

ESSAY

A New CFIUS: Refining the Committee's Multimember Structure with For-Cause Protections

Vania Wang*

ABSTRACT

Foreign investment in the United States has always been an important element of the nation's economy, but it can leave the United States and its citizens vulnerable to foreign control. In recent years, many have grown concerned that sovereign governments have been investing in the United States with motives beyond mere business and financial strategy. Since 1975, the President and the Committee on Foreign Investment in the United States ("CFIUS" or the "Committee") have overseen foreign investment transactions and reviewed them for any implications on national security. As their scope of review has expanded over the years and inbound investment has increased in the country, CFIUS and the President have become far more active in finding that transactions should be reversed due to national security concerns. China's presence in this space is especially notable, with its companies forming the highest percentage of transactions reviewed and reversed.

Through the case study of TikTok's forced divestment from ByteDance, this Essay explains the broad scope of the Committee's and President's power

* J.D., 2022, The George Washington University Law School; B.A., Chemistry, 2015, Reed College. I would like to thank my professor, the Honorable F. Scott Kieff, for his support. For their hard work on this piece, I am indebted to the editors and staff of *The George Washington Law Review*. For their love and insight, I am grateful to my friends and my partner, Tola Ogunrinde. Finally, thank you to my parents for making the brave choice to immigrate to the United States so that I could grow up as a Chinese person in America. Any remaining errors are my own.

regarding Chinese transactions, and the weaknesses in the Committee’s multi-member structure that make it vulnerable to presidential interference with protectionist motivations. The Essay concludes by making recommendations on how the joint goals of national security and open investment can be achieved. Proposals include restructuring the Committee to include members that are not removable at will by the President, with the ultimate recommendation to reform it completely as an independent agency.

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INTRODUCTION

In 2020, TikTok was the world’s most downloaded mobile app, with approximately 66.5 million users in the United States.¹ At the time, it was the only app out of the top five most downloaded apps that was not owned by Facebook, who had dominated the charts in recent years.² TikTok was created and is owned by a Chinese company, ByteDance Ltd.³

TikTok achieved this status despite then-President Donald Trump’s best efforts to topple its presence in the United States. In August of 2020, President Trump issued two orders banning all transactions with ByteDance and forcing TikTok to divest from ByteDance in ninety days.⁴ He even went as far as banning all new downloads of the app through the Commerce Department in September.⁵

President Trump attributed his Administration’s actions to data privacy concerns stemming from TikTok’s Chinese ownership by ByteDance.⁶ The core concerns were that the Chinese government would be able to access extensive user data through TikTok for espionage purposes, and that it could spread misinformation by censoring political speech and promoting the Chinese Communist Party’s agenda.⁷ Outside of the Cabinet, however, experts asserted that

1 *TikTok Named as the Most Downloaded App of 2020*, BBC NEWS (Aug. 10, 2021), <https://www.bbc.com/news/business-58155103> [<https://perma.cc/4VD3-C3CV>]. TikTok is projected to have 89.7 million users in the United States in 2023. L. Ceci, *Number of TikTok Users in the United States from 2020 to 2023*, STATISTA (Jan. 28, 2022), <https://www.statista.com/statistics/1100836/number-of-us-tiktok-users/> [<https://perma.cc/66RC-5VZ7>].

2 *See TikTok Named as the Most Downloaded App of 2020*, *supra* note 1 (listing the other four most downloaded apps: Facebook, WhatsApp, Instagram, and Facebook Messenger).

3 *See id.*

4 Exec. Order No. 13,942, 85 Fed. Reg. 48,637 (Aug. 6, 2020); Order of Aug. 14, 85 Fed. Reg. 51,297 (Aug. 14, 2020).

5 *See* Bobby Allyn & Bill Chappell, *U.S. to Bar Downloads of TikTok, WeChat*, NPR (Sept. 18, 2020, 9:48 AM), <https://www.npr.org/2020/09/18/914322620/u-s-to-bar-downloads-of-tiktok-wechat> [<https://perma.cc/J53Z-MY3B>].

6 *See* Zak Doffman, *Is This Trump’s Real TikTok ‘Spyware’ Risk?*, FORBES (Aug. 8, 2020, 7:10 AM), <https://www.forbes.com/sites/zakdoffman/2020/08/08/trump-tiktok-spyware-ban-china-microsoft-security-update/?sh=497a7ef697e0> [<https://perma.cc/4457-3AWD>]. Former Secretary of State Mike Pompeo alleged that TikTok “feed[s] data directly to the Chinese Communist Party.” *Id.*

7 *See* Petition for Review at 44, *TikTok Inc. v. Comm. on Foreign Inv. in the U.S.*, (D.C. Cir. Nov. 10, 2020) No. 20-1444; Geoffrey Gertz, *Why is the Trump Administration Banning TikTok and WeChat?*, BROOKINGS (Aug. 7, 2020), <https://www.brookings.edu/blog/up-front/>

TikTok's Chinese ownership was simply not a threat to the United States's national security.⁸ It was likely that any threats posed by TikTok were not so different from those posed by other social media companies.⁹ Any potential threats could also be mitigated because the data collected by TikTok is stored on servers outside of China and is of limited value to the Chinese government.¹⁰

There were a number of other theories that potentially explained President Trump's orders. Some reporters theorized that the true impetus for President Trump's decision to force divestment was a TikTok prank that had hijacked his rally in Tulsa earlier that summer, leaving him fuming at the event's failure.¹¹

Meanwhile, the Brookings Institute claimed there were likely broader motivations concerning ongoing trade tensions between the United States and China,¹² but not actually related to ByteDance's

2020/08/07/why-is-the-trump-administration-banning-tiktok-and-wechat/ [https://perma.cc/3VYS-H99U].

⁸ See James Andrew Lewis, *How Scary is TikTok?*, *CTR. FOR STRATEGIC & INT'L STUD.* (July 14, 2020), <https://www.csis.org/analysis/how-scary-tiktok> [https://perma.cc/6KN6-NLYW].

⁹ Jefferson Graham, *TikTok and Privacy: What's the Problem? Perhaps the Video-sharing App Gathers Too Much Data*, *USA TODAY* (Aug. 7, 2020, 11:55 AM), <https://www.usatoday.com/story/tech/2020/08/06/tiktok-any-worse-privacy-and-data-mining-than-facebook/3311726001/> [https://perma.cc/YQG7-YAA8].

¹⁰ See *id.*; Lewis, *supra* note 8. As more evidence has come to light in the last year, experts and lawmakers have grown concerned about whether China can still access the flow of TikTok data regardless of where the data is stored. Emily Baker-White, *Senate Intelligence Committee Calls on FTC to Investigate TikTok for 'Deception'*, *FORBES* (July 5, 2022, 5:47 PM), <https://www.forbes.com/sites/emilybaker-white/2022/07/05/senate-intelligence-committee-calls-on-ftc-to-investigate-tiktok-for-deception/?sh=4a72929c6bd5> [https://perma.cc/3FDB-GAW2]; Emily Baker-White, *Leaked Audio from 80 Internal TikTok Meetings Shows That US User Data Has Been Repeatedly Accessed from China*, *BUZZFEED NEWS* (June 17, 2022, 12:31 PM), <https://www.buzzfeednews.com/article/emilybakerwhite/tiktok-tapes-us-user-data-china-bytedance-access> [https://perma.cc/R8YF-5G3H]. In 2020 when President Trump imposed divestment, however, such evidence did not exist to warrant skipping attempts to mitigate. Further, as discussed in Section I.A., ordering divestment before CFIUS review and investigation are completed is always considered premature.

¹¹ TikTok teens had reserved tickets for President Trump's Tulsa rally with no intention of attending, overinflating the number of potential attendees. On the day of, President Trump spoke to a nearly empty crowd. See Abram Brown, *Is This the Real Reason Why Trump Wants to Ban TikTok?*, *FORBES* (Aug. 1, 2020, 2:03 PM), <https://www.forbes.com/sites/abrambrown/2020/08/01/is-this-the-real-reason-why-trump-wants-to-ban-tiktok/> [https://perma.cc/RCM7-AVQJ]; Rebecca Leber, *Could Trump Have Another Reason for Banning TikTok?*, *MOTHER JONES* (Aug. 1, 2020), <https://www.motherjones.com/politics/2020/08/could-trump-have-another-reason-for-banning-tiktok/> [https://perma.cc/27HU-P3B3]; Kalhan Rosenblatt, *Trump's Threatened TikTok Ban Could Motivate Young Users to Vote, Some Say*, *NBC NEWS* (Aug. 1, 2020, 3:39 PM), <https://www.nbcnews.com/news/us-news/trump-s-threatened-tiktok-ban-could-motivate-young-users-vote-n1235587> [https://perma.cc/9ZSM-8KT6].

¹² See Gertz, *supra* note 7.

ownership. The Central Intelligence Agency (“CIA”) and Senator Mark Warner (D-VA)—the ranking member of the Senate Intelligence Committee at the time—both noted that the cybersecurity threat TikTok poses as a social media company is minuscule compared to more pressing China-based threats, such as Huawei’s emerging dominance in next-generation 5G networks.¹³ Surprisingly, the CIA emphasized that Chinese intelligence authorities have *never* actually intercepted data using TikTok.¹⁴ The American Enterprise Institute called the situation “botched,” noting that the blatant politicization of the investigation was alarming and not legally permissible.¹⁵ Overall, few seemed to believe the reason for President Trump’s decision was the national security reason that he had cited, suggesting that his order forcing TikTok’s divestment was unwarranted and that he had merely cited the threat for the purposes of securing divestment.

This Essay uses TikTok’s forced divestment as a case study to illustrate and discuss how the U.S. foreign investment review mechanism is critically vulnerable to the whims of the President, especially when the President has a predisposition against Chinese transactions. Part I sets the scene by describing the abnormal administrative hold President Trump had on CFIUS while it was reviewing the TikTok transaction, the repercussions of frequently reversing Chinese transactions on inbound investment, and the Biden Administration’s interest in continuing the same level of scrutiny toward Chinese foreign investments. Part II of this Essay will explain CFIUS’s history, the accountability motivations for its membership structure, and its broad scope of power in addressing national security concerns with foreign investment transactions. This Part will bring to view the drastic effects on Chinese investments when a President usurps the expansive powers set aside for the Committee. Part III will then describe how CFIUS’s intra-Committee, legislative, and judicial accountability mechanisms fail in the midst of a presidential administration that is predisposed to finding national security concerns where there are not necessarily any. Parts II and III together depict the limitless powers that CFIUS has, how President Trump asserted those powers for himself through TikTok’s forced divestment, and how he disrupted the system of

¹³ See David E. Sanger & Julian E. Barnes, *Is TikTok More of a Parenting Problem Than a Security Threat?*, N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/2020/08/07/us/politics/tiktok-security-threat.html> [https://perma.cc/UUD2-P4G6].

¹⁴ *Id.*

¹⁵ See Emily Birnbaum, *‘This Has Been Botched’: This Is What Makes Trump’s TikTok Tirade So Unusual*, PROTOCOL (Aug. 6, 2020), <https://www.protocol.com/cfius-tiktok-not-how-this-works> [https://perma.cc/B2ZW-Q2CT].

checks and balances in place. Part IV proposes a path forward after President Trump’s unprecedented misappropriation of CFIUS’s powers. In order to prevent further presidential encroachment, Part IV describes three ways of restructuring CFIUS with for-cause protections in order to remain true to the original intent behind its creation: protecting the United States from national security implications as a result of foreign direct investment (“FDI”).

I. CASE STUDY: TIKTOK’S FORCED DIVESTMENT REPRESENTING CONTINUED PRESIDENTIAL SKEPTICISM OF CHINESE INVESTMENTS AND ITS RESULTING EFFECTS

Using TikTok’s forced divestment as an example, this Part traces how President Trump jeopardized the neutrality and objectivity of CFIUS review by upsetting the established balance of power between the President and the Committee, its resulting effects on Chinese investments in the United States, and how it has set the tone for future administrations.

A. *President Trump’s Amplified Impact on Forcing TikTok’s Divestment*

National security issues regarding FDI in the United States are in the jurisdiction of the President and CFIUS.¹⁶ The President and CFIUS are equipped with certain powers to defend the United States against transactions where a foreign person exercises foreign control over U.S. businesses to the detriment of national security, and transactions related to critical technology, critical infrastructure, sensitive personal data, and certain real estate.¹⁷ Specifically, CFIUS has the power to review and investigate national security concerns, and decide whether to recommend the suspension or prohibition of a transaction to the President.¹⁸ Meanwhile, only the President has the ultimate power to block a transaction due to such concerns—a drastic remedy.¹⁹ The foreign investment review process proceeds in that exact order: CFIUS review, investigation, and referral, with a presidential

¹⁶ See JAMES K. JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 1 (2018), [hereinafter 2018 CFIUS REPORT], https://www.everycrsreport.com/files/20180619_RL33388_034bbdb9b07b40ceae88b98fc36e010dad4ba066.pdf [https://perma.cc/L87D-4R47].

¹⁷ 50 U.S.C. §§ 4565(a)(4)(B)(i)–(ii).

¹⁸ *Id.* §§ 4565(b)(1), (b)(2)(A), (l)(2); see 2018 CFIUS REPORT, *supra* note 16, at 13; CFIUS Overview, COOLEY LLP, <https://www.cooley.com/services/practice/export-controls-economic-sanctions/cfius-overview> [https://perma.cc/6GMQ-CF44].

¹⁹ 50 U.S.C. § 4565(d)(1)(4); see CFIUS Overview, *supra* note 18.

determination as needed.²⁰ The order allows CFIUS, as the first line of defense, to properly identify and thoroughly work out any potential national security issues throughout the process before it reaches the President.²¹ It also guarantees, in line with the original intent for its creation, that foreign investment review authority does not rest in the hands of a single decision-maker.²²

The Committee's independent decision to refer a transaction to the President is therefore crucial. It acknowledges that there are no legal alternatives available to mitigate a looming national security threat, and that the President must intervene.²³ Its referral affects the menu of options the President has in suspending or prohibiting a transaction, ensuring the President's ultimate remedy is deployed only when necessary. Accordingly, presidents have only wielded that power seven times since the Committee's inception in 1975 to respond to national security concerns.²⁴ President Trump, remarkably, was responsible for blocking four of the seven transactions, including

²⁰ See 2018 CFIUS REPORT, *supra* note 16, at 11.

²¹ See *id.*

²² See *infra* Section II.A (describing when President Reagan first delegated the majority of his FDI review powers to CFIUS).

²³ 50 U.S.C. § 4565(d)(2); see JAMES K. JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 7 (2020) [hereinafter 2020 CFIUS REPORT], <https://sgp.fas.org/crs/natsec/RL33388.pdf> [<https://perma.cc/9966-TMAB>].

²⁴ See Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1975); 2018 CFIUS REPORT, *supra* note 16, at 7. The first transaction was in 1990, where President Bush ordered the China Aero-Technology Import and Export Corporation ("CATIC") to divest from MAMCO Manufacturing. The second was in 2012, when President Obama ordered Ralls Corporation (owned by two Chinese nationals) to divest from an Oregon wind farm. 2016 marked the third transaction, with President Obama blocking Chinese firm Fujian Grand Chip Investment Fund from acquiring Aixtron, a Europe-based semiconductor firm with U.S. assets. The fourth transaction was in 2017, when President Trump blocked Canyon Bridge Capital Partners, a Chinese investment firm, from the acquisition of Lattice Semiconductor Corp. in Portland. During the fifth transaction in 2018, President Trump blocked Singapore-based Broadcom's \$117 billion hostile takeover bid on semiconductor chip maker Qualcomm due to national security concerns that China would overtake the United States in 5G if the transaction were to commence and Qualcomm's R&D funding would be reduced by Broadcom's notoriously bottom-line oriented CEO Hock Tan. In 2019, President Trump ordered Beijing Shiji Information Technology to divest from StayNTouch as the sixth transaction. The seventh and most recent transaction was in 2020, when President Trump attempted to force Chinese company ByteDance to divest from TikTok. See 2018 CFIUS REPORT, *supra* note 16, at 7; *President Trump Orders Divestiture of StayNTouch, Inc. by Shiji Group of China*, COVINGTON & BURLING LLP (Mar. 9, 2020), <https://www.cov.com/en/news-and-insights/insights/2020/03/President-trump-orders-divestiture-of-stayntouch-inc-by-shiji-group-of-china> [<https://perma.cc/36AJ-BBRH>]; William Alan Reinsch, Patrick Saumell, Isabella Frymoyer & Jack Caporal, *TikTok is Running out of Time: Understanding the CFIUS Decision and its Implications*, CTR. FOR STRATEGIC & INT'L STUD. (Sept. 2, 2020), <https://www.csis.org/analysis/tiktok-running-out-time-understanding-cfius-decision-and-its-implications> [<https://perma.cc/FL56-DACB>].

ByteDance's ownership of TikTok.²⁵ Even more remarkably, all seven blocked transactions involved Chinese investors or were prohibited due to concerns with China.²⁶ During his term, President Trump reviewed Chinese transactions more unfavorably than ever before and was aided by CFIUS, who played a role by referring the transactions for his prohibition.

TikTok's forced divestment demonstrates President Trump's control over CFIUS and the Committee's subsequent inability to properly review and investigate the transaction before its hasty referral to the President.²⁷ The proof is in President Trump's and his Administration's public communications about the transaction. The Trump Administration jeopardized the neutrality and confidentiality of the process by publicly announcing its intentions to force ByteDance's divestment before the CFIUS review and investigation had concluded and the transaction had been referred.²⁸ President Trump, whose role need only come into play at the end of FDI review, was active in disparaging TikTok and its Chinese ownership throughout the entire process. The Trump Administration's impropriety was only magnified, as it is usually extremely uncommon for the President and the Committee to speak about a transaction due to their operations in a classified national security environment.²⁹ Confidentiality requirements typically prevent even the acknowledgment of a review's existence.³⁰

On July 6th, 2020, weeks before the review, investigation, or referral had concluded, former Secretary of State Mike Pompeo announced that the United States was intending to ban TikTok and other Chinese social media apps for national security reasons.³¹ A day after, President Trump affirmed Secretary Pompeo's comments that

25 2018 CFIUS REPORT, *supra* note 16, at 7; Reinsch, et al., *supra* note 24; *President Trump Orders Divestiture of StayNTouch, Inc. by Shiji Group of China*, *supra* note 24.

26 See 2018 CFIUS REPORT, *supra* note 16, at 7.

27 See Petition for Review, *supra* note 7, at 14–16 (describing TikTok's suit against the Trump Administration in the United States Court of Appeals for the D.C. Circuit for immediately referring the matter to the President without addressing any attempts at mitigation, a departure from its prescribed regulatory scheme).

28 See Lauren Feiner & Amanda Macias, *Mnuchin Confirms TikTok is Under CFIUS Review Following National Security Concerns*, CNBC (July 29, 2020, 11:30 AM), <https://www.cnbc.com/2020/07/29/mnuchin-confirms-tiktok-is-under-cfius-review.html> [<https://perma.cc/8HJ9-2X4K>].

29 *What is CFIUS?*, TALKS ON LAW, <https://www.talksonlaw.com/briefs/what-is-cfius> [<https://perma.cc/N2ZS-H9YT>].

30 See Birnbaum, *supra* note 15; *What is CFIUS?*, *supra* note 29.

31 Arjun Kharpal, *U.S. is 'Looking at' Banning TikTok and Chinese Social Media Apps, Pompeo Says*, CNBC (July 7, 2020, 11:48 AM), <https://www.cnbc.com/2020/07/07/us-looking-at-banning-tiktok-and-chinese-social-media-apps-pompeo.html> [<https://perma.cc/4E2H-UJQ9>].

his Administration was looking into the ban as retribution against China for coronavirus.³² A day before CFIUS concluded its review period on July 29th, Treasury Secretary Steven Mnuchin told reporters that there would be a recommendation to the President even though CFIUS had yet to conduct its investigation.³³ That same day, President Trump announced “[w]e are looking at TikTok, . . . [w]e are thinking about making a decision,” even though the transaction had still not yet been referred to him.³⁴ Finally, President Trump announced on August 1 that he would ban TikTok before even issuing official orders on the ban and the divestment on August 6 and 14, respectively.³⁵ CFIUS had only just referred the transaction to him on July 30, merely a few hours after concluding its review and starting its investigation.³⁶ In the end, it was not shocking when President Trump ordered TikTok’s divestment from ByteDance. It was inevitable.³⁷

President Trump left no opportunity for the Committee to conduct its own painstaking review and investigation before recommending the transaction to him. By inserting himself into the already inappropriately public conversation, his influence hung over CFIUS like a specter during its review and investigation period. The eagerness of the communications to the public revealed the Administration’s premature disposition for a certain outcome. The public antics of President Trump and CFIUS member officials called into question whether their decision to force TikTok’s divestment was based purely on national security reasons, thus jeopardizing the objectivity and neutrality of U.S. foreign investment review.

³² Shelly Banjo, Jordan Fabian & Nick Wadhams, *Trump Says He’s Considering a Ban on TikTok in the U.S.*, BLOOMBERG (July 8, 2020, 11:40 AM), <https://www.bloomberg.com/news/articles/2020-07-07/tiktok-touts-u-s-ties-after-pompeo-threatens-to-ban-social-app> [<https://perma.cc/HM63-K2HJ>].

³³ Feiner & Macias, *supra* note 28.

³⁴ *Id.*

³⁵ See Exec. Order No. 13,942, 85 Fed. Reg. 48,637 (Aug. 6, 2020); Order of Aug. 14, 85 Fed. Reg. 51,297 (Aug. 14, 2020).

³⁶ Petition for Review, *supra* note 7, at 15.

³⁷ See generally Miles Kruppa, James Fontanella-Khan & Demetri Sevastopulo, *Trump’s TikTok Dance: The Politicisation of American Business*, FIN. TIMES (Sept. 18, 2020), <https://www.ft.com/content/cdf696fb-5d40-4ecd-a1d2-81007e59a23e> [<https://perma.cc/5BHG-2ER7>] (describing President Trump’s hawkish stance toward TikTok and the political lead up to his orders banning the app).

B. *The Repercussions of The Trump Administration's Actions on Chinese Investments*

President Trump's attempted divestment of TikTok is representative of the level of scrutiny the Trump Administration employed toward Chinese investments at large.³⁸ Because of the extreme focus on Chinese FDI during the Trump Administration, the United States has potentially lost \$114 billion in foreign investments from the country in the past few years.³⁹ Chinese investor filings notifying CFIUS of a transaction also drastically declined from fifty-five in 2018 to seventeen in 2020.⁴⁰

The economic health and long-term security of the United States depends on maintaining an open environment for foreign investment.⁴¹ Simply put, American savings are insufficient to finance domestic investment, and foreign investors create jobs in the United States.⁴² Further, in observing American policies to maintain tight control of its economy, other countries might follow suit and tighten their rules.⁴³ Ultimately, erring on the side of apprehension over open-

³⁸ See *supra* note 24; Blair Wang, *CFIUS Ramps Up Oversight of China Deals in the US*, DIPLOMAT (Sept. 14, 2021), <https://thediplomat.com/2021/09/cfius-ramps-up-oversight-of-china-deals-in-the-us/> [<https://perma.cc/JW79-GLZ7>].

³⁹ The United States potentially lost out on \$38 billion a year after Chinese FDI peaked at \$45 billion in 2016 only to drop to an average \$7 billion a year from 2018 to 2020 during Trump's presidency. See Adam Chan, *CFIUS, Team Telecom and China*, LAWFARE (Sept. 28, 2021, 10:35 AM), <https://www.lawfareblog.com/cfius-team-telecom-and-china> [<https://perma.cc/WG2S-9EWB>]. Chinese investments in 2019 were the lowest since the global financial crisis in 2009. See Thilo Hanemann, Daniel H. Rosen, Cassie Gao & Adam Lysenko, *Two-Way Street—US-China Investment Trends—2020 Update*, RHODIUM GRP. (May 11, 2020), <https://rhg.com/research/two-way-street-us-china-investment-trends-2020-update/> [<https://perma.cc/G2FJ-J2TA>]. 2020 showed some improvement with \$7.2 billion in Chinese investments in the United States, compared to \$6.3 billion in 2019.

⁴⁰ COMM. ON FOREIGN INV. IN THE UNITED STATES, ANNUAL REPORT TO CONGRESS 35 (2020), <https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2020.pdf> [<https://perma.cc/2H5N-P2JC>]. Chinese investors filed forty-four notices in 2021, however, showing a willingness to test the Biden Administration's position on Chinese FDI. COMM. ON FOREIGN INV. IN THE UNITED STATES, ANNUAL REPORT TO CONGRESS 32 (2021), <https://home.treasury.gov/system/files/206/CFIUS-Public-AnnualReporttoCongressCY2021.pdf> [<https://perma.cc/T6MC-WL5U>].

⁴¹ ALAN P. LARSON & DAVID M. MARCHICK, CONG. RSCH. SERV., CSR No. 18, FOREIGN INVESTMENT AND NATIONAL SECURITY: GETTING THE BALANCE RIGHT 6 (2006), <https://cdn.cfr.org/sites/default/files/pdf/2006/07/CFIUSreport.pdf> [<https://perma.cc/KMF7-N8FB>].

⁴² *Id.* at 7. In 2016 when FDI in the United States was at its highest, FDI was estimated to support 12 million jobs through direct employment, indirect or induced employment, or productivity spillovers. Will Moreland, *FDI Like You're FDR: CFIUS Review Under the Biden Administration's Rooseveltian Conception of National Security*, 12 J. NAT'L SEC. L. & POL'Y 627, 655 (2022).

⁴³ *Id.* at 24.

ness has significant impacts beyond the intended effect of withholding sensitive information from foreign governments, the importance of which is debatable in TikTok's case.⁴⁴

Though some national security concerns regarding China have proven to be accurate,⁴⁵ the increasing tenor of blocked transactions with Chinese companies and the plummeting values of inbound investment provoke concern as to whether the U.S. foreign investment review mechanism is operating as intended. The review mechanism should be amended so that it can rigorously identify transactions that truly threaten national security without obstructing the transactions that do not, of which TikTok is a prime example.⁴⁶ The President's role in particular—not only in blocking transactions but also in influencing CFIUS's processes—carries enormous weight and should be modified. Specifically, it should be modified to ensure U.S. foreign investment review is not subject to the decision-making of a single individual when the process was meant to include the Committee as well.⁴⁷

C. *The Biden Administration's Continuation of The Trump Administration's Legacy*

The courts and the Biden Administration stymied most of the Trump Administration's overtures against TikTok in the last few years. Several months after Trump's orders in 2020, the District Court for the Eastern District of Pennsylvania and the District Court for the District of Columbia granted preliminary injunctions prohibiting the Commerce Department from banning new app downloads and transactions.⁴⁸ In 2021, President Biden ultimately revoked former Presi-

⁴⁴ See *supra* notes 11–15.

⁴⁵ See generally Michael D. Swaine, *China Doesn't Pose an Existential Threat for America*, FOREIGN POLICY (Apr. 21, 2021, 5:54 PM), <https://foreignpolicy.com/2021/04/21/china-existential-threat-america/> [<https://perma.cc/AD47-G9ZU>]; *Survey of Chinese Espionage in the United States Since 2000*, CTR. FOR STRATEGIC AND INT'L STUD. (July 2021), <https://www.csis.org/programs/strategic-technologies-program/archives/survey-chinese-espionage-united-states-2000> [<https://perma.cc/S9E6-4Q3Y>]. However, the specific concern with Chinese foreign investments is that many companies from China are government owned or government controlled, and as a result, a foreign company's decisions have the potential to become an extension of the government's policy choices. See LARSON & MARCHICK, *supra* note 41.

⁴⁶ See *supra* notes 11–15.

⁴⁷ See *supra* note 18; 50 U.S.C. app. §§ 2170(b), (k).

⁴⁸ See, e.g., Jay Peters, *Second Judge Says Trump Can't Ban TikTok*, THE VERGE (Dec. 7, 2020, 8:25 PM), <https://www.theverge.com/2020/12/7/22160239/tiktok-ban-judge-trump-administration-us-commerce-department> [<https://perma.cc/57JL-3AES>]. Courts explained that President Trump likely exceeded his powers under the International Emergency Economic Powers Act in issuing his executive order on August 6th blocking all transactions with TikTok. See *id.*

dent Trump's executive order banning transactions with TikTok.⁴⁹ The Biden Administration, however, allowed one Trump-era presidential action to stand—Trump's presidential order forcing TikTok's divestment.⁵⁰ The issue remains under active discussion,⁵¹ with the Biden Administration currently re-investigating whether there is a genuine national security threat to the United States stemming from ByteDance's ownership of TikTok.⁵²

Nevertheless, now that President Trump exposed the structural flaws inherent in CFIUS's design, the danger remains that future presidents could prey on the vulnerability of the U.S. national security regime and monopolize it for their own political agendas. The Biden Administration has already taken steps to build on President Trump's empowerment of CFIUS to target China. The Biden Administration has added more staff to identify sensitive transactions and inquire into China-related transactions in which the United States has only a limited nexus.⁵³ Experts have projected that transactions that present China-related concerns will only receive deeper political and regulatory scrutiny.⁵⁴ The Commerce Department, relatedly, is keeping TikTok in mind while finalizing rules to strengthen the government's

⁴⁹ Exec. Order No. 14,034, 86 Fed. Reg. 31,423 (June 9, 2021).

⁵⁰ Makena Kelly, *Biden Revokes and Replaces Trump Orders Banning TikTok and WeChat*, VERGE (June 9, 2021, 10:00 AM), <https://www.theverge.com/2021/6/9/22525953/biden-tiktok-wechat-trump-bans-revoked-alipay> [<https://perma.cc/EUM9-CX5F>].

⁵¹ *Id.*; see also Letter from Marco Rubio, U.S. Sen., to Janet Yellen, U.S. Sec'y of the Treasury (June 27, 2022), https://www.rubio.senate.gov/public/_cache/files/238dd5bf-46e6-493e-ad36-d6f72b95a70a/F2FE132A26782A5313972AB34A47CD88.tiktok-letter.pdf [<https://perma.cc/7MKA-BVU2>] (calling for the Biden Administration to conclude its ongoing discussion and proceed to enforce the August 14th presidential order).

⁵² Cat Zakrzewski & Drew Harwell, *Biden Administration Weighing New Rules to Limit TikTok, Foreign Apps*, WASH. POST (Feb. 2, 2022, 2:05 PM), <https://www.washingtonpost.com/technology/2022/02/02/tiktok-biden-administration-rules/> [<https://perma.cc/FAL2-52WY>]; see David Shepardson & Steve Holland, *U.S. Asks Courts to Put TikTok Appeals on Hold Pending Biden Team Review*, REUTERS (Feb. 10, 2021, 8:24 AM), <https://www.reuters.com/article/us-tiktok-bytedance-biden-idINKBN2AA1MN> [<https://perma.cc/VP9V-CDRM>].

⁵³ See generally *Magnachip and Wise Road Capital Announce Withdrawal of CFIUS Filing and Mutual Termination of Merger Agreement*, YAHOO FIN. (Dec. 13, 2021), <https://finance.yahoo.com/news/magnachip-wise-road-capital-announce-222400096.html> [<https://perma.cc/8XMX-3FRM>]; Alex Leary & Katy Stech Ferek, *Biden Builds on Trump's Use of Investment Review Panel to Take on China*, WALL ST. J. (July 7, 2021, 1:25 PM), <https://www.wsj.com/articles/investment-review-panel-gets-wider-role-under-biden-in-rivalry-with-china-11625650200> [<https://perma.cc/RXF9-2PRP>].

⁵⁴ *CFIUS in the Biden Administration*, COVINGTON & BURLING LLP (Jan. 29, 2021), <https://www.cov.com/en/news-and-insights/insights/2021/01/cfius-in-the-biden-administration> [<https://perma.cc/P3SG-NFQT>]. CFIUS in general is employing a greater level of scrutiny, reviewing 164 declarations and 272 notices in 2021—a record number of covered transactions. *Top 10 Takeaways from Treasury's CY 2021 CFIUS Annual Report*, SIDLEY AUSTIN LLP (Aug. 4, 2022),

ability to ban apps that present data privacy issues that impact national security.⁵⁵ CFIUS must be reformed while the United States continues on a trajectory that will potentially single out China beyond the true risk it poses.

II. THE HISTORY AND FRAMEWORK OF CFIUS: BALANCING UNLIMITED POWER WITH AN INTERDISCIPLINARY STRUCTURE

In order to better understand how CFIUS's decision-making was compromised during the TikTok transaction and why CFIUS is vulnerable to the President regarding Chinese transactions, this Part explains the history and intent of the Committee, the motivations for its interdisciplinary membership structure, and the broad powers that it has over Chinese transactions in particular, which can be dangerous when usurped by a single decision-maker. The following Section begins by describing the Committee's history, intent for its creation, and its unique membership structure.

A. *CFIUS's History and Source of Authority*

CFIUS is an interagency committee created by Section 721 of the Defense Production Act of 1950 and was established by executive order of President Ford in 1975 to review and investigate national security implications of foreign investment transactions in the United States.⁵⁶ The Committee is chaired by the Secretary of the Treasury; the other voting members are the heads of the Departments of Justice ("DOJ"), Homeland Security ("DHS"), Commerce ("Commerce"), Defense ("DOD"), State ("State"), Energy ("DOE"), and the Offices of the U.S. Trade Representative ("USTR"), and Science & Technology Policy ("OSTP").⁵⁷ The Director of National Intelligence and the Secretary of Labor function as non-voting, *ex officio* members of the Committee, and additional White House offices and nonmember agencies are included as necessary.⁵⁸

<https://www.sidley.com/en/insights/publications/2022/08/top-10-takeaways-from-treasurys-cy-2021-cfius-annual-report> [<https://perma.cc/H858-YPN3>].

⁵⁵ See Zakrzewski & Harwell, *supra* note 52.

⁵⁶ See Defense Production Act of 1950 § 721(k), 50 U.S.C. § 4565(k) (2012); Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 9, 1975).

⁵⁷ *CFIUS Overview*, U.S. DEP'T OF TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview> [<https://perma.cc/X37J-2V5B>].

⁵⁸ *Id.*

CFIUS was originally only intended to monitor foreign investment in the United States.⁵⁹ However, in 1988 amid concerns over aggressive Japanese investment, Congress passed the Exon-Florio provision.⁶⁰ This provision is the source of the President's authority to block foreign transactions of persons engaged in interstate commerce if they threaten to impair national security.⁶¹ The President is statutorily permitted to invoke this authority only when there is credible evidence that a foreign transaction will impair national security, and when no other laws are adequate and appropriate to address the threat.⁶²

President Reagan delegated most of his authority to administer the Exon-Florio provision to CFIUS so that FDI review would not rest in the hands of a single department or decision-maker.⁶³ The only power President Reagan retained was the ultimate one to suspend or prohibit a transaction.⁶⁴ This delegation, later codified in the Foreign Investment and National Security Act of 2007 ("FINSA"),⁶⁵ transformed the interagency committee into a body with a broad mandate and significant authority to review, investigate, and advise the President on national security issues concerning foreign investment.⁶⁶ CFIUS still performs the same three functions today⁶⁷: (1) review, during which the Committee prepares a threat assessment to identify any national security concerns; (2) investigate, which is essentially an extended review, where CFIUS may identify and impose measures on the parties mitigating its concerns before allowing the transaction to proceed;⁶⁸ and (3) recommend that the President block the transaction if at the end of the investigation period CFIUS has determined that

⁵⁹ See 2020 CFIUS REPORT, *supra* note 23, at 5.

⁶⁰ See JAMES K. JACKSON, CONG. RSCH. SERV., RL33312, THE EXON-FLORIO NATIONAL SECURITY TEST FOR FOREIGN INVESTMENT (2013), <https://sgp.fas.org/crs/natsec/RL33312.pdf> [<https://perma.cc/8ZH8-YSEQ>].

⁶¹ *Id.*

⁶² 50 U.S.C. § 4565(d)(2); 2020 CFIUS REPORT, *supra* note 23, at 7.

⁶³ See Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 867–69 (2011) (“Insulation [from a single decision-maker] increases the likelihood that reasoned policy rather than raw politics shapes the Committee’s investigation, mitigation strategy, and even ultimate recommendation. . . . To the extent that accountability is blurred by the secretive nature of foreign-investment review, . . . concerns about presidential predilections supplanting reasoned decisionmaking correspondingly rise.”).

⁶⁴ Exec. Order No. 12,661, 54 Fed. Reg. 779 (Dec. 27, 1988).

⁶⁵ Compare *id.*, with 50 U.S.C. app. §§ 2170(b), (k).

⁶⁶ JACKSON, *supra* note 60, at 4.

⁶⁷ See Michaels, *supra* note 63, at 824.

⁶⁸ See CFIUS Overview, *supra* note 18.

parties did not adequately resolve national security concerns or that no possible mitigation would resolve such concerns.⁶⁹

Despite all members of the Committee being subject to at-will removal and serving at the pleasure of the President's national security agenda, the combination of the members' numerous institutional affiliations and commitments were anticipated to produce a balanced approach to foreign investment and insulation from the President.⁷⁰ The multitude of perspectives guarantees, through friction, outcomes based on reasoned deliberation and consistency.⁷¹ It also makes presidential interference much more difficult, which is desirable so that the President can promote their foreign policy goals without having to address allegations of disparate treatment through CFIUS.⁷²

The Committee's multimember structure was thought to be better suited than an independent agency structure for addressing unbounded executive action in the national security realm because officers can only be removed by the President for "inefficiency, neglect of duty, or malfeasance."⁷³ In the national security realm, the executive branch carries out FDI review in secret and without scrutiny⁷⁴ because heightened procedural transparency and accountability mechanisms imposed from other branches could potentially endanger national security.⁷⁵ Experts that support the multimember Committee structure have commented that for-cause presidential removal in independent agencies only provides insulation from the President and does not introduce any real checks on the agency.⁷⁶ For that reason, it is not an adequate substitute for legal constraints in an area where the executive branch is essentially boundless and the agency has a prominent role in decision-making.⁷⁷ However, because foreign investment review in the United States is conducted by a multimember Commit-

⁶⁹ See *The Invisible Risks of CFIUS: Timing and Uncertainty*, CONTROL RISKS (Sept. 3, 2020), <https://www.controlrisks.com/our-thinking/insights/the-invisible-risks-of-cfius-timing-and-uncertainty> [<https://perma.cc/T2UC-K5AW>].

⁷⁰ See Michaels, *supra* note 63, at 865.

⁷¹ See *id.* at 863. This is also a version of the "bureaucracy" theory proposed by Professor Katyal that promoted internal executive checks and encouraged a robust flow of advice from agencies to the President. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2318 (2006).

⁷² See Michaels, *supra* note 63, at 863–64.

⁷³ *Humphrey's Ex'r v. United States*, 295 U.S. 602, 620 (1935).

⁷⁴ See William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2475 (2006).

⁷⁵ Michaels, *supra* note 63, at 831.

⁷⁶ See *id.* at 866–68.

⁷⁷ See *id.*

tee and not a single agency,⁷⁸ the overlapping Committee structure potentially cultivates executive accountability where it ordinarily would not exist.

To achieve its desired interdisciplinary approach in practice, CFIUS operates based on consensus among the member agencies.⁷⁹ Each member agency must confirm to Treasury that it has no unresolved national security concerns before the Committee as a whole clears a transaction to proceed.⁸⁰ The Committee membership is balanced between agencies that are oriented toward “economy” and those that are oriented toward “security.”⁸¹ The economic agencies, who are expected to move a transaction along in favor of economic incentives, typically include Treasury, Commerce, State, and USTR.⁸² The security agencies, who are expected to be hesitant and avoid national security risks stemming from foreign investment, typically include DOD, DHS, and DOJ.⁸³ Leadership of the Committee by Treasury, an economic agency, is crucial⁸⁴ because its presence as the Chair prevents the process from stagnating over a security issue.⁸⁵ Overall, the member agencies in 2018 expressed satisfaction with the Committee’s structure with Treasury as the lead agency and the current agencies as voting members.⁸⁶

CFIUS’s strong interdisciplinary check must exist to confine its vigorous review and investigatory powers, and to enable it to advise the President with reasoned deliberation and consistency. Sections II.B and II.C go on to portray CFIUS’s wide scope of powers. Section II.B describes the broad definition of “national security,” and how and why Chinese investments in particular are prime targets under that scope. Section II.C explains how CFIUS’s own unique powers can exert enough pressure that companies will abandon transactions of

⁷⁸ *See id.*

⁷⁹ *See* EDWARD M. GRAHAM & DAVID M. MARCHICK, U.S. NATIONAL SECURITY & FOREIGN DIRECT INVESTMENT 35–36, 40 (2006).

⁸⁰ *Id.* *But see* 2018 CFIUS REPORT, *supra* note 16, at 14–15 (“[A]ny agency that has a different assessment of the national security risks posed by a transaction has the ability to push that assessment to a higher level within CFIUS and, ultimately, to the President.”).

⁸¹ *See* GRAHAM & MARCHICK, *supra* note 79, at 35–36, 40.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *See id.*

⁸⁶ *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-249, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: TREASURY SHOULD COORDINATE ASSESSMENTS OF RESOURCES NEEDED TO ADDRESS INCREASED WORKLOAD 22–23 tbl.3 (2018), <https://www.gao.gov/assets/gao-18-249.pdf> [<https://perma.cc/9STZ-V5ZY>].

their own accord without presidential intervention. Therefore, when a President influences members of CFIUS in furtherance of their own agenda, they assert crucial powers that were not intended for them and deprive themselves of the reasoned deliberation and consistency of a decision made by the multimember Committee.

B. “National Security” Implications of Chinese Foreign Investment

This Section explains why the United States sees Chinese foreign investments as a threat, and the unlimited discretion the Committee has in addressing Chinese transactions in the name of “national security.” The Section concludes by using TikTok as an example to show that even transactions with mild national security implications can still be scrutinized by the Committee if China is a part of the deal.

It is no secret that CFIUS is meant to target China.⁸⁷ Senator John Cornyn (R-TX), the sponsor of the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”), noted that the legislation was crafted to empower CFIUS against China’s threat to our global technological advantage.⁸⁸ Under China’s 2015 “Made in China 2025” plan, China seeks technological dominance in semiconductors, artificial intelligence, robotics, and information technology.⁸⁹ Senator Cornyn described that as a result of the plan, China had weaponized investment-driven transfer of advanced technologies,⁹⁰ increasing FDI in the United States 18,000 percent in a decade to \$45.2 billion in 2016.⁹¹ In response, the new legislation expanded the scope of investments the Committee had oversight of and included specific reports to Congress on Chinese investments,⁹² plugging the “gaps” in coverage that had allowed some transactions to go unreviewed until too late.⁹³

⁸⁷ See Chan, *supra* note 39.

⁸⁸ See *Foreign Investments and National Security: A Conversation With Senator John Cornyn*, COUNCIL ON FOREIGN RELS. (June 22, 2017), <https://www.cfr.org/event/foreign-investments-and-national-security-conversation-senator-john-cornyn> [<https://perma.cc/UQC4-9QL8>]. Some Chinese officials have framed the plan as merely aspirational. James McBride & Andrew Chatzky, *Is ‘Made in China 2025’ a Threat to Global Trade?*, COUNCIL ON FOREIGN RELS. (May 13, 2019, 8:00 AM), <https://www.cfr.org/background/made-china-2025-threat-global-trade> [<https://perma.cc/JW7F-82WR>].

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Chan, *supra* note 39 (describing how FDI has dropped to \$7 billion a year from 2018 to 2020 during Trump’s presidency).

⁹² *Id.*

⁹³ See *Foreign Investments and National Security: A Conversation With Senator John Cornyn*, *supra* note 88. For example, major concerns among legislators centered around Huawei’s pre-FIRRMA acquisition of 3Leaf, a U.S. server technology company. Chan, *supra* note 39. Huawei declined to notify CFIUS under its voluntary reporting mechanism because the

FIRRMA sharpened CFIUS's aim against China regarding *what* it can review and left no doubt that the modern CFIUS is meant to eliminate China's threat to the United States. CFIUS, however, has always had largely unfettered discretion in *how* it reviews—i.e., how it determines what constitutes a national security threat and what should be mitigated and recommended to the President. The Committee is not bound by a formal definition of “national security.”⁹⁴ Congress and past and present administrations have routinely declined to define the meaning,⁹⁵ preferring to keep the term flexible as national security threats continue to evolve.⁹⁶ Due to the sensitive nature of the review, CFIUS's discretion is protected as it does not disclose its deliberations or reasons for its decisions.⁹⁷

FINSA and FIRRMA do provide some illumination into the definition of “national security” by listing eighteen non-exhaustive factors CFIUS and the President may consider in reviewing or blocking a transaction.⁹⁸ Some of the factors include whether a transaction affects the following areas: domestic defense and energy production; critical technologies and infrastructure; U.S. technological leadership; exposure of biometric information; or exacerbation or creation of U.S. cybersecurity vulnerabilities.⁹⁹ Other factors are directed at the identities of the foreign parties—i.e., whether a transaction involves a country of special concern that has a demonstrated goal of acquiring a type of critical technology or infrastructure that would affect U.S. national security leadership and whether a foreign person engaging in a transaction has a history of complying with U.S. laws and regulations.¹⁰⁰

transaction was only for \$2 million and involved only the purchase of patents. *Id.* Huawei had already gained access to 3Leaf's sensitive technology before CFIUS reviewed the transaction and ordered divestment. *Id.* Some other gaps include venture capital investments in early state technologies. See *Foreign Investments and National Security: A Conversation With Senator John Cornyn*, *supra* note 88.

⁹⁴ See 2018 CFIUS REPORT, *supra* note 16, at 18.

⁹⁵ See *id.*

⁹⁶ See E. Maddy Berg, *A Tale of Two Statutes: Using IEEPA's Accountability Safeguards to Inspire CFIUS Reform*, 118 COLUM. L. REV. 1763, 1794 (2018); Paul J. Pena, *Evolving Threats Demand an Evolving National Security Strategy*, FORBES (Feb. 19, 2015, 5:14 PM), <https://www.forbes.com/sites/realspin/2015/02/19/evolving-threats-demand-an-evolving-national-security-strategy/?sh=8a1359131249> [<https://perma.cc/YM78-76MP>] (describing the twenty-first century threats of cyber, biological, and nuclear attack).

⁹⁷ See David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 83 (2009).

⁹⁸ See 2020 CFIUS REPORT, *supra* note 23, at 29–31.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 31.

Finally, the list admits *any* factor the President or Committee may deem appropriate, which leaves the scope of power quite broad.¹⁰¹

These factors make it easier for CFIUS to target China without having to discern the actual implications of the transaction at hand.¹⁰² Because Chinese companies have been encouraged through Made in China 2025¹⁰³ to strategically invest in foreign companies to gain access to advanced technology, all investments involving China—not just those involving critical technology or infrastructure—have the potential to be scrutinized. Since the United States has accused China of intellectual property theft and defying its laws and regulations,¹⁰⁴ all Chinese investments—not just those involving advanced technical knowledge—can be scrutinized. These factors emphasize the unlimited discretion that CFIUS has in targeting *all* investments with Chinese origins or involvement even if the content of the transactions themselves might not raise national security concerns.

As a result of this discretion, transactions that have mild, mitigable national security implications run the risk of majorly upsetting the Committee. In the case of TikTok, the Trump Administration cited that the reason for the forced divestment was data privacy considerations.¹⁰⁵ TikTok does not, however, collect types of personal data beyond what other similar social media companies collect,¹⁰⁶ and reportedly less than Facebook and Google.¹⁰⁷ Further, TikTok's source code and user data are maintained separately from its Chinese parent company. But because the Committee has unlimited discretion in determining what constitutes a national security threat, the Committee can determine every transaction involving China or affecting its technological race against China as a threat to the national security of the United States—just like it did with TikTok.

¹⁰¹ *Id.* at 30.

¹⁰² See generally Uday Khanapurkar, *CFIUS 2.0: An Instrument of American Economic Statecraft Targeting China*, 48 J. CURRENT CHINESE AFFS. 226, 228–29 (2020), <https://journals.sagepub.com/doi/10.1177/1868102620906973> [<https://perma.cc/7XQK-UNP4>].

¹⁰³ McBride & Chatzky, *supra* note 88; see also 2020 CFIUS REPORT, *supra* note 23.

¹⁰⁴ See Yukon Huang & Jeremy Smith, *China's Record on Intellectual Property Rights Is Getting Better and Better*, FOREIGN POL'Y (Oct. 16, 2019, 9:52 PM), <https://foreignpolicy.com/2019/10/16/china-intellectual-property-theft-progress/> [<https://perma.cc/86L6-3SXW>]; see also 2020 CFIUS REPORT, *supra* note 23, at 29–31.

¹⁰⁵ See *supra* note 6.

¹⁰⁶ Graham, *supra* note 9.

¹⁰⁷ Robert McMillan, Liza Lin & Shan Li, *TikTok User Data: What Does the App Collect and Why Are U.S. Authorities Concerned?*, WALL ST. J. (July 7, 2020, 8:16 PM), <https://www.wsj.com/articles/tiktok-user-data-what-does-the-app-collect-and-why-are-u-s-authorities-concerned-11594157084> [<https://perma.cc/YL67-RRPH>].

The next Section explains the strength of CFIUS's independent impact and how presidential intervention into CFIUS's processes would give the President an overwhelming amount of power in reviewing foreign investments.

C. CFIUS's Independent Role from the President

CFIUS's powers to review and investigate foreign investments and to negotiate with transacting parties are extraordinarily strong.¹⁰⁸ Through these powers, the Committee is able to condition its endorsement of a deal based on whether parties meet the parameters that it sets to mitigate national security concerns.¹⁰⁹ Thus, parties will preemptively divest once it becomes clear that the Committee will not greenlight a deal even when the President has not taken action to suspend or prohibit a transaction.¹¹⁰

Though the President has blocked seven transactions in the entire lifetime of the Committee, the Committee itself has unraveled eighty-six transactions since 2008. In those instances, parties abandoned their transactions after (1) CFIUS informed the parties it was unable to identify mitigation measures that would resolve its national security concerns, or (2) CFIUS proposed mitigation terms that the parties chose not to accept.¹¹¹ During Trump's presidency from 2017 to 2020, the Committee unraveled an unprecedented fifty-seven transactions.¹¹² In contrast, there were only twenty-nine transactions aban-

¹⁰⁸ See Michaels, *supra* note 63, at 825–27.

¹⁰⁹ See *id.*

¹¹⁰ See U.S. DEP'T OF TREASURY, COVERED TRANSACTIONS, WITHDRAWALS, AND PRESIDENTIAL DECISIONS 2008–2020, <https://home.treasury.gov/system/files/206/CFIUS-Summary-Data-2008-2020.pdf> [<https://perma.cc/S7WY-AQAR>].

¹¹¹ See *id.*

¹¹² *Id.* For example, in 2018, MoneyGram and Ant Financial, a Chinese financial services company agreed to terminate its \$1.2 billion merger agreement in 2018 after it became clear CFIUS would not approve the transaction. Jon Russell, *The US Government Blocks MoneyGram's \$1.2B Sale to Alibaba's Ant Financial*, TECHCRUNCH (Jan. 3, 2018, 2:06 AM), <https://techcrunch.com/2018/01/02/moneygram-ant-financial-alibaba-deal-collapses/> [<https://perma.cc/9YBR-RAQ2>]; *MoneyGram and Ant Financial Announce Termination of Amended Merger Agreement*, MONEYGRAM (Jan. 2, 2018), <https://ir.moneygram.com/news-releases/news-release-details/moneygram-and-ant-financial-announce-termination-amended-merger?ReleaseID=1053096> [<https://perma.cc/H25S-WWH8>]. Ant Financial paid a \$30 million termination fee in order to terminate the agreement. *Id.* In 2019, China-based iCarbonX agreed to divest from PatientsLikeMe, and Beijing Kunlun Tech Co. Ltd. agreed to sell its rights to Grindr, all due to personal data concerns. See *President Trump Orders Chinese Company to Divest Acquisition of US Hotel Software Company*, O'MELVENY & MYERS LLP (Mar. 9, 2020), <https://www.omm.com/resources/alerts-and-publications/alerts/President-trump-orders-chinese-company-to-divest-acquisition-of-us-hotel-software-company/> [<https://perma.cc/6G4J-6WC8>]. Under the Biden Administration, CFIUS has threatened to recommend that the \$1.4 billion

done during President Obama's two terms from 2008 to 2016.¹¹³ Thus, the Committee became more proactive under a President who was adverse toward foreign direct investment.

CFIUS's unique authority to negotiate with parties through mitigation and secure their attrition when necessary is an important power, and distinct from the President's power to suspend or prohibit a transaction. When CFIUS negotiates with parties during its review and investigation periods, there is inherently a collaborative element¹¹⁴ that does not exist once the President gets involved in a transaction. This allows the Committee to acquire the information needed to reach its decision in a measured and deliberate way. Transactions are escalated to the President only when negotiations have failed and national security concerns *cannot* be resolved.¹¹⁵ When the President steps in to influence CFIUS's review and investigation process, they usurp the Committee's important role in negotiating with transacting parties to mitigate national security concerns.

When CFIUS told TikTok that there was no way to resolve national security concerns and refused to respond to its suggestions for mitigation only one day into the statutorily required investigation period,¹¹⁶ the loss of sincere negotiations jeopardized CFIUS's process of reasoned deliberation and consistency. Genuine mitigation measures regarding sensitive personal data have included ensuring that only authorized persons have access to certain technology and services and ensuring that certain activities and products are located only in the

acquisition of South Korea-based semiconductor company Magnachip by Chinese private equity firm Wise Road Capital posed risks to U.S. national security despite the company having minimal activities in U.S. interstate commerce. Chase D. Kaniecki, William S. Dawley & Pete Young, *CFIUS Threatens to Block Magnachip Deal; Shows Willingness to Interpret its Jurisdiction Broadly*, CLEARY GOTTlieb STEEN & HAMILTON LLP (Dec. 15, 2021), <https://www.clearytradewatch.com/2021/09/cfius-threatens-to-block-magnachip-deal-shows-willingness-to-interpret-its-jurisdiction-broadly/> [<https://perma.cc/EX57-6HMW>]. In December 2021, the companies terminated their merger agreement. *Magnachip and Wise Road Capital Announce Withdrawal of CFIUS Filing and Mutual Termination of Merger Agreement*, *supra* note 53.

¹¹³ U.S. DEP'T OF TREASURY, *supra* note 110.

¹¹⁴ See Giovanna M. Cinelli, *Navigating CFIUS Review: National Security Restrictions on Foreign Ownership of US Real Estate*, MORGAN LEWIS & BOCKIUS LLP (June 18, 2018), <https://www.morganlewis.com/pubs/2018/06/navigating-cfius-review-national-security-restrictions-on-foreign-ownership-of-us-real-estate> [<https://perma.cc/E2C9-PJB4>] (explaining how the review and investigation periods may involve Committee meetings with parties and requests for additional information to inform Committee deliberations).

¹¹⁵ See JACKSON, *supra* note 60, at 3 (describing the President's intervention as a last resort).

¹¹⁶ Petition for Review, *supra* note 7, at 14–16.

United States.¹¹⁷ These measures were offered to other companies,¹¹⁸ but not to TikTok while President Trump's presence over the transaction loomed large.

Certainly, there are emergency situations in which a President must intervene to protect the United States' national security. For example, President Trump has taken action to block Broadcom's hostile takeover of Qualcomm after a six-day investigation period by CFIUS.¹¹⁹ This occurred after Broadcom began to take action to redomicile to the United States within a month, therefore stepping out of CFIUS's jurisdiction of foreign investments.¹²⁰ Qualcomm's stature as the crown jewel of the U.S. semiconductor industry, coupled with Broadcom's known tactics to underfund research and development, would have made the hostile takeover fatal to the American high-tech industry's ability to keep up with China.¹²¹ Further, in taking action, Broadcom had refused to heed CFIUS's interim order requiring notice before taking actions to relocate.¹²² When President Trump intervened in this case, it was because CFIUS could not restrain Broadcom alone. CFIUS and its powers to negotiate were no longer capable at that stage.

In contrast, when TikTok made concerted efforts to comply with CFIUS, offering suggestions for mitigation, it was denied any opportunity to negotiate with no explanation.¹²³ Even though Treasury and State officials expressed their intent to conclude that CFIUS had concerns in the media, the Committee itself never officially informed ByteDance of any concerns prior to announcing that it was not able to identify any adequate mitigation measures.¹²⁴ Ultimately, it referred the issue to President Trump without giving TikTok any opportunity to respond.¹²⁵ Absent CFIUS's efforts to conduct a thorough review

117 COMM. ON FOREIGN INV. IN THE UNITED STATES, *supra* note 40, at 40–42.

118 See Michaels, *supra* note 63, at 826 (describing CFIUS mitigation requests of Lucent and Lenovo asking the companies to wall off classified information from certain personnel).

119 See Michael Leiter, Ivan Schlager & Donald Vieira, *Broadcom's Blocked Acquisition of Qualcomm*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 3, 2018), <https://corpgov.law.harvard.edu/2018/04/03/broadcoms-blocked-acquisition-of-qualcomm/> [<https://perma.cc/WMD4-LJUS>].

120 See *id.*

121 See Kevin Granville, *CFIUS, Powerful and Unseen, Is a Gatekeeper on Major Deals*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/business/what-is-cfius.html> [<https://perma.cc/CGK2-A7CQ>].

122 See Leiter et al., *supra* note 119.

123 Petition for Review, *supra* note 7, at 3; see 2018 CFIUS REPORT, *supra* note 16, at 11.

124 See Petition for Review, *supra* note 7, at 29, ex. 1.

125 *Id.* at 39.

and make a sincere effort to collaborate on mitigation, the transaction skipped the negotiations stage to go straight to the chopping block.

Finally, unlike Broadcom's attempted hostile takeover of Qualcomm, there was no actual urgency regarding the general public's use of TikTok. The CIA said Chinese intelligence authorities had *never* actually intercepted data using TikTok¹²⁶ since its initial acquisition by ByteDance in 2017.¹²⁷ Even now, the Biden Administration has taken a prolonged period of time to re-investigate the matter,¹²⁸ and has not banned or forced the app to immediately divest.¹²⁹ There was no reason for the Trump Administration to ban TikTok as hastily as it did, but because of CFIUS's inability to conduct a proper review and investigation under pressure from the President, it was not able to curtail President Trump's final prohibition. The Biden Administration is still cleaning up the Trump Administration's mistake,¹³⁰ but the damage has already been done. Experts have detected politicization and bias in the Committee's processes, tarnishing its neutral reputation and destroying trust in its reasoned decision-making.¹³¹ Further, the route has now been illuminated for future administrations to make, without limits, the same hasty decisions influenced by a President inclined against Chinese transactions.

CFIUS's broad independent powers, which are especially strong when zeroed in on China, are different from a President's own powers regarding foreign investment in the United States. When CFIUS's powers are usurped by a President with protectionist motivations, there is nothing left to protect a company from having its transactions

¹²⁶ See Sanger & Barnes, *supra* note 13.

¹²⁷ See Georgina Smith, *The History of TikTok: From Musical.ly to the Number 1 App in the World*, DEXERTO (May 8, 2021, 3:48 PM), <https://www.dexerto.com/entertainment/the-history-of-tiktok-1569106/> [<https://perma.cc/TA9E-RS5W>].

¹²⁸ See Letter from Marco Rubio, U.S. Sen., to Janet Yellen, U.S. Sec'y of the Treasury, *supra* note 51 (calling for enforcement of the divestment order amidst the ongoing re-investigation); Tali Arbel & Matt O'Brien, *Biden Backs Off on TikTok Ban in Review of Trump China Moves*, AP NEWS (Feb. 10, 2021), <https://apnews.com/article/donald-trump-jen-psakica5e68d8b23cb26a0e964b3ea5fe826d> [<https://perma.cc/8WYG-BAV9>].

¹²⁹ See Dan Primack, *TikTok's National Security Saga Nears Its End*, AXIOS (Mar. 11, 2022), <https://www.axios.com/tiktok-national-security-saga-nears-end-oracle-2123b942-6ad6-4d0f-badf-51e272c2c4aa.html> [<https://perma.cc/DH67-XWQG>] (describing how TikTok, two years later from the original offer, may be close to a deal with Oracle to store all of its U.S. user data with the company); John D. McKinnon & Alex Leary, *TikTok Sale to Oracle, Walmart is Shelved as Biden Reviews Security*, WALL ST. J. (Feb. 10, 2021, 5:40 PM), <https://www.wsj.com/articles/tiktok-sale-to-oracle-walmart-is-shelved-as-biden-reviews-security-11612958401> [<https://perma.cc/Y3MA-V3XD>].

¹³⁰ See Shepardson & Holland, *supra* note 52.

¹³¹ See Birnbaum, *supra* note 15.

reversed. The Trump Administration was responsible for the greatest number of abandoned transactions ever in the Committee's history. The next Part discusses the sparse accountability mechanisms that exist to check U.S. foreign investment review, and how they have failed to stop an aggressive CFIUS and the President's ability to wield CFIUS's powers as their own.

III. THE INSUFFICIENCY OF CFIUS'S ACCOUNTABILITY MECHANISMS IN PREVENTING PRESIDENTIAL PROTECTIONISM

The President's power to oversee foreign direct investments and their threat to U.S. national security was diffused across CFIUS's interagency structure in furtherance of political accountability and measured decision-making¹³² by President Reagan¹³³ and later by Congress.¹³⁴ This Part explores how CFIUS's interdisciplinary design failed in the midst of a President who did not shy from imposing their political agenda on CFIUS member agencies, and how there is no legislative or judicial recourse available to check such an incursion. This Part also describes how the Committee will continue to be vulnerable to presidential politicization in future administrations.

A. *Intra-Committee Check*

This Section explains how CFIUS's broad powers and interdisciplinary structure are inclined toward protectionism, making the Committee vulnerable to presidents who prematurely bar transactions with mitigable issues in the name of protecting the United States from national security threats.

CFIUS was designed to be cautious of national security threats in FDI, so its consensus-based processes involve each member agency confirming that it has no unresolved national security concerns before it clears a transaction to proceed.¹³⁵ However, as a result, *any* member agency that perceives national security risks posed by a transaction has the ability to escalate that assessment to a higher level within the Committee, and ultimately, to the President.¹³⁶ CFIUS was therefore

¹³² See Michaels, *supra* note 63, at 807–08.

¹³³ See Exec. Order No. 12,661, *supra* note 64.

¹³⁴ See 50 U.S.C. app. §§ 2170(b), (k).

¹³⁵ See 50 U.S.C. § 4565(b)(3)(C)(ii); 2018 CFIUS REPORT, *supra* note 16, at 15.

¹³⁶ 2018 CFIUS REPORT, *supra* note 16, at 12.

extremely vigilant under President Trump,¹³⁷ with the Committee taking advantage of the ease with which a transaction can be denied.

Experts noted during Trump's presidency that the intentional balance between the Committee's economic and security agencies was disrupted,¹³⁸ specifically because the economic agencies were uncharacteristically aggressive on national security issues.¹³⁹ Experts explained that the historically tolerant economic agencies assumed positions and adopted biases that reflected those of the hawkish senior political officials in those agencies.¹⁴⁰ Decision-making was reported to have turned on the President's whims, with a notable absence of process, making it difficult for essential sub-cabinet level officials and staff to work through complicated issues¹⁴¹ that could have been mitigated instead of escalated to President Trump. This occurred publicly in TikTok's case, when President Trump and CFIUS member officials Secretary Mnuchin and Secretary Pompeo outwardly expressed their intent to find national security threats even before the Committee concluded its review and investigation of the transaction, and President Trump ordered divestment almost immediately after the referral.¹⁴² Trump's presidency made clear that a President can easily spur CFIUS's processes toward protectionism if it can influence a single member agency head.

Though CFIUS's decision-making under the Biden Administration is projected to be driven by formalized interagency processes rather than informal discussions among senior political officials,¹⁴³ the

¹³⁷ See Feiner & Macias, *supra* note 28; Kharpal, *supra* note 31 (describing former Secretary of State Pompeo and former Treasury Secretary Mnuchin national security concerns with TikTok and their intent to ban the application before the Committee's review and investigation period was completed).

¹³⁸ See LARSON & MARCHICK, *supra* note 41.

¹³⁹ See Feiner & Macias, *supra* note 28; Kharpal, *supra* note 31 (describing former Secretary of State Pompeo and former Treasury Secretary Mnuchin antagonistic against TikTok).

¹⁴⁰ *CFIUS Annual Report Offers Picture of Committee's Evolution and Enhanced Capabilities*, COVINGTON & BURLING LLP (Aug. 9, 2021), <https://www.cov.com/en/news-and-insights/insights/2021/08/cfius-annual-report-offers-picture-of-committees-evolution-and-enhanced-capabilities> [<https://perma.cc/XPV6-67Q9>]. This was demonstrated in a brief moment when the head of a historically economic CFIUS member agency, Secretary of State Mike Pompeo, quoted former Attorney General William Barr, the head of a security agency, in a speech: "The ultimate ambition of China's rulers isn't to trade with the United States. It is to raid the United States." Michael R. Pompeo, Sec'y of State, U.S. Dep't of State, Speech at the Richard Nixon Presidential Library and Museum (July 23, 2020), <https://sv.usembassy.gov/secretary-michael-r-pompeo-remarks-at-the-richard-nixon-presidential-library-and-museum-communist-china-and-the-free-worlds-future/> [<https://perma.cc/JBA9-WNDB>].

¹⁴¹ See *CFIUS in the Biden Administration*, *supra* note 54.

¹⁴² See *supra* Section I.A.

¹⁴³ See 2018 CFIUS REPORT, *supra* note 16, at 13.

balance between the economic and security agencies remains vulnerable. Due to tensions between the United States and China, the use of CFIUS will likely only increase in coming years, leaving room for undue influence from a President with a heavy hand toward preserving our nation's advantage against China.¹⁴⁴

The Biden Administration is taking steps to build on the previous administration's empowerment of the Committee by wielding its wide and rigorous scrutiny gained under FIRRMA.¹⁴⁵ For example, in December 2021, Chinese private equity firm Wise Road Capital caved under CFIUS's pressure to divest from Magnachip,¹⁴⁶ a semiconductor company founded and headquartered in South Korea but publicly traded in the United States and incorporated in Delaware.¹⁴⁷ Though almost none of its operations are in the United States, CFIUS decided that the transaction posed a national security threat because it would affect the U.S. technological leadership in the semiconductor industry by allowing China to acquire additional knowledge in the industry.¹⁴⁸

CFIUS's willingness under President Biden to assert its extraterritorial reach here is notable.¹⁴⁹ It indicates that this Committee still views China's technological capabilities as a threat to our national security, and that it has no qualms raising such concerns even when another country is implicated. Further, though some have said that President Biden's CFIUS is more inclined to resolve matters consistent with its delineated process,¹⁵⁰ thus legally justifying its boldness, the process itself is still predisposed against Chinese involvement in foreign investments.¹⁵¹ In order to preserve the Committee's objectivity and neutrality, it is best in this negative climate against China to remove any potentiality that a single decision-maker can completely sway the Committee. In wielding its broad authority, the Committee

¹⁴⁴ The use of CFIUS is also increasing as the definition of national security expands to include economic security. See generally Moreland, *supra* note 42. However, this Essay is specifically focused on deterring misuse of FDI review regarding Chinese transactions with mitigable national security concerns and does not address the broadened use for preserving the United States' economic security.

¹⁴⁵ See Leary & Ferek, *supra* note 53.

¹⁴⁶ *Magnachip and Wise Road Capital Announce Withdrawal of CFIUS Filing and Mutual Termination of Merger Agreement*, *supra* note 53.

¹⁴⁷ *CFIUS Prepares to Block Semiconductor Chinese Entity*, MORRISON & FOERSTER (Sept. 3, 2021), <https://www.mofo.com/resources/insights/210903-cfius-semiconductor-chinese-entity.html> [<https://perma.cc/6FUX-Q6FH>].

¹⁴⁸ See Chan, *supra* note 39.

¹⁴⁹ See *id.*

¹⁵⁰ *CFIUS in the Biden Administration*, *supra* note 54.

¹⁵¹ See *supra* Section II.B.

should be aligned with its original intent to have separate FDI review powers from the President.¹⁵²

The following Sections discuss the inability of the legislative and judicial branches to restrain the executive on national security issues. Ultimately, these Sections show that because CFIUS and the executive branch cannot be checked externally, the Committee must be reformed from the inside out.

B. Legislative Check

Congress has only a limited check on CFIUS, and therefore it can only guarantee so much accountability from the Committee. CFIUS is meant to operate free from burdensome congressional interference, so that its national security processes cannot be politicized and co-opted by a member whose district may be impacted by a transaction.¹⁵³ When Congress has chosen to exercise its oversight, which has not been often,¹⁵⁴ it has done so in two ways: (1) threatening to block CFIUS by statute¹⁵⁵ and (2) increasing agency reporting commitments.¹⁵⁶

As for the first solution, Congress has threatened in the past to block CFIUS because it had approved a transaction that Congress deemed to pose national security concerns.¹⁵⁷ However, because it seems that what Congress fears most is executive inaction against China,¹⁵⁸ also seen in the case of TikTok,¹⁵⁹ it is unlikely that Congress

¹⁵² See *supra* Sections II.A, II.C.

¹⁵³ Matthew R. Byrne, *Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance*, 67 OHIO ST. L.J. 849, 891–92 (2006).

¹⁵⁴ Congress usually only exercises its oversight to affirm that the Committee has exercised enough scrutiny over transactions, not whether its scrutiny has been too much. One key example is the catalytic Dubai Ports World (“DP World”) incident. During the DP World incident, Congress was upset at CFIUS’s approval of a transaction transferring port operations at six U.S. ports to DP World, a United Arab Emirates state-owned company. See David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. TIMES (Mar. 10, 2006), <https://www.nytimes.com/2006/03/10/politics/under-pressure-dubai-company-drops-port-deal.html> [<https://perma.cc/QL2D-MP26>]. Congress believed that the transaction would allow U.S. ports to be vulnerable to terrorists; President George W. Bush and CFIUS believed such suspicions were racist. See *id.* Either way, DP World bowed out of the deal in the face of increasing pressure from Congress, and Congress drastically empowered CFIUS and increased its oversight of the Committee shortly after by passing FINSA. See 2020 CFIUS REPORT, *supra* note 23, at 5.

¹⁵⁵ Congress threatened to block CFIUS by statute during the DP World incident. Sanger, *supra* note 154.

¹⁵⁶ Congress increased agency reporting commitments in its legislative proposals after the DP World incident. 2020 CFIUS REPORT, *supra* note 23, at 12.

¹⁵⁷ See Sanger, *supra* note 154.

¹⁵⁸ See *id.* (describing Congress’s willingness to jump in during the DP World incident when it deemed that CFIUS had not done enough to protect the country’s national security by block-

would try to block CFIUS or the President if they deny a transaction approval instead. Further, Congress's block of an executive branch's action regarding national security raises serious separation of powers issues.¹⁶⁰ In this climate, it seems unlikely and also illegal for Congress to discharge its override powers to rein in the Committee and the President with regard to foreign investment.

As for the second solution, CFIUS's reporting responsibilities have been insufficient for keeping the Committee in check when it comes to over-scrutinizing investments. Reports contain the outcome of each review or investigation, as well as any mitigation agreements, the nature of the business activities or products, and plans to enforce compliance.¹⁶¹ Reports do not contain any information about ongoing reviews or investigations.¹⁶² As a result, reports are likely unhelpful because it is difficult for Congress to weigh in on discretionary issues until a determination has come to light. CFIUS has also been accused of lackluster reporting in the past,¹⁶³ making it even more difficult for Congress to exercise its oversight.

Tensions do exist between Congress and the FDI review process it has created for CFIUS and the President to implement, especially when CFIUS is not as proactive as Congress would prefer. But, because Congress has mainly been focused on strengthening CFIUS and the President's powers through its legislative mandates, and the accountability it is able to establish through reporting is minimal, Congress is largely powerless and disinclined to stop a Committee or presidential determination of a national security threat.

ing the transaction); Chan, *supra* note 39 (explaining how FIRRMA sponsor Senator Cornyn (R-TX) majorly expanded through the legislation CFIUS's authority to empower it against the threat of Chinese investment).

¹⁵⁹ Congress displayed this fear in the TikTok case when Senator Marco Rubio (R-FL) requested CFIUS review of TikTok, and Senators Chuck Schumer (D-NY) and Tom Cotton (R-AR) requested the Acting Director of National Intelligence to assess the potential cybersecurity threats posed by TikTok and other Chinese apps in October 2019. See Press Release, Senator Marco Rubio, Rubio Requests CFIUS Review of TikTok After Reports of Chinese Censorship (Oct. 9, 2019), <https://www.rubio.senate.gov/public/index.cfm/2019/10/rubio-requests-cfius-review-of-tiktok-following-reports-of-chinese-censorship> [https://perma.cc/7NGN-R6MY]; Whitney Kimball, *Senators Warn That TikTok May Pose National Security Threat*, GIZMODO (Oct. 24, 2019, 4:45 PM), <https://gizmodo.com/senators-warn-that-tiktok-may-pose-national-security-th-1839333101> [https://perma.cc/42F9-Z9D7].

¹⁶⁰ See LARSON & MARCHICK, *supra* note 41, at 28.

¹⁶¹ 2020 CFIUS REPORT, *supra* note 23, at 33–34.

¹⁶² Cf. *id.*

¹⁶³ See JACKSON, *supra* note 60, at 3.

C. *Judicial Review*

The judicial branch has a limited check on issues of national security as a constitutional matter,¹⁶⁴ deferring often to the executive branch on such issues.¹⁶⁵ Congress has cemented this concept through FINSA, mandating that presidential determinations after CFIUS review are not judicially reviewable.¹⁶⁶ As a result, attempts at judicial review of CFIUS and presidential determinations regarding FDI have largely been nonexistent.

Federal courts have only ruled on issues regarding CFIUS in a single case: *Ralls Corp. v. Committee on Foreign Investment in the U.S.* (“*Ralls*”).¹⁶⁷ The court in *Ralls* ruled that President Obama’s order prohibiting the transaction for national security reasons was unconstitutional,¹⁶⁸ as a foreign investor should be given due process protection to be notified of the official action, the unclassified evidence, and an opportunity to rebut the evidence.¹⁶⁹ The decision, however, did not impact the non-reviewability of CFIUS and presidential determinations of national security risk beyond permitting constitutional challenges.¹⁷⁰

More recently, in the midst of the TikTok scandal, TikTok and ByteDance sued CFIUS, former Secretary of the Treasury and Chairperson of CFIUS Steven Mnuchin, former President Donald Trump, and former U.S. Attorney General William Barr.¹⁷¹ In the suit, TikTok and ByteDance called for the Court of Appeals for the D.C. Circuit to reverse the CFIUS action and the President’s presidential order forcing divestment due to constitutional and Administrative Procedure Act (“APA”) violations.¹⁷² It is uncertain, however, whether these claims are necessarily viable, as TikTok agreed to dis-

¹⁶⁴ See generally Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1363, 1371 (2009).

¹⁶⁵ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004); *Kaufman v. Mukasey*, 524 F.3d 1334, 1340 (D.C. Cir. 2008) (stating that “[agency] determinations regarding national security are matters that federal courts acknowledge are generally beyond their ken”).

¹⁶⁶ 50 U.S.C. § 4565(e)(1).

¹⁶⁷ *Ralls Corp. v. Comm. on Foreign Inv. in the U.S. (Ralls III)*, 758 F.3d 296, 302 (D.C. Cir. 2014); see also Jonathan Wakely & Lindsay Windsor, *Ralls on Remand: U.S. Investment Policy and the Scope of CFIUS’ Authority*, 48 INT’L L. 105, 106 (2014).

¹⁶⁸ *Ralls III*, 758 F.3d at 325.

¹⁶⁹ *Id.* at 319.

¹⁷⁰ *Id.* at 311. The D.C. Circuit states that it thinks courts are barred from reviewing final actions by the President to suspend or prohibit any covered transaction under 50 U.S.C. app. § 2170(e), but that review of constitutional claims challenging the process by which determinations were made were permitted. *Id.*

¹⁷¹ See Petition for Review, *supra* note 7, at 1.

¹⁷² *Id.* at 34.

miss the claim¹⁷³ while the Biden Administration reviews the previous administration's actions against TikTok.¹⁷⁴

The hurdle to changing judicial reviewability of CFIUS action is impossibly high. Some reforms have called for the creation of Article III courts capable of handling national security issues to review CFIUS actions or presidential orders¹⁷⁵ regarding FDI.¹⁷⁶ But because of the classified information that CFIUS handles, the statutory language preventing judicial review, and the danger of undermining the executive branch's constitutional authority, the judicial branch still currently defers to the executive branch on national security issues regarding FDI.¹⁷⁷

CFIUS, like other agencies in the national security realm, is not subject to stringent legislative or judicial oversight. Therefore, when presidents step in to sway the Committee to block a transaction, there are essentially no ways to check CFIUS or for the Committee to retract a decision if needed. TikTok's forced divestment was only stalled because of the change in administrations. What would have happened to TikTok if President Trump had been re-elected?

The next Section proposes solutions for the Committee to maintain its objectivity and neutrality and extricate itself from the political agenda of a President who is suspicious of Chinese investments in the United States and interested only in a referral from the Committee to ban the transaction. Because the legislative and judicial accountability mechanisms are insufficient or unconstitutional to constrain national security decisions, the only option that remains is to re-evaluate CFIUS's structural design.

IV. RESTRUCTURING CFIUS

President Trump pushed executive boundaries like no President had ever done before, as demonstrated by the forced divestment of TikTok from ByteDance. In reviewing the transaction, he obliterated the modest intra-Committee checks set in place by forcing loyalist member agency heads to support and carry out his determinations on

173 Will Knight, *TikTok a Year After Trump's Ban: No Change, But New Threats*, WIRED (July 26, 2021, 7:00 AM), <https://www.wired.com/story/tiktok-year-trump-ban-no-change-new-threats/> [<https://perma.cc/95XT-YZR6>].

174 See Arbel & O'Brien, *supra* note 128.

175 See Isaac Lederman, *The Right Rights for the Right People? The Need for Judicial Protection of Foreign Investors*, 61 B.C. L. REV. 703, 744–45 (2020).

176 See Will Gent, *Tilting at Windmills: National Security, Foreign Investment, and Executive Authority in Light of Ralls Corp. v. CFIUS*, 94 OR. L. REV. 455, 459 (2016).

177 See *id.* at 482–83.

FDI before it even came time for him to act to suspend or prohibit a transaction. There was no divided government, and he went unchecked by public accountability, the legislative and judicial branches, and the intra-Committee check. TikTok's forced divestment and the Trump Administration's behavior during its term revealed the structural flaws of the Committee in constraining presidential overstepping and is a warning of what may occur again toward Chinese investments in the United States.

At this time, modest intra-Committee checks¹⁷⁸ alone are not enough to ensure a proper bureaucracy is functioning. Modern agencies are what Professor Katyal has described as a “stew of presidential loyalists and relatively powerless career officials”¹⁷⁹—a statement that still resonates today. Further, executive prominence in the national security realm makes it difficult for executive accountability theories to apply, such as relying on the President to diffuse their power through Committee directives¹⁸⁰ or relying on the President and CFIUS to prioritize legislative expectations of separate powers between them.¹⁸¹ Because of the state of devoted senior political officials in modern agencies and the President's indomitability in the national security realm, it is time to revisit the traditional way of insulating agencies from the President by installing for-cause protections for CFIUS.

This Essay proposes three alternative ways to restructure CFIUS and install for-cause protections for the Committee while preserving its interdisciplinary approach: (1) adding a new head of the Committee removable only for cause; (2) replacing the Committee members with officials from the original member agencies who are not the agency heads and are removable only for cause; and (3) re-creating CFIUS as an independent agency. Though for-cause protections were initially cited as subordinate to multimember structures as a means of

¹⁷⁸ Professor Katyal advanced the idea that modest intra-Committee checks are insufficient through his theory on creating better bureaucracy through more bureaucratic overlap. See Katyal, *supra* note 71, at 2324–27.

¹⁷⁹ See *id.* at 2322.

¹⁸⁰ See Bijal Shah, *Deploying the Internal Separation of Powers Against Racial Tyranny*, 116 NW. U. L. REV. ONLINE 244 (2021), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1318&context=NULr_online [<https://perma.cc/92TP-8WDV>] (emphasizing empowerment of agency ability to check the President order to stave off their impulses toward racial tyranny).

¹⁸¹ See Bijal Shah, *Statute-Focused Presidential Administration*, 90 GEO. WASH. L. REV. (2022) (forthcoming in this issue) (describing how agencies, which have recently been extremely responsive to the presidential policy agenda, must not neglect legislative directives).

creating agency accountability in CFIUS's design,¹⁸² what CFIUS currently needs most is not legal constraint within the agency, but insulation from individual presidents that take advantage of the Committee's overwhelming powers. The next Section briefly discusses independent agency theories and their benefits before introducing the solutions, which involve a mixture of independent agency and multi-member agency theories.

A. *The Theory and Benefits of Independent Agencies*

Independence in agencies has been crucial in our nation's legal history as a method to insulate agency decision-making from politics.¹⁸³ When a President cannot remove agency personnel for policy disagreements at will, they lack a key method to impose their political agenda.¹⁸⁴ Especially because the rate of turnover was so high at the senior political level during the Trump Administration,¹⁸⁵ for-cause protections limiting the President's reasons for removal would have been an effective way to ensure that the Committee could stand its ground against the President.

An important aspect of independent agencies is their ability to promote long-term interests of expert decision-making over the short-term interests of the presidential administration.¹⁸⁶ This is because their insulation allows them to easily diverge from presidential priorities.¹⁸⁷ Though the multimember approach was also an attempt at agency divergence from presidential priorities through its strength in numbers,¹⁸⁸ the issue remains that CFIUS's consensus-based approach was created with caution in mind. Due to the inclination towards caution, it only takes a single-member agency refusing to relent on its perception of a national security threat to impede the FDI process because it takes all of the agencies together to clear a transaction. Therefore, the President need only find one weak link to successfully assert a protectionist agenda and corrupt the Committee's processes.

¹⁸² See Michaels, *supra* note 63, at 890.

¹⁸³ See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625 (1935) (recognizing independent agencies require insulation from politics because its operations "should not be open to the suspicion of partisan" bias).

¹⁸⁴ Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 611 (2010).

¹⁸⁵ Kathryn Dunn Tenpas, *Tracking Turnover in the Trump Administration*, BROOKINGS INST. (Jan. 2021), <https://www.brookings.edu/research/tracking-turnover-in-the-trump-administration/> [<https://perma.cc/PN72-NT5B>].

¹⁸⁶ See Bressman & Thompson, *supra* note 184, at 613.

¹⁸⁷ See *id.*

¹⁸⁸ See Michaels, *supra* note 63, at 866–67.

In order to guard against such behavior, the following Sections detail how for-cause protections in CFIUS could work to fortify its current multimember structure against presidential interference.

B. Replacing Treasury Secretary as the Chairperson with a Specially Designated Member Removable Only for Cause

The first of these configurations involves a recommendation to install a specially designated member as the Chairperson of CFIUS instead of the Secretary of Treasury. This new Chairperson would be someone nominated by the President, confirmed by Senate, and removable only for cause. Then, there would be someone on the Committee whose removal is insulated from the President and whose appointment is based on the dedicated purpose of leading the Committee. Under independent agency theory, such a choice would ensure that the President lacks a crucial way to impose their political agenda.¹⁸⁹ Future presidents looking to politicize the CFIUS process without going through the reasoned decision-making in the Committee would have to face off against the Committee Chairperson, who would have the freedom to make sound decisions independent of the President. The Committee would ideally still operate by full consensus of the member agencies but be led by an individual who is not installed at the member agencies and does not have a vote. Under the multimember theory, such a design would keep what can be retained of the system of checks and balances already established between the “economic” and “security” agencies.¹⁹⁰

This solution would wrest the chairperson position from Treasury. Based on a 2018 Government Accountability Office report, the member agencies are satisfied with Treasury and the heavy role it plays in CFIUS.¹⁹¹ However, the new Chairperson would not fully supplant Treasury because it would not have a vote in the Committee’s consensus and would only serve in a coordinator role.

Further, as originally described by the multimember theory,¹⁹² one could argue that the concentration of the Chairperson role in a single individual could make that person more vulnerable to direct pressure from the President. However, the original Committee struc-

¹⁸⁹ See Bressman & Thompson, *supra* note 184.

¹⁹⁰ See GRAHAM & MARCHICK, *supra* note 79, at 170.

¹⁹¹ See U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-249, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: TREASURY SHOULD COORDINATE ASSESSMENTS OF RESOURCES NEEDED TO ADDRESS INCREASED WORKLOAD 22–23 tbl.3 (2018), <https://www.gao.gov/assets/gao-18-249.pdf> [<https://perma.cc/9STZ-V5ZY>].

¹⁹² See Michaels, *supra* note 63, at 866.

ture with Treasury as the chair of nine voting member agencies was arguably even more susceptible to presidential pressure due to their service at will.¹⁹³

Finally, the addition of a chairperson removable only for cause could encourage jockeying of the position in its presidential nomination and congressional confirmation, and further politicization of CFIUS as a result. However, the long-term benefits of a chairperson who is insulated during the lifetime of that role far outweigh the initial pandering involved in securing the position.

The notable issue with this solution is the potential for the President to undermine the chairperson who is removable only for cause by influencing one of the at-will agency heads in their decision-making. The next two solutions address that issue by making everyone removable for cause, not just the chairperson.

C. Replacing the Committee Members with CFIUS-Designated Officials from Each Member Agency Instead of the Agency Heads

The second reconfiguration of CFIUS involves replacing the nine voting agency heads as Committee members with CFIUS-designated officials from the same agency. The CFIUS-designated officials that compose the Committee would be individuals nominated by the President, confirmed by Senate, and removable only for cause. This structure is distinguishable from the first proposal because there would not be an additional member to the Committee, and the Treasury representative would remain the Chairperson. Further, this structure would insulate every Committee member from the President, not just the Chairperson. Under independent agency theory, the Committee would be impenetrable by the President's political agenda.¹⁹⁴ This insulation revitalizes the internal checking process¹⁹⁵ of the multimember theory by ensuring each Committee member's decision is autonomous. It still retains the benefits of multimember theory by having each official stationed in their member agencies, obligating them to represent their institutional commitments.¹⁹⁶

The drawback to this solution is the bureaucratic hassle of nominating and confirming nine different individuals stationed in each

¹⁹³ See *supra* Section I.A (describing former Secretaries of State Pompeo and Treasury Mnuchin's intentions to force TikTok's divestment, affirmed by President Trump).

¹⁹⁴ See Bressman & Thompson, *supra* note 184, at 611.

¹⁹⁵ See Michaels, *supra* note 63, at 863.

¹⁹⁶ See *id.*

member agency to be CFIUS point-people. Though it could be inefficient, the end result of an individuated Committee that successfully performs intra-Committee checks so it can make accurate assessments of national security threats is too important to discount.

The other hesitation is a common concern with independent agencies—whether an agency constitutionally can and should be detached from presidential plenary power, especially in the national security realm.¹⁹⁷ An insulated CFIUS should have no negative effect on the presidential obligation to “take Care that the Laws be faithfully executed.”¹⁹⁸ President Reagan already delegated away the President’s review and investigation powers to CFIUS, while keeping only the power to block transactions.¹⁹⁹ This was later codified by FINSA.²⁰⁰ The insulation only makes the demarcations between the roles clear after the Trump Administration muddied the boundaries.

In fact, it would be difficult for the President to “take care” if the Committee is not sufficiently insulated. One of CFIUS’s core functions is to present to the President the legal reasoning and evidence necessary to inform the presidential action of suspending or prohibiting transactions.²⁰¹ Without insulation from the President, as seen in the case of TikTok,²⁰² it could be impossible for CFIUS to refer transactions with reasoned deliberation and consistency if a President is inclined toward finding national security concerns with Chinese investments.

D. *Restructuring the Committee as an Independent Federal Agency*

This final proposal involves completely reforming CFIUS as an independent federal agency to conduct reviews, investigations, and recommendations of FDI transactions. This solution would consolidate the nine Committee members and the additional agency personnel assigned to CFIUS activities under one agency. The respective teams would still represent their area of agency expertise under the lead of individual Commissioners reflecting the original nine Committee members—each representing an Office of Treasury, Office of State, and so on. Each Commissioner would have a consensus vote. In

¹⁹⁷ See generally Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1567 (2007).

¹⁹⁸ U.S. CONST. art. II, § 3; *Morrison v. Olson*, 487 U.S. 654, 686 (1988).

¹⁹⁹ See Exec. Order No. 12,661, *supra* note 64.

²⁰⁰ See 50 U.S.C. app. §§ 2170(b), (k).

²⁰¹ See Johnsen, *supra* note 197 (describing how core functions of agencies that enable legal advice to the President are constitutional because it allows them to take care).

²⁰² See *supra* Section I.A.

this way, the interdisciplinary nature of the multimember theory would still be preserved,²⁰³ even though every member would be under only one agency. Further, the independent agency structure would solve the problem of presidential influence on the Committee because the structure would insulate every member, so no members would disrupt the interagency process because of presidential influence.²⁰⁴

Concerns that may arise from this new configuration include (1) whether the multimember structure would be rendered useless when funneled into a single agency that does not have various institutional commitments and (2) whether accountability for approving transactions would be affected as a result.²⁰⁵ However, the intra-Committee checks that presently exist for when CFIUS approves a transaction would still exist within this proposed independent agency structure. First, the internal checking structure would be preserved through the nine Offices. Second, consensus voting among nine voting Commissioners would work both to slow down any undue eagerness to push a transaction toward approval and to keep Commissioners accountable to one another. Lastly, one can expect that the climate toward foreign investment within the independent agency would not be conducive to blind approval of transactions. Congress in particular would be more than enthusiastic to check CFIUS when it inappropriately approves a transaction, rather than when it denies a transaction and refers it to the President.²⁰⁶ President Trump exposed the current lack of accountability mechanisms present when CFIUS denies a transaction—a status quo that seems to exist in no small part because of the broad powers and multimember structure of the Committee.²⁰⁷ Conversely, checks for when CFIUS approves a transaction, as described in Section III.B,²⁰⁸ would still be present if CFIUS were to be restructured as an independent agency.

Finally, national security review of investments is growing in the United States. The Committee has been strained in its resources across member agencies, delayed in its review and investigation time-

²⁰³ See Michaels, *supra* note 63, at 873.

²⁰⁴ See Bressman & Thompson, *supra* note 184, at 611.

²⁰⁵ See Michaels, *supra* note 63, at 865.

²⁰⁶ See *supra* notes 154 (describing the DP World incident where congressional furor against CFIUS approval pressured transacting parties to divest), 159 (describing the suspicions against TikTok).

²⁰⁷ See *supra* Section III.A.

²⁰⁸ See *supra* Section III.B.

lines,²⁰⁹ and limited in its budgets, with recently introduced filing fees up to \$300,000 and a budget request for \$39.6 million for 2022.²¹⁰ An outbound investment regime has also been proposed by Congress this year.²¹¹ Functioning as an independent agency could finally give CFIUS the proper congressional recognition for the increased budget it would need to alleviate some of these problems. This reason alone supports this third configuration of CFIUS over the other two. There could not be a sooner time for a new CFIUS, reformed as an independent agency.

CONCLUSION

The Trump Administration's forced divestment of TikTok from ByteDance illuminated the flaws in CFIUS's structure that enable its processes to be easily usurped by the President. As CFIUS's scope of power becomes stronger and it is used more frequently than ever due to our political circumstances with China, CFIUS should maintain its broad jurisdiction over sensitive transactions but retain its separate powers from the President—as these powers were originally delegated by President Reagan and as statutorily determined in FINSAs. Retaining the ultimate power to suspend or prohibit a transaction, the President plays an important function in extreme cases where a national security concern cannot be mitigated and negotiations with CFIUS have failed. However, CFIUS's functions should not be overly supplanted by the President's decision-making during those extreme circumstances—in order to best advise the President, the Committee's process should continue to include a detailed review, genuine mitigation requests, and a recommendation to the President to suspend or prohibit a transaction only if necessary. If anything, CFIUS's recommendations are an especially important check on the President because they can alter the menu of options the President can choose from when deciding to block a transaction.

²⁰⁹ See Llewellyn Hinkes-Jones, *Foreign M&A Delayed More Often By U.S. Review*, BLOOMBERG L. (Jan. 29, 2018, 3:33 PM), <https://news.bloomberglaw.com/securities-law/foreign-m-a-delayed-more-often-by-u-s-review-1> [<https://perma.cc/4Y4K-7W2S>]. All while reviewing a record number of covered transactions. See *Top 10 Takeaways from Treasury's CY 2021 CFIUS Annual Report*, *supra* note 54.

²¹⁰ DEP'T OF THE TREASURY COMM. ON FOREIGN INV. IN THE U.S. ACTIVITIES, CONGRESSIONAL BUDGET JUSTIFICATION AND ANNUAL PERFORMANCE REPORT AND PLAN (FY 2022) 4–5, <https://home.treasury.gov/system/files/266/07.-CFIUS-FY-2022-CJ.pdf> [<https://perma.cc/B94V-6VJU>]; *CFIUS Filing Fees*, U.S. DEP'T OF TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-filing-fees> [<https://perma.cc/7K2L-6H93>].

²¹¹ America COMPETES Act of 2022, H.R. 4521, 117th Cong. § 104001 (2022).

Now is the time to change CFIUS so that it can be an individual decision-making body. Though experts remain confident in the formalized nature of the Biden Administration's decision-making, the Committee is vulnerable as long as tensions with China remain high and while the President continues to have unfettered removal power over CFIUS member agency heads. The Committee's original multi-member design should incorporate for-cause removal protections in order to best achieve the intended goal of preserving our country's national security while promoting open investment.