *supra* note 12, at 207 (viewing China as a strategic threat “has led CFIUS to closely examine recent Chinese investment in U.S. energy projects” that potentially present security concerns).

170. *Id.* at 207-08.

As commentators have noted, the CFIUS review strongly resembles an antitrust review in that it draws on the oligopoly theory, which examines the level of market concentration “necessary to create a plausible likelihood that the acquiring company can successfully exploit the transaction to unfair advantage by restricting production [and] raising prices . . . .”<sup>171</sup> The primary U.S. antitrust law regulating mergers and acquisitions is the Hart–Scott–Rodino Antitrust Improvements Act of 1976 (Section 7a of the Clayton Act), which aims to block transactions that substantially “lessen competition” or “create a monopoly.”<sup>172</sup> U.S. courts have traditionally played a vital role in interpreting the statute and in shaping the American antitrust law in general.<sup>173</sup> Courts regularly determine whether a merger would result in a high market share and monopoly based on factors such as the concentration of the market, the absence of competitive alternatives, the regulatory barrier to entry, and the elasticity of demand.<sup>174</sup> Given courts’ expertise in antitrust review, courts should also be trusted to review a CFIUS decision,<sup>175</sup> as long as courts review classified information *in camera*.<sup>176</sup>

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171. Moran, *supra* note 162, at 34; *see also* GRAHAM & MARCHICK, *supra* note 30, at 123 (noting the CFIUS review is “much like” an antitrust review).

172. 15 U.S.C. § 18 (2012); W. Robert Shearer, *The Exon-Florio Amendment: Protectionist Legislation Susceptible to Abuse*, 30 HOUS. L. REV. 1729, 1770-71 (1993).

173. R. Hewitt Pate, Assistant Attorney Gen., Dep’t of Justice, Address at the British Institute of International and Comparative Law Conference: Antitrust Law in the U.S. Supreme Court (May 11, 2004), <https://www.justice.gov/atr/speech/antitrust-law-us-supreme-court>.

174. *See* United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974) (holding the merger of coal producers would not result in anticompetitive effects based on the amount and availability of usable reserves); United States v. Philadelphia Nat’l Bank, 374 U.S. 321, 365 (1963) (holding the merger of two banks would result in high market share); Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986) (noting acquisitions of hospitals are likely to foster collusive practices harmful to consumers).

175. As a matter of fact, the Reagan Administration reviewed foreign transactions under the Hart-Scott-Rodino Act prior to the enactment of Exon-Florio. GRAHAM & MARCHICK, *supra* note 30, at 41.

176. Josselyn, *supra* note 4, at 1378-79.

### C. *The Jurisdiction Over Agency Procedure*

While FINSA exempted the President's "findings and actions" from judicial review, it did not grant an exemption to CFIUS,<sup>177</sup> which is an administrative committee bound by its empowering statute and the Administrative Procedure Act (APA).<sup>178</sup> Under APA section 706, the reviewing court decides "all relevant questions of law, interpret[s] constitutional and statutory provisions, and determine[s] the meaning or applicability of the terms of an agency action."<sup>179</sup> The law entitles any person adversely affected by agency action to obtain judicial review of the action.<sup>180</sup> Several Supreme Court decisions indicate that the APA created a strong presumption in favor of judicial review.<sup>181</sup>

Even though a presidential order may render a CFIUS order moot, CFIUS decisions satisfy the "capable of repetition yet evading review" exception to mootness.<sup>182</sup> As Ralls contended, although the CFIUS order is short-lived, it may affect Ralls or other foreign acquirers in the future.<sup>183</sup> After all, only a fraction of cases reach the President's desk, and CFIUS handles the rest.<sup>184</sup> That a presidential order has superseded the CFIUS order should, thus, be of no moment in terms of the availability of judicial review.

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177. 50 U.S.C. APP. § 2170(c) (2012).

178. Christina E. Holzer, *Committee on Foreign Investment in the United States and Judicial Review*, 13 J. INT'L BUS. & L. 169, 181 (2014).

179. 5 U.S.C. § 706 (2012).

180. *Id.*

181. Robert F. Holland, *Statutory Preclusion of Judicial Review Under the Administrative Procedure Act*, 1976 DUKE L.J. 430, 433 (1976) (citing *Ass'n Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 156-57 (1970); *Abbott Lab. v. Gardner*, 387 U.S. 136, 140 n.2 (1946)).

182. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 321 (D.C. Cir. 2014).

183. *Id.* at 324-25.

184. Among all 538 notices submitted to CFIUS from 2008 to 2012, only one officially reached the President's desk. COMM. ON FOREIGN INV. IN THE U.S., *supra* note 66, at 3.

APA provides that only “final” agency actions are subject to judicial review.<sup>185</sup> CFIUS decisions amount to final decisions because the President relies on CFIUS’s investigations and recommendations in making his decisions.<sup>186</sup> Indeed, CFIUS weighs so much in the process that many investors choose to back off from the deal once they hear adverse opinions from CFIUS.<sup>187</sup> Therefore, a business deserves judicial review for being adversely affected by CFIUS’s action.

There is little need to worry that courts may step on the toes of the executive branch in performing their functions in matters related to national security. Courts could use a highly deferential “arbitrary and capricious” standard to review the government’s action.<sup>188</sup> That is, to consider “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”<sup>189</sup> A court cannot substitute its policy judgment for CFIUS, but it can determine whether there is a clear error of judgment on the government’s part when considering the factors provided by FINSA.<sup>190</sup>

#### V. COMPARATIVE ANALYSIS OF COURTS’ INTERPRETATIONS OF NO-JUDICIAL-REVIEW PROVISIONS IN OTHER TRANSNATIONAL STATUTES

After exploring the proper scope of judicial review under FINSA, this section positions FINSA in a larger picture by comparing FINSA’s no-judicial-review provision with those in

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185. 5 U.S.C. § 704 (2012).

186. 50 U.S.C. APP. § 2170(e) (2012).

187. See Daniel B. Pickard et al., *CFIUS Forces Chinese Government-Backed Firm to Divest Interest in Canadian Mining Company with U.S. Operations*, WILEY REIN LLP (June 25, 2013), <http://www.wileyrein.com/newsroom-articles-2752.html> (stating three Chinese companies decided to back off from acquisitions of U.S. mining facilities due to CFIUS’s rejection).

188. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971) (explaining that an agency action must be upheld unless the action is arbitrary and capricious).

189. *Id.* at 416.

190. *Id.*

other transnational statutes that face similar challenges. The section aims to conjecture how U.S. courts will interpret FINSA's no-judicial-review provision by comparing FINSA with (1) the Military Commissions Act (MCA); (2) the approval statutes of free trade agreements, such as the implementation legislation that approved the North American Free Trade Agreement (NAFTA) and the Uruguay Round Agreements, which bar claims based on a domestic law's consistency with the agreements;<sup>191</sup> and (3) U.S. export regulations.<sup>192</sup>

A. *The Military Commissions Act*

The three cases that led to the fatal destiny of the MCA represent a remarkable judicial response to Congress and the President during the U.S. War on Terror.<sup>193</sup> The Court first required the government to give the alleged enemy combatants a meaningful opportunity to contest their detention in *Hamdi v. Rumsfeld*.<sup>194</sup> To satisfy the due process requirement raised in *Hamdi*, the Deputy Secretary of Defense transferred the individuals to Guantanamo Bay, Cuba, and established Combatant Status Review Tribunals (CSRTs), which determined that the individuals detained were "enemy combatants."<sup>195</sup> The detainees filed writs of habeas corpus in the U.S. federal courts.<sup>196</sup> While the cases were pending, Congress passed the Detainee Treatment Act of 2005 (DTA), which provides: "no court, justice, or judge shall have jurisdiction to hear or consider [] an application for a writ of habeas corpus filed by or on

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191. See 19 U.S.C. § 3311(a) (2012) (describing the approval process for NAFTA's national enacting legislation); § 3511(a) (describing the approval of the Uruguay Round Agreements); § 3312(b)(2) (describing the relationship of NAFTA to domestic law).

192. 50 U.S.C. APP. § 2412(e) (2012).

193. See Trevor W. Morrison, *The Middle Ground in Judicial Review of Enemy Combatant Detentions*, 45 WILLAMETTE L. REV. 453, 460-65 (2009) (discussing the Court's response to executive and congressional efforts during the war on terror).

194. *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004).

195. *Boumediene v. Bush*, 553 U.S. 723, 733 (2008).

196. *Id.* at 734.

behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba . . . .”<sup>197</sup>

In *Hamdan v. Rumsfeld*, the Supreme Court avoided striking down the DTA but held that this provision did not apply to the cases that were pending before the enactment of the statute.<sup>198</sup> Congress responded with further restrictions by enacting the MCA, which states:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States *who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination*.<sup>199</sup>

Facing Congress’s unambiguous court-stripping gesture, the Supreme Court struck down the entire section of the MCA.<sup>200</sup>

This case marked the outer boundary that the Supreme Court was willing to reach to protect individual rights.<sup>201</sup> As one commentator aptly pointed out, courts play an essential role in protecting individual rights that are sacrificed in the name of preserving the security of the majority.<sup>202</sup> In this sense, FINSA was enacted to protect U.S. national security, but judicial review is necessary to protect the minorities whose property and liberty interests might be hurt by the majority-elected government. *Boumediene* shows that if a no-judicial-review provision

197. Detainee Treatment Act (DTA) of 2005, Pub. L. No. 109-148, § 1005(e)(1)-(2), 119 Stat. 2680, 2742 (2006).

198. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-77 (2006) (stating in the absence of “clear congressional intent” the provision could not be applied retroactively to the pending cases).

199. Military Commissions Act (MCA) of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600-2636 (emphasis added), *invalidated by Boumediene v. Bush*, 553 U.S. 723 (2008).

200. *Boumediene*, 553 U.S. at 733.

201. See *Cole*, *supra* note 127, at 48 (“The Court has traditionally sought to avoid such confrontations through the application of statutory interpretation, bending over backward to interpret statutes to preserve judicial review where it might be unconstitutional to deny such review.”).

202. *Id.* at 60. See also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 7-8 (1980) (stating John Ely’s theory that courts play a vital role in protect minorities’ rights that are not represented in the democratic political process).

forecloses any possibility for judicial review, the courts may preempt the statute completely.<sup>203</sup>

*B. The NAFTA Implementation Act (NIA) and the Uruguay Round Agreements Act (URAA)*

The free trade agreements, such as NAFTA and Uruguay Round Agreements, become effective when Congress approves them by enacting the implementation statutes.<sup>204</sup> Because Congress has limited power to modify the terms set by the President, these laws are more the President's product than that of Congress.<sup>205</sup>

The statutes that implemented NAFTA (NIA) and Uruguay Round Agreements (URAA) prohibit any private cause of action under "the Agreement or by virtue of Congressional approval thereof," and bar any challenges to any laws or federal or state government actions on the grounds that such actions or inactions are inconsistent with the agreement.<sup>206</sup> The primary reason for barring judicial review is that the legislative inconsistency is up to Congress to remedy, not the courts.<sup>207</sup>

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203. See *Boumediene*, 553 U.S. at 733 (invalidating MCA § 7 after ascertaining Congress's intent in restricting courts' jurisdiction over habeas corpus claims).

204. See Patti Goldman, *The Legal Effect of Trade Agreements on Domestic Health Environmental Regulation*, 7 J. ENVTL. L. & LITIG. 11, 25 (1992) (explaining how nontariff barrier trade agreements become binding). The negotiation of international trade agreements is assigned to the executive branch set forth in the Trade Act of 1974 and its later amendments. *Id.* at 24. The process is called a "fast-track" procedure, which limits the debate to twenty hours in each house and requires a floor vote within the sixty to ninety-day period. *Id.* at 25.

205. See IAN F. FERGUSSON, CONG. RESEARCH SERV., RL33743, TRADE PROMOTION AUTHORITY (TPA) AND THE ROLE OF CONGRESS IN TRADE POLICY (2015) (explaining Congress's limited role in expedited trade agreement procedures). NAFTA was attacked for failing to obtain a supermajority vote from the Senate as required by the Treaty Clause. *Made in the USA Found. v. United States*, 242 F.3d 1300, 1302 (11th Cir. 2001).

206. 19 U.S.C. §§ 1516a(g)(2), 3312(c) (2012).

207. See *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 668 (Fed. Cir. 1992) (stating that if U.S. statutory provisions at issue are "inconsistent with" trade agreement, then "it is a matter for Congress and not this court to decide and remedy").

U.S. courts traditionally enjoy the power of interpreting domestic law;<sup>208</sup> thus, once the trade agreements are approved by the implementing statutes, courts face a dilemma of whether to hear a private lawsuit requesting the interpretation of the inconsistency.<sup>209</sup> If a court hears such a claim, it essentially interprets the President's decisions on foreign affairs.

### 1. The Interpretative Challenges of NIA and URAA

The Federal Circuit chose to take jurisdiction over private claims despite the no-review provision in NIA.<sup>210</sup> The Canadian Lumber Trade Alliance brought a claim under NIA,<sup>211</sup> which provides that any subsequent amendment to U.S. trade laws should not apply to goods from Canada or Mexico.<sup>212</sup> Congress subsequently amended the trade laws by providing that collected countervailing duties and antidumping duties that originally went to a U.S. general fund should be distributed to individual domestic producers.<sup>213</sup> The Canadian Lumber Trade

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208. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”)

209. *See generally* Petition for Writ of Certiorari at 19-20, *U.S. Steel Corp. v. Can. Lumber Trade Alliance*, 555 U.S. 819 (2008) (No. 07-1470) (emphasizing the importance to resolve the circuit split on the meaning of the no-judicial-review provision in free trade agreements).

210. *See* JEANNE J. GRIMMETT, CONG. RESEARCH SERV., WTO DISPUTE SETTLEMENT: STATUS OF US COMPLIANCE IN PENDING CASES 12 (2012) (stating federal courts have taken jurisdiction over challenges to agency determinations). In two other cases, plaintiffs also brought up claims under NAFTA, but both were dismissed for inapposite claim or lack of standing. *See, e.g.,* *LeClerc v. Webb*, 419 F.3d 405, 412 (5th Cir. 2005) (stating Affleck lacked standing to assert a claim under NAFTA); *Friedman v. United States*, No. 01CiV.7518LTSRLE, 2003 WL 1460525, at \*11 (S.D.N.Y. Mar. 18, 2003) (stating the NAFTA Implementation Act did not allow for a private action against any United States department or agency).

211. *See* Petition for Writ of Certiorari, *supra* note 209, at 8 (describing the different interpretations of the provision by Federal Circuit and the Ninth Circuit).

212. *Can. Lumber Trade All. v. United States*, 517 F.3d 1319, 1343 (Fed. Cir. 2008).

213. *See* JEANNE J. GRIMMETT, CONG. RESEARCH SERV., THE CONTINUED DUMPING AND SUBSIDY ACT (“BYRD AMENDMENT”) 2-3 (2005) (discussing how the CDSOA amended prior trade laws). Congress amended the trade laws with the Continued Dumping and Subsidy Offset Act (CDSOA). *Can. Lumber Trade All.*, 517 F.3d at 1324.

Alliance contended that the new law should not apply on products from Canada according to NIA.<sup>214</sup> The Federal Circuit Court granted review on this case, despite NIA explicitly barring judicial review of private claims under the NAFTA agreement.<sup>215</sup> The Court construed the no-review provision to ban private actions against NAFTA itself, not the domestic implementation statute, NIA.<sup>216</sup>

The Ninth Circuit, on the other hand, refused to hear a suit alleging that a state regulation contradicted URAA, the domestic legislation implementing the terms of the Uruguay Round Agreements.<sup>217</sup> In that case, the plaintiff, Bronco Company, a wine producer, sued the U.S. Bureau of Alcohol, Tobacco, and Firearms (ATF), for detaining its wine and preventing wine sales.<sup>218</sup> Bronco alleged that ATF's regulation contradicted an amendment to the URAA.<sup>219</sup> The Ninth Circuit held that Bronco did not have a cause of action, citing the no-review language.<sup>220</sup>

The Federal Circuit criticized the Ninth Circuit's decision in *Bronco Wine* because the opinion "may have conflated" Uruguay Round Agreements with their implementation act, the URAA.<sup>221</sup> In other words, the court could not find a reason to deny judicial review under a domestic law. The losing parties in both *Canadian Lumber* and *Bronco Wine* petitioned for certiorari at

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214. See *Can. Lumber Trade All.*, 517 F.3d at 1324-25 (arguing that the CDSOA does not apply to goods from NAFTA countries such as Canada).

215. See *id.* at 1325, 1340 (explaining the court had jurisdiction to review the claim regardless of the no-review provision).

216. See *id.* at 1340 (explaining because the claim did not rely on NAFTA it could be brought).

217. See *Bronco Wine Co. v. Bureau of Alcohol, Tobacco & Firearms*, No. 98-15444, 1999 WL 68632, at \*1 (9th Cir. Feb. 11, 1999) (stating the district court properly dismissed the claim because the Lanham Trade Act, which implemented the URAA, did not provide a cause of action under which Bronco Wine Co. could bring a claim).

218. Appellant's Opening Brief at 1-2, *Bronco Wine Co. v. Bureau of Alcohol, Tobacco & Firearms*, 168 F.3d 498 (9th Cir. Feb. 11, 1999) (No. 98-15444).

219. See *id.* (explaining the amendments to the Lanham Trade Act implemented the Uruguay Round Trade Agreement).

220. *Bronco Wine*, 1999 WL 68632, at \*1.

221. *Can. Lumber Trade All.*, 517 F.3d at 1341.

the Supreme Court, but both petitions were denied.<sup>222</sup> Before the Supreme Court takes a look at the issue, however, the Federal Circuit opinion should be found to have more persuasive value. For one reason, the opinion elaborates on the Court's rationale in granting jurisdiction, while the *Bronco Wine* court abruptly denied the jurisdiction without specifically addressing petitioner's due process claim.<sup>223</sup> For another, the *Bronco Wine* court has designated the opinion as an unpublished opinion; thus it has no binding precedential value.<sup>224</sup> Also, in later cases, the Federal Circuit Court has always allowed claimants to bring suits challenging regulations that violate WTO agreements.<sup>225</sup>

## 2. Implications for FINSA

The NIA and URAA contain no-review provisions for the reason that courts usually defer to the executive branch in areas of foreign relations.<sup>226</sup> However, once these agreements are implemented, they provide causes of action for private parties whose economic and social rights are violated.<sup>227</sup> Although courts did not explicitly strike down NAFTA or the no-review provision in the implementation statute, the Federal Circuit adopted a tactful way of exercising judicial power over the interpretation of the statutes.<sup>228</sup> Similar to the fast-track

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222. *U.S. Steel Corp. v. Can. Lumber Trade All.*, 555 U.S. 819 (2008); *Bronco Wine Co. v. Bureau of Alcohol, Tobacco and Firearms*, 528 U.S. 950 (1999).

223. *Compare Can. Lumber Trade All.*, 517 F.3d at 1324, 1340 (granting jurisdiction), with Appellant's Opening Brief, *supra* note 216, at 2 (denying jurisdiction).

224. *Bronco Wine*, 1999 WL 68632, at \*1; Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L.J. 621, 623 (2009).

225. *See Timken Co. v. United States*, 240 F. Supp. 2d 1228, 1238 (2002), *aff'd*, 354 F.3d 1334 (Fed. Cir. 2004) (allowing the plaintiff to bring a claim arguing the agency's interpretation of U.S. laws violated WTO agreements).

226. *See Golan v. Holder*, 609 F.3d 1076, 1085 (10th Cir. 2010), *aff'd*, 562 U.S. 1270 (2011) (explaining courts give special deference to the other branches judgments regarding foreign affairs).

227. *See, e.g., Can. Lumber Trade All. v. United States*, 517 F.3d 1319, 1339-42 (Fed. Cir. 2008) (stating the no review provision of the NIA did not bar the Canadian Wheat Board's cause of action because the suit was brought under the implementation of NAFTA requirements not NAFTA itself).

228. *See supra* Part V.B.1 (explaining the court exercised judicial review despite the presence of a no-review provision and without striking NAFTA).

executive agreements, FINSA sets down rules in the foreign relations and national security – functions historically designated to the executive branch. Following the rationale of the Federal Circuit in construing the provisions to allow judicial review of the President’s actions in foreign trade, courts should similarly construe FINSA to allow review of the President’s national security determinations that affect a private party’s constitutional rights and interests.<sup>229</sup>

### C. *U.S. Export Regulations’ Judicial Review Ban*

Another statute that blurs the line between the executive authority and individual rights is the U.S. export control regulation.<sup>230</sup> In 1979, Congress passed the Export Administration Act (EAA) to restrict the export of goods and technology that may contribute to the military capabilities of nations posing a threat to the United States.<sup>231</sup> EAA delegated broad authority to the executive branch to implement its policies, including establishing a licensing system as detailed in the Export Administration Regulations (EAR).<sup>232</sup> The EAA is not permanent legislation and Congress has let it expire a few times.<sup>233</sup> The current EAR, which inherits most of the provisions in the EAA, operates under IEEPA.<sup>234</sup> EAR requires exporters to obtain licenses before exporting certain goods detailed on the Commerce Control List, including commodities, software, technical data, computers, and other electronic equipment.<sup>235</sup> The regulation proclaims that “functions exercised under this

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229. See *supra* Part IV (stating under FINSA, the President’s negative impact on a foreign investor’s property interest should give rise to the cause of actions set forth in Part IV of the Comment).

230. See generally Scott C. Whitney & Steven R. Perles, *Judicial Review Under the Export Administration Act*, 4 GEO. MASON L. REV. 251, 253 (1996) (noting how the E.A.A.’s judicial review exemption has a pervasive effect on individual rights).

231. Joyner, *supra* note 131, at 108.

232. *Id.* at 108-09.

233. Cecil Hunt, *U.S. Export Controls and Economic Sanctions—An Overview*, 33 A.L.I.-A.B.A. BUS. L. COURSE MATERIALS J. 51, 52 (2009).

234. *Id.* at 52-53.

235. Whitney & Perles, *supra* note 230, at 251-52.

Act . . . are excluded from the operation of” the APA.<sup>236</sup> In addition, the Department of Commerce is given authority over enforcement determinations, which “shall be final and [are] not subject to judicial review.”<sup>237</sup>

Despite the language, courts have granted review on claims challenging the agency’s scope of authority and procedures.<sup>238</sup> In a case challenging the Secretary of Commerce’s decision to impose civil sanctions for failure to obtain proper licensing for exporting wafer polishers, the Court of Appeals for the D.C. Circuit decided that the Secretary had acted in excess of its delegated powers.<sup>239</sup> <sup>240</sup> In another case, the Ninth Circuit also listed several occasions where judicial review should be permitted.<sup>241</sup> Such occasions could arise if the Department of Commerce began denying licenses for impermissible reasons, such as denying all licenses submitted by a minority group, if the Secretary acted in excess of his or her delegated authority, or if the Secretary exercised export controls for reasons other than national security reasons.<sup>242</sup> The court said the seemingly absolute no-review provision is only constitutional if it does not bar the above-mentioned claims.<sup>243</sup>

Similar to the Commerce Secretary exercising power to determine the eligibility of certain exports for national security reasons, FINSA grants the executive branch power to review whether a certain transaction might threaten national

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236. 50 U.S.C. APP. § 2412(a) (2012).

237. § 2412(c).

238. *See e.g.*, *United States v. Bozarov*, 974 F.2d 1037, 1044-45 (9th Cir. 1992) (noting the court’s power to grant review if the Secretary denied licenses, acted in excess of his authority, or controlled exports for reasons other than national security); *Dart v. United States*, 848 F.2d 217, 219 (D.C. Cir. 1988) (noting the court’s power to review when a procedural safe guard was not followed); *Spawr Optical Research, Inc. v. Baldrige*, 649 F. Supp. 1366, 1369 (D.D.C. 1986) (noting the court’s power to grant review when there is a substantial departure from an important procedural right).

239. *Dart*, 848 F.2d at 219.

240. *Id.*

241. *See Bozarov*, 974 F.2d at 1044-45 (stating types of judicial review available under the EAA).

242. *Id.*

243. *Id.*

security.<sup>244</sup> Based on courts' interpretations of EAR's no-review language, courts should also grant review on constitutional-rights claims or claims regarding CFIUS's scope of power.

The destinies of three transnational statutes' no-judicial-review provisions showcase a spectrum of possibilities on how courts react to preclusion of judicial review. MCA's nullification represents how far the nation's highest court is willing to reach to protect the right to petition for habeas corpus, a type of fundamental human right, even for alleged enemy combatants in Guantanamo Bay.<sup>245</sup> The courts' interpretations of NIA, URAA, and the Export Administration Act also presents a more moderate yet assertive approach of exercising judicial power over interpreting domestic statutes, policing the agency's scope of power, and reviewing constitutional claims.<sup>246</sup> Given the importance of property and liberty interests at stake under FINSA, courts will likely treat such claims with no less respect than habeas corpus claims. Courts will likely avoid the blunt approach taken with the MCA but, instead, try to interpret no-judicial-review provisions as allowing certain claims. However, if Congress modifies this language to foreclose all possibilities of judicial review, FINSA might suffer the same fate as MCA.

## VI. THE PURPOSE OF JUDICIAL REVIEW IN SHIELDING THE CFIUS PROCESS FROM POLITICIZATION

A wealth of academic writing has criticized the politicization of the CFIUS process and its harm to foreign investment.<sup>247</sup>

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244. See *supra* Part II (explaining that the Exon-Florio Amendment lists several factors that CFIUS and the President may consider in determining whether a certain transaction may threaten national security).

245. See *supra* Part V.A (noting that the Supreme Court treats habeas corpus as a fundamental right).

246. See *generally supra* Part V.B-C (noting court's assertiveness in interpreting the NIA, URAA, and EAA).

247. See *e.g.*, GRAHAM & MARCHICK, *supra* note 30, at 123 (explaining how the politicization of the Exon-Florio process raises costs for potential foreign acquirers); Yiheng Feng, Note, "We Wouldn't Transfer Title To The Devil": Consequences Of the

Within the U.S. tripartite government, the framers designed the federal judiciary to be insulated from political pressure.<sup>248</sup> Thus, judicial review helps cool down the often-overheated CFIUS process.

Politicization often steers decision makers with emotion rather than fact.<sup>249</sup> Although decision-making processes in Washington are colored by political influences in varying degrees, CFIUS review invites more manipulation because the catchy phrases, foreign ownership, and national security easily grab attention from constituents who may oppose certain foreign investors due to their particular worldview or self-interest.<sup>250</sup>

The opposition to the Dubai Ports Acquisition took advantage of the anti-Arab sentiment after the attacks of September 11, 2001.<sup>251</sup> Dubai Ports World, a firm based in Dubai, had obtained the CFIUS clearance in its acquisition of Peninsular and Oriental Steam Navigation Company (P&O), a ports operator owned by a British firm.<sup>252</sup> However, after public denunciations from Congress, CFIUS came back with a more rigorous review.<sup>253</sup> Senator Frank Lautenberg (D-NJ) stated:

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*Congressional Politicization of Foreign Direct Investment On National Security Grounds*, 42 N.Y.U.J. INT'L L. & POL. 253, 283 (2009) (commenting that inappropriate congressional oversight of the FDI review process threatens the legitimacy and effectiveness of FDI review).

248. See *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (noting the framers' desire to keep the process of adjudication impartial).

249. Feng, *supra* note 247, at 271.

250. GRAHAM & MARCHICK, *supra* note 30, at 123 (explaining how no decision-making process in Washington is immune from political influences). See generally Christopher F. Corr, *US Tightens the Screws on Foreign Investors*, WHITE & CASE LLP (July 26, 2007), [http://www.lexology.com/articles/71001a64-8283-4197-b418-00250d061443](http://www.lexology.com/articles/71001a64-8283-4197-b418-00250d061443?g=71001a64-8283-4197-b418-00250d061443) (noting the high profile situations CFIUS deals with, which may increase the opportunity for political manipulation).

251. See GRAHAM & MARCHICK, *supra* note 30, at 136 (noting that statements made by members of Congress, from both parties, expressed anti-Arab sentiment in relation to the Dubai Ports controversy).

252. *Id.* at 138.

253. See *id.* at 139 (noting that after extensive news coverage and commentary by members of Congress, the case was reopened and subjected to an extensive 45-day review).

“Don’t let them tell you this is just the transfer of title. Baloney. We wouldn’t transfer title to the Devil; we’re not going to transfer title to Dubai.”<sup>254</sup> Another congressman’s press conference invited families of victims of the September 11 attacks to appeal to the hearts and minds of the American public.<sup>255</sup> The saga ended with a Capitol Hill newsletter titled “House Puts a Bullet in Port Deal’s Corpse” and has since cast a shadow on Gulf States’ investments in the United States.<sup>256</sup>

A small company’s self-interest apparently catalyzed the political controversy.<sup>257</sup> A small firm based in Miami, Eller & Co., had a long-standing commercial dispute with P&O.<sup>258</sup> In order to increase its leverage in negotiations with P&O, the company lobbied Congress to block the deal; before then, the Dubai World transaction had received almost no attention on Capitol Hill.<sup>259</sup>

Another transaction, CNOOC’s proposed acquisition of Unocal, was blocked by a strong anti-China sentiment in Congress.<sup>260</sup> Other than the fear that “the Chinese are coming, the Chinese are coming,”<sup>261</sup> the strong interest of a domestic company, Chevron Corp., in competing for the bid also fueled the

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254. *Id.* at 136.

255. *Id.* at 136-37.

256. *Id.* at 136; see *DP World’s Long Shadow*, *ECONOMIST* (July 14, 2007), <http://www.economist.com/node/9340470> (explaining how UAE’s fall in investment to the United States was the result of domestic national security concerns).

257. GRAHAM & MARCHICK, *supra* note 30, at 139; see Neil King, Jr. & Gregg Hitt, *Small Florida Firm Sowed Seed of Port Dispute*, *WALL ST. J.* (Feb. 28, 2006), <http://www.wsj.com/articles/SB114105320594384271> (noting how the Peninsular & Oriental Steam Navigation Co. dispute with its partner company was the catalyst behind the controversy).

258. GRAHAM & MARCHICK, *supra* note 30, at 139.

259. *Id.*; King & Hitt, *supra* note 257.

260. See GRAHAM & MARCHICK, *supra* note 30, at 129 (noting how several congressmen and commentators expressed anti-China sentiment with regards to the acquisition of Unocal, specifically how the acquisition would come with “disastrous consequences”).

261. James F. Peltz, Elizabeth Douglass & Evelyn Iritani, *Chinese Oil Firm Bids for Unocal*, *L.A. TIMES* (June 23, 2005), <http://articles.latimes.com/2009/jun/23/business/fi-unocal23>.

sentiment.<sup>262</sup> After a month-long attack by members of Congress, CNOOC withdrew its bid.<sup>263</sup> From a market efficiency standpoint, Chevron's bid of \$1 billion less than that of the CNOOC's should not have won.<sup>264</sup>

In marked contrast to CNOOC's Waterloo in bidding for Unocal, CNOOC successfully acquired Nexen's assets in the Gulf of Mexico seven years later.<sup>265</sup> Other than the fact that Nexen's moderate name recognition drew less political attention and that CNOOC stepped up their political lobbying efforts, no other reason could seemingly explain why the same company succeeded in the Nexen acquisition but failed in the previous one.<sup>266</sup>

CFIUS may keep a better balance between open investment and national security than Congress,<sup>267</sup> but the ultimate decision to block or divest a transaction falls to the President.<sup>268</sup> Many observers noted that the rare presidential order to block the Ralls transaction came at the time when President Obama

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262. GRAHAM & MARCHICK, *supra* note 30, at 129.

263. *Id.* at 131-32. For example, 41 members of Congress sent a letter to Treasury Secretary John Snow in late June 2005, asking the transaction be reviewed immediately; on July 11, 2005, Senators Kent Conrad (D-ND) and Jim Bunning (R-KY) wrote a letter to U.S. trade representative Rob Portman suggesting that CNOOC's proposed acquisition "is 'inconsistent' with China's WTO commitments." *Id.* For a complete history of congressional actions. *Id.* at 131-34.

264. Lynn J. Cook, *CNOOC's Exit Leaves Chevron's Unocal Bid in Play*, HOUS. CHRON. (Aug. 3, 2005), <http://www.chron.com/business/energy/article/CNOOC-s-exit-leaves-Chevron-s-Unocal-bid-in-play-1506117.php>.

265. *See supra* notes 12-13 (noting CFIUS approval of CNOOC's acquisition of Nexen's assets).

266. *See* David Ljunggren, et al., *Insight: China's CNOOC Scoped Nexen, Partnered, Then Pounced*, REUTERS (July 25, 2012, 6:22 AM), <http://www.reuters.com/article/us-nexen-cnooc-idUSBRE86O05J20120725> (noting that CNOOC hired Hill and Knowlton for lobbying in Canada and the United States); Donald D. Orol, *Cnooc's Big Deal for Nexen Seen Succeeding*, MARKETWATCH (Aug. 16, 2012), <http://www.marketwatch.com/story/cnoocs-big-deal-for-nexen-seen-succeeding-2012-08-16> (noting that Unocal was well known by Americans, but very few people in the United States really knew about Nexen).

267. *See* Orol, *supra* note 267 (explaining CFIUS's implementation of a balancing test between investment and national security concerns).

268. *See* 50 U.S.C. APP. § 2170(f) (2012) (explaining that the fate of a CFIUS decision ultimately falls to the President).

was accused of being too soft on China during the 2012 presidential campaign.<sup>269</sup> Giving the executive branch unfettered discretion increases the chance that a future protectionist-minded administration will overzealously block benign transactions.<sup>270</sup> As critics have noted, national security is susceptible to too many interpretations, and this could easily lead the President to abuse the CFIUS power and deter foreign investment.<sup>271</sup>

Compared to Congress and the President, Article III judges enjoy lifetime tenure and salary protections, so they are insulated from the motivation to please constituents.<sup>272</sup> Article III directs that “[t]he judicial Power of the United States[] shall be vested in one supreme Court”<sup>273</sup> and serves to “safeguard litigants’ right to have claims decided before judges who are free from potential domination by other branches of government.”<sup>274</sup> Judicial oversight of the decision-making process is necessary to maintain a cool, balanced approach in evaluating whether a proposed transaction poses a national security threat.<sup>275</sup>

## VII. CONCLUSION

CFIUS review of foreign investment was born amid the national sentiment that foreign enemies might take control of key U.S. industries and that the existing statute, IEEPA, could not adequately protect national security in situations where

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269. Rachele Younglai, *Obama Blocks Chinese Wind Farms in Oregon Over Security*, REUTERS (Sep. 28, 2012, 7:15 PM), <http://www.reuters.com/article/us-usa-china-turbines-idUSBRE88R19220120929>.

270. Matthew R. Byrne, *Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance*, 67 OHIO ST. L.J. 849, 890 (2006).

271. Shearer, *supra* note 172, at 1768-69.

272. Tracey E. George, *Judicial Independence and the Ambiguity of Article III Protections*, 64 OHIO ST. L.J. 221, 221-22 (2003).

273. U.S. CONST. art. III, § 1.

274. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848 (1986) (citing *United States v. Will*, 449 U.S. 200, 218 (1980)) (internal quotations omitted).

275. See Feng, *supra* note 247, at 283 (noting that CFIUS is in the best position to analyze FDI threats to national security).

declaring a hostility against the country was improper.<sup>276</sup> Yet, unlike IEEPA, CFIUS's authorizing statute, FINSA, granted the agency and the President unchecked power by precluding judicial review.<sup>277</sup> The no-judicial-review provision is improper when it violates investors' due process rights and could result in the executive branch's abuse of power. Moreover, courts regularly review antitrust issues, a major component of the CFIUS review, so the scope of judicial review should extend to the President's substantive decisions as it does in matters of antitrust regulation.

To balance necessity of judicial review and the sensitivity of national security, this comment proposes to allow Article III courts to review foreign investors' complaints in camera, or establish a special court much like the court established by the Foreign Intelligence Surveillance Act (FISA).<sup>278</sup> The FISA Court decides whether to grant warrants related to domestic surveillance in national security investigations.<sup>279</sup> Just like the FISA Court's duty to watch for Fourth Amendment violations, a similar court could help decide whether national security concerns may warrant the President's decision in prohibiting, blocking, or divesting a foreign transaction under FINSA.

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276. *See supra* Part II.A (noting that generally the President avoided using his power to block under foreign transactions under the IEEPA, due to the fear that it would amount to a "hostile declaration against the country involved").

277. *See id.* (noting the executive branch's unchecked power and preclusion of judicial review under FINSA).

278. *About the United States Foreign Intelligence Surveillance Court*, U.S. FOREIGN INTELLIGENCE SURVEILLANCE CT., <http://www.fisc.uscourts.gov/about-foreign-intelligence-surveillance-court> (last visited Feb. 17, 2014).

279. *Id.*; Bill Mears & Halimah Abdullah, *What Is the FISA Court?*, CNN (Jan. 17, 2014, 2:21 PM), <http://www.cnn.com/2014/01/17/politics/surveillance-court/> (explaining that FISA's larger mission is to decide whether to grant certain types of government requests such as wiretapping, data analysis, and other monitoring for foreign intelligence purposes).