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Defend and Protect: National Security Restrictions on Foreign Investments in the United States

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Defend and Protect: National Security Restrictions on Foreign Investments in the United States

Cover Page Footnote

J.D., Cornell Law School, 2014. I would like to thank Professor Junewicz for his insight and guidance throughout the writing of this Article. I am also extremely grateful for the hard work and dedication of the editors of the University of Cincinnati Law Review, especially Executive Editor Elizabeth Thoman. Finally, I would like to thank Jade Harry for her unwavering love and support.

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DEFEND AND PROTECT: NATIONAL SECURITY RESTRICTIONS ON FOREIGN INVESTMENT IN THE UNITED STATES

*Matthew Aglialoro**

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I. INTRODUCTION

Securing the United States from foreign threats is one of the single most important functions of government. The Department of Defense, tasked with the security of our Nation, is the largest government agency both by headcount and budget.[1] And while many of these resources go

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1. The Department Defense has over 1.3 million active service members, 700,000 civilian employees, and an annual budget of more than $500 billion. *See The Executive Branch*, WHITEHOUSE.GOV, http://www.whitehouse.gov/our-government/executive-branch (last visited May 28, 2015); OFFICE OF THE UNDERSECRETARY OF DEF., UNITED STATES DEPARTMENT OF DEFENSE FISCAL YEAR 2014 BUDGET REQUEST 1-3 (2013), *available at* http://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2014/FY2014_Budget_Request_Overview_Book.pdf. The Department of

towards the defense of U.S. interests abroad, a large part of securing our Nation from foreign threats occurs domestically, protecting valuable U.S. assets such as classified information and strategic resources.

One potential source of such threats arises from foreign corporations' growing access to classified information and strategic resources. To counteract this threat, the U.S. has relied on a patchwork of laws and regulations controlling foreign participation in U.S. commerce domestically. In some instances, foreign corporations are completely prohibited from engaging in certain commercial ventures. In most cases, however, access to classified information or strategic resources—such as through a foreign corporation's acquisition of a domestic company—is reviewed on a case-by-case basis, under which the foreign corporation's activities are scrutinized for potential threats. In addition, corporations that contract with the U.S. government must comply with specific regulations aimed at protecting classified information.

Navigating the tangled web of laws and regulations controlling foreign access to domestic markets is complicated even for the most sophisticated companies. More troubling, the realities of today's global marketplace suggest that the current laws are also impractical, unfair, and fundamentally at odds with our notion of a free market. Indeed, the breadth and arbitrary application of the current laws often result in unfair and unpredictable outcomes. A new approach is necessary; one that secures the Nation from foreign threats while also upholding the principles of the free market.

This Article attempts to unravel the laws and regulations that impede foreign corporations from accessing U.S. markets. Part II identifies several laws and regulations that impact foreign investment domestically, and identifies several contemporary applications of these laws demonstrating how they work in practice. Part III outlines three major critiques of the current laws, largely focusing on the anachronistic and unfair nature of their application. Part IV presents a multi-prong reform strategy that attempts to balance national security interests with the promotion of foreign investment.

II. THE LEGAL AND REGULATORY CLIMATE

The current regulatory landscape is a product of years of patchwork legislation by Congress and the President—a web of interlaced statutes,

Defense budget grew exponentially after the terrorist attack on September 11, 2001, increasing from $287.4 billion in 2001 to $529.9 billion in 2012. *See id.* The Department of Defense's annual budget is equal to nearly twenty-five percent of total government spending. *See* Shan Carter & Amanda Cox, *Obama's 2011 Budget Proposal: How It's Spent*, N.Y. TIMES (Feb. 1, 2010), http://www.nytimes.com/interactive/2010/02/01/us/budget.html.

executive orders, and regulations that aim to limit or restrict foreign participation in certain industries. This approach is far from uniform, and the government has relied on everything from agency approval of foreign investment to outright prohibition. Ultimately, these laws and regulations target every aspect of foreign investment in commerce from production to exportation of goods. What follows is a discussion of those laws and regulations as well as recent examples of their application.

A. National Industrial Security Program

1. Current Law

In 1993, President George H.W. Bush established the National Industrial Security Program (NISP) to "serve as a single, integrated, cohesive industrial security program to protect classified information and to preserve our Nation's economic and technological interests."[2] The NISP has integrated the security clearance process for "military services, Defense Agencies, 27 federal agencies and approximately 13,500 cleared contractor facilities."[3]

The origin of the NISP can be traced back to the Cold War when, in 1960, President Eisenhower signed Executive Order 10865 directing the Department of Defense to create regulations to protect national security information that was available to corporations in the United States.[4] In response, the Defense Department instituted the Defense Industrial Security Program to establish guidelines by which national security secrets may be disclosed to U.S. corporations.[5] Each subsequent President signed executive orders similar to President Eisenhower's Order "extend[ing] and defin[ing] the relationship between the executive and private companies,"[6] which ultimately culminated in President Bush's establishment of the NISP in 1993.

In conjunction with the NISP, President Bush ordered the

2. *See* Exec. Order No. 12829, 58 Fed. Reg. 3479 (Jan. 6, 1993). The Order was amended slightly and signed by President Clinton less than a year later. *See* Exec. Order No. 12885, 58 Fed. Reg. 65863 (Dec. 14, 1993).

3. About Us, DEF. SEC. SERV., http://www.dss.mil/about_dss/index.html (last visited May 28, 2015).

4. Exec. Order No. 10865, § (1)(a)-(b), 25 Fed. Reg. 1583 (Feb. 20, 1960).

5. *See* DEP'T OF DEF., DIRECTIVE 5220.22-R, INDUSTRIAL SECURITY REGULATION 14 (1985), *available at* http://www.dtic.mil/whs/directives/corres/pdf/522022r.pdf ("The objective of the Department of Defense Industrial Security Program is to ensure the safeguarding of classified information in the hands of U.S. industrial organizations, educational institutions, and all organizations and facilities used by prime and subcontractors . . . .").

6. Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 93 (2010).

promulgation of the National Industrial Security Program Operating Manual (NISPOM) to "prescribe specific requirements, restrictions, and other safeguards that are necessary to preclude unauthorized disclosure and control authorized disclosure of classified information to contractors, licensees, or grantees."[7] The NISPOM "controls the authorized disclosure of classified information released by U.S. Government Executive Branch Departments and Agencies to their contractors."[8] It applies to all executive branch agencies and "all cleared contractor facilities."[9] As the name implies, the NISPOM serves as an implementing tool for the NISP. While the NISP calls for the integration of national security measures across executive agencies, the NISPOM sets forth unified rules and practices for which agencies and contractors must abide.[10]

The NISP and NISPOM only regulate the disclosure of information that is deemed "classified", as that term is defined by executive order.[11] Classified information can fall within one of three categories: "top secret," "secret," or "confidential."[12] Information is categorized based on the impact that the disclosure of that information would have if made public. Information is categorized as "top secret" if the disclosure of that information "reasonably could be expected to cause exceptionally grave damage to the national security."[13] Information is deemed "secret" if the disclosure of that information "reasonably could be expected to cause serious damage to the national security."[14] Information is "confidential" if the disclosure of the information "reasonably could be expected to cause damage to the national security."[15]

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7. *See* Exec. Order No. 12829, 58 Fed. Reg. 3479, at § 201(b).

8. *See* DEP'T OF DEF., DIRECTIVE 5220.22-M, NATIONAL INDUSTRIAL SECURITY PROGRAM: OPERATING MANUAL § 1-100 (2006), *available at* http://www.dtic.mil/whs/directives/corres/pdf/522022m.pdf [hereinafter DEP'T OF DEF. DIRECTIVE].

9. *Id.* § 1-102.

10. *See id.* § 1-100 ("This Manual is issued in accordance with the National Industrial Security Program (NISP). It prescribes the requirements, restrictions, and other safeguards to prevent unauthorized disclosure of classified information.").

11. Since the establishment of the NISP, the Executive Order governing classification of information has been amended several times. When NISP was first established, it provided protection of information as classified by Executive Order No. 12356. *See* Exec. Order 12829, 58 Fed. Reg. 3479, at § 101(b). The classification system was amended by President Bill Clinton, President George W. Bush, and most recently by President Barack Obama. *See* Exec. Order No. 12958, 60 Fed. Reg. 19825 (April 17, 1995); Exec. Order No. 13292, 68 Fed. Reg. 15315 (March 25, 2003); Exec. Order No. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009).

12. *See* Exec. Order No. 13526, 75 Fed. Reg. 707, at § 1.2.

13. *Id.* § 1.2(a)(1).

14. *Id.* § 1.2(a)(2).

15. *Id.* § 1.2(a)(3). For more information regarding clearance levels, see generally *Facility Clearance Process FAQs*, DEF. SEC. SERV., http://www.dss.mil/isp/fac_clear/per_sec_clear_

The government relies on this hierarchical classification system to prioritize the importance of classified information. While the exact contours of each category of classified information are not clearly defined, the Executive Branch has provided some guidance on each category. For example, information concerning "armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security [or] the compromise of vital national defense plans of complex cryptologic and communication intelligence systems" could cause exceptionally grave damage to national security and should be classified as "top secret."[16] However, to avoid abuse of this classification, the top-secret classification should be used with the "utmost restraint."[17] Comparatively, information that concerns "disruption of foreign relations significantly affecting the national security [or] significant impairment of a program or policy directly related to the national security" could cause serious damage to national security and thus should be classified as "secret."[18] This designation too, should only be used sparingly to avoid abuse. Finally, examples of information that could be expected to cause damage to the national security and thus labeled as "confidential" include information "that indicates strength of ground, air, and naval forces in the United States and overseas areas; disclosure of technical information used for training, maintenance, and inspection of classified munitions of war; revelation of performance characteristics, test data, design, and production data on munitions of war."[19]

For a private contractor to access classified information, the NISPOM requires the private contractor to be cleared, a process that has a number of requirements. First and foremost, a contractor must be "sponsored" by an established and trusted government contractor.[20] That is, a private contractor must rely on a previously cleared private contractor to vouch for its reliability. In addition, the contractor must appoint one or more U.S. citizens to serve as Facility Security Officers (FSO).[21] FSOs are responsible for supervising and directing "security measures necessary for implementing applicable requirements of [the NISPOM] and related Federal requirements for classified information."[22] In essence, an FSO

proc_faqs.html (last visited May 28, 2015).

16. Exec. Order No. 11652, 37 Fed. Reg. 5209, at § 1(A) (Mar. 8, 1972).

17. *Id.*

18. *See id.* § 1(B).

19. *See* Department of Defense Directive 5200.1-R § 1-503 (1978).

20. Department of Defense Directive, *supra* note 8, § 2-102.

21. *See id.* § 1-201.

22. *See id.* § 1-201. FSOs are an integral part of implementing "FOCI mitigation agreement." *See Facility Security Officers*, DEF. SEC. SERV., http://www.dss.mil/isp/fac_clear/per_sec_clear_proc_faqs.html (last visited May 28, 2015).

serves as the gateway through which a contractor accesses and uses classified information, including controlling and reporting which of the contractor's employees require security clearance to properly carry out their responsibilities.[23]

Once cleared, contractors may only seek security clearance for those employees that require access to classified information to perform their duties related to the fulfillment of a classified contract." [24] The FSO of the cleared contractor must seek clearance for an employee from the Cognizant Security Agency (CSA), which is one of the federal agencies that possess the classified information.[25] The scope of an employee's security clearance is limited to the extent it is necessary to work on the specific project to which he or she is assigned.[26] Therefore, an employee who is cleared and currently working on one project may not begin working on a second classified project without further clearance, even though the employee's contractor is completing both projects.

The government imposes a number of obligations on employees that receive security clearance. To start, each employee has an independent legal duty to withhold the classified information from those who do not have security clearance. Any willful disclosure of the information could result in criminal fines and up to ten years imprisonment.[27] Moreover, each employee must sign a non-disclosure form prior to the government granting clearance,[28] which potentially subjects employees to additional liability. In addition, cleared employees have an affirmative duty to report any security discrepancies not only to their employer, but also directly to the federal agency with whom their employer is contracted.[29]

Because access to classified information by foreign contractors seemingly implicates a greater risk to national security than U.S. contractors' access, the NISPOM sets out additional hurdles which

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23. Only employees that are absolutely necessary to carry out the functions as a government contractor must receive security clearance. DEP'T OF DEF. DIRECTIVE, *supra* note 8, at § 2-200. This can require the exclusion of the contractor's board of directors or senior officers from classified information, see *id.* at § 2-104, -106, implicating potential conflicts with director duties. Even after a contractor obtains clearance, it is subject to continued evaluation, including constant reporting requirements as well as ongoing training. *See* DEP'T OF DEF. DIRECTIVE, *supra* note 8, at §§ 2-300–2-304, 3-100–3-108.

24. *See id.* at § 2-200(a).

25. *See id.* at § 2-200(b). The CSA can be one of four federal agencies: the Department of Defense, Department of Energy, the Nuclear Regulatory Commission, or the Director of National Intelligence. *See id.* at § 1-104.

26. *See id.* at § 2-200(d). The NISPOM explicitly prohibits disclosing export-control information and technology to foreign persons, even if they are employees. *See id.* at § 5-508.

27. *See* 18 U.S.C. §§ 793(d), 798 (2006).

28. *See* CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT (2013), *available at* http://www.archives.gov/isoo/security-forms/sf312.pdf (standard form 312).

29. *See* DEP'T OF DEF. DIRECTIVE, *supra* note 8, at § 1-207.

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foreign organizations must pass before gaining access to classified information. While the NISPOM emphasizes the importance of foreign investment in the United States, such investment need be "consistent with the national security interests of the United States."[30] Chapter 2, Section 3 of the NISPOM is devoted to rules and regulations governing companies that are under Foreign Ownership, Control, or Influence (FOCI).[31] A company will be deemed to be under FOCI whenever "foreign interest has the power, direct or indirect . . . to direct or decide matters affecting the management or operations of that company in a manner which may result in unauthorized access to classified information or may adversely affect the performance of classified contracts."[32] A company under FOCI is presumptively ineligible for clearance, "unless and until security measures have been put in place to negate or mitigate FOCI."[33]

Ultimately, the decision to label a company as "under FOCI," whether or not to grant it clearance, as well as to determine what other security measures are to be taken is for the Department of Defense to decide.[34] The NISPOM lists several factors that are relevant for making that decision, including the history of economic and government espionage against the government and the type of information the company has access to.[35] Further, NISPOM establishes procedures for companies under FOCI to create Voting Trust Agreements and Proxy Agreements, "whereby the foreign owner relinquishes most rights associated with ownership of the company to cleared U.S. citizens approved by the U.S. Government."[36]

2. Current Application of the NISP Regulations

The effectiveness of the NISP regulations has come under public scrutiny recently. Due to several high-profile scandals, many question whether the current regulations are sufficient to protect classified government information. Interestingly, these current failures implicate

30. *Id.* at § 2-300(a).

31. *Id.* For more information defining FOCI, see Melvin Rishe, *Foreign Ownership, Control, or Influence: The Implications for United States Companies Performing Defense Contracts*, 20 PUB. CONT. L.J. 143, 162-64 (1991).

32. DEP'T OF DEF. DIRECTIVE, *supra* note 8, at § 2-300(b).

33. *Id.* at § 2-300(c).

34. The Defense Security Service offers a number of suggestions a FOCI can take to mitigate the dangers of foreign control. They even offer templates for drafting a Board Resolution or a Special Security Agreement. *See* DEFENSE SECURITY SERVICE, *FOCI Mitigation Instruments* (last visited Nov. 20, 2013), *available at* http://www.dss.mil/isp/foci/foci_mitigation.html.

35. Department of Defense Directive, *supra* note 8 § 2-301.

36. *Id.* § 2-303(b).

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domestic national security breaches rather than any international ones. The most notable failure relates to the recent information leak by Edward Snowden. The lack of oversight and control brought to light several system-wide deficiencies in protecting classified information.

Edward Snowden was a high-school dropout who was able to secure a job paying $122,000 annually with Booz-Allen-Hamilton (BAH), one of the largest private government contractors, and gain top secret security clearance in the process.[37] After working for less than three months, Snowden boarded a plane to Hong Kong and leaked top secret information to U.S., British, and German press.[38] The world now knows that BAH never conducted a criminal background check on Snowden and hired him despite discrepancies on his resume.[39] In addition, the largest provider of federal background checks, United States Investigations Services (USIS), is currently under federal investigation for failing to conduct proper background checks.[40]

Similar criticism arose from the hiring of Aaron Alexis, the IT-contractor responsible for the mass killing at the Washington Navy Yard in September 2013. Like Snowden, Alexis was an IT employer for a government subcontractor who was granted secret clearance. After being discharged from the U.S. Navy and working a number of odd jobs, Alexis went on to work at The Experts, a subcontractor of Hewlett-Packard (H-P) to "work on a project at the Navy facility."[41] Less than three months after starting his job, Alexis arrived at work and killed 12 people.

Originally from New York City and later from Fort Worth, Texas, investigators were only able to unearth limited biographical details about Alexis.[42] The little information that was found about Alexis revealed that he did not have a college degree and was arrested on two

37. *See* Dennis M. Crowley, *Alexis and Snowden: Both IT Contractors, No College—But Security Clearances*, CNSNEWS.COM (Sep. 17, 2013), http://cnsnews.com/news/article/dennis-m-crowley/alexis-and-snowden-both-it-contractors-no-college-security-clearances.

38. *Id.*

39. *See* Mark Hosenball, *Exclusive: NSA Contractor Hired Snowden Despite Concerns About Resume Discrepancies*, REUTERS (June 20, 2013), http://www.reuters.com/article/2013/06/21/us-usa-security-snowden-idUSBRE95K01J20130621.

40. *Id.*

41. *See* Nathan Koppel & Rebecca Ballhaus, *Background Details on Suspected Shooter Aaron Alexis*, WALL STREET J. BLOGS (Sept. 16, 2013), http://blogs.wsj.com/washwire/2013/09/16/background-details-on-supectedshooter-aaron-alexis/; *Aaron Alexis Biographical Information*, CBS DC (Sept. 17, 2013), http://washington.cbslocal.com/2013/09/17/aaron-alexis-biographical-information/.

42. *See Navy Yard Shooting Suspect Aaron Alexis: Scant Biographical Details Emerge*, HUFFINGTON POST (Sept. 17, 2013), http://www.huffingtonpost.com/2013/09/16/navy-yard-shooting-suspect_n_3936876.html ("The 34-year-old left a scant social media footprint, though that could have been by design.").

earlier occasions for gun-related offenses.[43] And although Alexis was involved in work-related discipline a few days prior to the shooting, there is no indication that the discipline was related to the shooting. Rather, all reports indicate that Alexis was suffering from mental or emotional distress, as evidence appeared to indicate that "[Alexis] thought he was being controlled by extremely low frequency electromagnetic waves."[44]

Setting recent criticisms aside, the NISP's success with respect to preventing foreign access to government information is difficult to measure. According to a 2012 report, the number of individuals who experienced significant delays in receiving security clearance due to "foreign influence" or "questions regarding their allegiance to the U.S." remained rather small.[45] That being said, these statistics can be misleading as they only represent a small portion of those individuals seeking clearance. Moreover, the statistics are difficult to interpret considering that the single greatest reason for delay was based on multiple issues instead of one in particular.[46]

B. Defense Production Act of 1950 and Its Amendments

1. Current Law

As more foreign nations rose to global prominence in the 1970s, Congress became increasingly concerned with the relative lack of power the U.S. government had to review foreign transactions within the United States. In response, President Gerald Ford created the Committee on Foreign Investment in the United States (CFIUS) as a way to review foreign transactions and detect those that may be harmful to U.S. interests.[47] At the time it was created, CFIUS was comprised of

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43. *See* Dennis M. Crowley, *Alexis and Snowden: Both IT Contractors, No College—But Security Clearances*, CNS NEWS (Sep. 17, 2013), http://www.cnsnews.com/news/article/dennis-m-crowley/alexis-and-snowden-both-it-contractors-no-college-security-clearances.

44. *See* Ann E. Marimow & Peter Hermann, *Navy Yard Shooter Aaron Alexis Driven by Delusions*, WASH. POST (Sept. 25, 2013), http://www.washingtonpost.com/local/crime/fbi-police-detail-shooting-navy-yard-shooting/2013/09/25/ee321abe-2600-11e3-b3e9-d97fb087acd6_story.html.

45. OFFICE OF THE DIRE. OF NAT'L INTELLIGENCE, 2012 REPORT ON SECURITY CLEARANCE DETERMINATIONS 10 (2013), *available at* http://www.fas.org/sgp/othergov/intel/clear-2012.pdf.

46. *Id.*

47. *See* Exec. Order No. 11858, 40 Fed. Reg. 20263 (May 1, 1975) ("The Committee shall have primary continuing responsibility within the Executive Branch for monitoring the impact of foreign investment in the United States."). While the NISP attempts to protect government secrets from coming under foreign control, the DPA and its progeny are largely concerned with foreign entities gaining control over strategic U.S. interests, whether it be resources, technology, or land within the U.S. Section 2-310 of NISPOM grants review authority over mergers and acquisitions to CFIUS. *See* DEP'T OF DEF. DIRECTIVE, *supra* note 8, at § 2-310.

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six representatives from different Executive Branch agencies, including the Departments of Defense, State, Treasury, and Commerce.[48] However, CFIUS had no authoritative power to prevent or block foreign transactions that would have a significantly detrimental impact on the national security of the United States. Rather, the Committee merely "served the limited role to alert the government of potential problems with certain transactions."[49]

After more than a decade of discretionary authority, Congress passed the Omnibus Trade and Competitive Act of 1988.[50] The Act served as a comprehensive reform of foreign policy and expanded the executive branch's power to oversee foreign involvement in U.S. commerce. Specifically, the Act amended § 721 of the Defense Production Act (DPA),[51] transforming CFIUS's role from advisory to authoritative. Under the new law, commonly referred to as the Exon-Florio Amendment, CFIUS had the power not only to investigate foreign investment, but "to block certain mergers or acquisitions for national security reasons."[52]

Even under the Exon-Florio Amendment, though, parties to a transaction were not required to divulge an upcoming merger or acquisition to CFIUS. Instead, CFIUS relies on the voluntary disclosure of transactions that may implicate national security concerns. Of course, parties to such transactions have an incentive to voluntarily disclose transactions because the President could order a post-hoc divestiture of the transaction if CFIUS discovers any national security concerns.[53]

Upon notification of an upcoming transaction, each member of

48. *Id.* at § 1(a). CFIUS has expanded a number of times over the years and it is currently comprised of 16 members, including the heads of nine executive agencies, as well as five additional agency representatives and two non-voting members (Director of National Intelligence and the Secretary of Labor). *See Composition of CFIUS*, DEPT. OF TREASURY, http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx (last updated Dec. 1, 2010). Note that the heads of the Executive agencies are now required to serve on CFIUS rather than designees of each respective agency. *See* Exec. Order No. 12661, 54 Fed. Reg. 779 (Dec. 27, 1988).

49. Maira Goes de Moraes Gavioli, *National Security or Xenophobia: The Impact of the Foreign Investment and National Security Act ("FINSA") in Foreign Investment in the U.S.*, 2 WM. MITCHELL L. RAZA J. 1, 6 (2011).

50. Pub. L. 100-418, 102 Stat. 1107 (Aug. 23, 1988).

51. *See* 50 App. U.S.C. § 2170 (2013). The DPA was originally enacted in the wake of the Korean War and the fear of spreading Communism. Under the Act, Congress granted the President "complete power to regulate every phase of industry and commerce, through the authority to allocate materials and facilities." Manly Fleischmann, *The Mobilization Program and the Public Interest*, 100 U. PA. L. REV. 483, 484 (1952). At the time, the DPA was considered a broad and sweeping grant of power to the Executive Branch.

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

53. *See* 50 App. U.S.C. § 2170 (d)(3) ("The President may direct the Attorney General to seek appropriate relief, including divestment relief, in the district courts of the United States in order to implement and enforce this section.").

CFIUS conducts its own analysis of the transaction to determine national security risks within their respective agencies.[54] If each member initially concludes that the transaction is benign, CFIUS conducts no investigation and the transaction may proceed as planned. However, if a national security concern is implicated, CFIUS has an additional 45 days to conduct an investigation to determine whether the transaction could substantially impact national security.[55] Once presented with the investigatory findings, the President has an additional 15 days to determine whether that the transaction would "threaten to impair the national security."[56] If the President determines that the transaction would impair national security, then the transaction could be prevented. Absent such a find, the transaction may proceed.

By many accounts, the immediate impact of Exon-Florio on foreign transactions was marginal. Although Exon-Florio significantly increased the number of voluntary notifications that CFIUS received,[57] few notifications ended in actual investigations. From 1988 to 1994, CFIUS investigated only 15 of the 918 transactions to which they were notified. Further, the President ultimately blocked only one of those.[58] Perhaps motivated by the paucity of investigations, as well as several failed foreign transactions, Congress further amended section 721 of the DPA.

Rather than allowing CFIUS to conduct investigations at its discretion, the Byrd Amendment, enacted in 2000, mandated investigations in certain circumstances. Ultimately, the Byrd Amendment required CFIUS to conduct an investigation of any covered transaction that involved a foreign-controlled entity seeking to acquire a U.S. company which "could impair national security."[59]

Congress made its most recent changes to CFIUS review procedures in 2007. The Foreign Investment and National Security Act of 2007 (FINSA) was passed after public outcry over the Dubai Ports World purchase of P&O North America, "a company running commercial operations at five major U.S. port facilities and involved in more than a

54. *See id.*

55. *Id*.

56. *Id.*

57. *See* U.S. GEN. ACCOUNTING OFFICE., FOREIGN INVESTMENT: IMPLEMENTATION OF EXON-FLORIO AND RELATED AMENDMENTS 4 (1995), *available at* http://www.gao.gov/archive/1996/ns96012.pdf.

58. *Id.* In 1990, President Bush ordered Catic, "a Chinese agency that exports military and civilian planes, to divest itself of Mamco," an aerospace supplier based in Seattle. *See* Harriet King, *Chinese Ends Silence on Deal U.S. Rescinded*, N.Y. TIMES (Feb. 20, 1990), http://www.nytimes.com/1990/02/20/business/china-ends-silence-on-deal-us-rescinded.html.

59. *See* 50 App. U.S.C. § 2170(b)(2)(B).

dozen others."[60] FINSA further expanded CFIUS's review and investigatory power by allowing the Committee to consider a number of new factors when determining whether a particular covered transaction poses a threat to national security. Such factors include the impact the transaction will have on critical infrastructure, the foreign entities cooperation with U.S. treaties and nonproliferation efforts, and the United States' long-term energy independence.[61] These new factors ultimately focus less on issues that directly implicate national security, and instead focus on issues that can indirectly impact national security.

2. Contemporary Examples of CFIUS's Operation

The most recent amendments of the CFIUS review process have arguably had a significant impact on mergers and foreign investment within the U.S. While the impact cannot be traced to any single decision or review by CFIUS, the threat of action has served as a powerful deterrent to foreign corporations seeking to invest in the U.S.

In the summer of 2005, China's state-owned oil company, China National Offshore Oil Corporation (CNOOC), made an unsolicited bid to acquire Unocal, an American oil producer for $18.5 billion.[62] CNOOC's bid was the highest that Unocal received, topping Chevron's already-accepted offer of $16.5 billion.[63] But the Chinese company's bid came at a time of significant economic tension between China and the U.S., particularity about the artificial devaluation of China's currency, as well as the unfair disparity between the two countries' trade laws. CNOOC's attempt to purchase a century-old U.S. company was the proverbial straw that broke the camel's back. Despite testimony warning of "isolationist trade policies,"[64] a number of congressmen

60. *See* Jonathan C. Stagg, *Scrutinizing Foreign Investment: How Much Congressional Involvement Is Too Much?*, 93 IOWA L. REV. 325, 344 (2007). For more information surrounding the public outcry which led to the passage of FINSA, see *id.*; Greg Hitt, *Lawmakers Keep Up Pressure on Dubai Ports Firm*, WALL ST. J., Mar. 16, 2006, at A4.

61. *Compare* 50 App. U.S.C. § 2170 (2006) *with* 50 App. U.S.C. § 2170 (2013).

62. Jonathan Weisman & Peter S. Goodman, *China's Oil Bid Riles Congress*, WASHINGTON POST (June 24, 2005), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/06/23/AR2005062302065.html.

63. *See* David Barboza & Andrew Ross Sorkin, *Chinese Company Drops Bid to Buy U.S. Oil Concern*, N.Y. TIMES (Aug. 3, 2005), http://www.nytimes.com/2005/08/03/business/worldbusiness/03unocal.html?pagewanted=all&_r=1&.

64. *See* THEO S. EICHER ET AL., INTERNATIONAL ECONOMICS 429 (7th ed. 2009) (statement by John Snow, Secretary of the Treasury); *see also U.S. – China Economic Relations: Hearing Before S. Comm. on Fin.*, 109th Cong. (June 23, 2005) (statement of Sean Maloney, Executive Vice President, Intel Corporation, on behalf of the U.S. Chambers of Commerce) ("The U.S. and China must remain committed to resolving issue at hand without resorting to measures that will negatively impact workers and industries on either side of the Pacific.").

proffered legislative solutions to CNOOC's bid to acquire Unocal.[65] Perhaps as a result of the tumultuous economic climate, those solutions were more punitive than responsive, ranging from increased tariffs on Chinese exports to new penalties for intellectual property violations by China.[66]

Many in Congress claimed that a Chinese corporation's acquisition of a U.S. oil company posed a significant risk to a strategic asset that was vital to U.S. interest.[67] In response, Congress "demanded an administration review of the bid, required under the DPA, to determine potential economic and security risks."[68] Additionally, as a symbolic gesture of protest, the House of Representatives passed a non-binding resolution stating that CNOOC's acquisition of Unocal "would threaten to impair the national security of the United States."[69]

During the course of Congress's recalcitrance, CNOOC continuously insisted on a national security review by CFIUS.[70] Despite CNOOC's proactive commitment to follow all procedures, Congress amended the Energy Policy Act of 2005 to include a one-time study of China's energy requirements and its future impact on the United States.[71] The amendment was far from benign, and prevented CFIUS from reviewing any Chinese corporation's acquisition of a U.S. company until it had the opportunity to review the report.[72] Effectively, the amendment stalled CFIUS's review of the transaction for 141 days, an additional burden that CNOOC could not surmount. Due to what CNOOC viewed as "unprecedented political opposition" to its proposed transaction, including attempts "to replace or amend the CFIUS process that has been successfully in operation for almost two decades," CNOOC withdrew its bid amid the overwhelming political backlash.[73]

65. Weisman & Goodman, *supra* note 62.

66. *See id.*; Jad Mouawad, *Congress Calls for a Review of the Chinese Bid for Unocal*, N.Y. TIMES (July 27, 2005), http://www.nytimes.com/2005/07/27/business/congress-calls-for-a-review-of-the-chinese-bid-for-unocal.html (noting Congress' consideration of an energy bill that would delay CNOOC's takeover by several months).

67. *See id*. (quoting Senator Byron L. Dorgan, member of the Senate's energy committee, as saying the CNOOC takeover of Unocal poses "a fairly significant issue and the fact is, we should deal with this in a manner that reflects our national interest").

68. Weisman & Goodman, *supra* note 62.

69. H. R. Res. 344, 109 Cong. (June 30, 2005).

70. *See* Dennis K. Berman, *U.S. Seems Wary of Giving CNOOC Fast Review of Bid*, WALL ST. J. (June 28, 2005), http://online.wsj.com/news/articles/SB111988482359270487; CNOOC Press Release, CNOOC Limited to Withdraw UNOCAL Bid (Aug. 2, 2005) (on file with author) ("CNOCC initiated a voluntary filing with CFIUS, and proactively committed to take actions with respect to Unocal's U.S. assets as necessary to satisfy CFIUS findings.") [hereinafter CNOOC Press Release].

71. *See* Energy Policy Act of 2005 § 1837(a), Pub. L. No. 109-58, 119 Stat. 594 (2005); GARY CLYDE HUFBAUER, ET AL., US-CHINA TRADE DISPUTES: RISING TIDE, RISING STAKES 48 (2006).

72. *See* Energy Policy Act of 2005 § 1837(c).

73. *See* CNOOC Press Release, *supra* note 70. Although CNOOC was seemingly willing to

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A more recent example that directly involved CFIUS review and ultimately concluded in an order of divestiture occurred in September 2012. Sany Group, a Chinese investment company acquired a wind farm in Oregon through its subsidiary, Ralls Corporation. Ralls purchased the wind farm in March 2012, but failed to report the acquisition to CFIUS until after the completion of the acquisition.[74] When CFIUS members discovered the acquisition in June 2012, they contacted Ralls and asked them to voluntarily submit to a retroactive review of their acquisition of the wind farm.[75] After an initial review, CFIUS requested that Ralls cease all activity on the wind farm so that the Committee could complete a full investigation.[76] The request was based on the U.S. Navy's objection that the wind farm's close proximity to a government training facility posed a significant risk to national security.[77] Upon the completion of the investigation, CFIUS recommended to the President that Ralls divest itself of the wind farm.[78] For the first time in 22 years, the President ordered a complete divestiture.[79]

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raise their bid price to $20 billion, CNOOC believed that their acquisition would not be approved no matter what price they offered. *See id.*

74. *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, 926 F. Supp. 2d 71, 77–79 (D.D.C. 2013). As discussed above, reporting to CFIUS is on a voluntary basis. Failure to do so does not present any direct consequences. As occurred here, however, an adverse finding by CFIUS can result in an order of divestiture from the President.

75. *See* JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 10 (2014).

76. *See id.*

77. *See id.*; Helene Cooper, *Obama Orders Chinese Company to End Investment at Sites Near Drone Base*, N.Y. TIMES, Sept. 29, 2012, at A16.

78. *See* Cooper, *supra* note 77.

79. *See* Order of September 28, 2012, *Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation*, 77 Fed. Reg. 60281 (Oct. 3, 2012). Ralls Corp. challenged the President's order contending, among other things, that Exon-Florio and its progeny do not give the President the authority to order divestment *after* the completion of a covered transaction. *See Ralls Corp.*, 926 F. Supp. at 88 ("So plaintiff's entire *ultra vires* claim is premised upon the notion that the only thing the statute permits the President to do is to suspend or prohibit a transaction."). Initially, the district court allowed Ralls Corp. to continue with its due process challenging the President's ability to deprive Ralls of property without opportunity to be heard, while dismissing the remainder of Ralls Corp.'s other claims based on the President's broad authority to not only suspend or prohibit transactions but also to order divestiture after the fact. *See id.* at 99-100. In a subsequent order, however, the district court dismissed Rall's remaining due process claim, holding that the President's order of divestiture did not deprive Ralls of a constitutionally protected property interest because Ralls "voluntarily acquired those state property rights subject to the known risk of a Presidential veto." *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, 987 F. Supp. 2d 18, 27 (D.D.C. 2013). In an unprecedented ruling, the Court of Appeals for the District of Columbia held that President's order deprived Ralls Corp. of a protected property interest without due process of law, and remanded the case to the district court to provide Ralls Corp. with the requisite process, "which should include access to the unclassified evidence on which the President relied and an opportunity to respond thereto." *See Ralls Corporation v. Comm. on Foreign Investment in the United States*, 758 F.3d 296, 318-321, 325 (D.C. Cir. 2014).

C. *Other Acts Restricting Foreign Investment*

In addition to the statutes and regulations monitoring and restricting foreign investment in the U.S., there are a number of federal laws that completely prohibit foreign ownership within specific industries. These categorical bans generally have a narrow focus based on a U.S. national security interest.

1. Cabotage

Cabotage is the "the transport of goods or passengers from one port or place to another in the same country."[80] For national security reasons, the U.S. has cabotage laws that prevent foreign companies from owning or operating companies that transport goods or persons from one U.S. destination to another. These prohibitions cover transportation by both sea and air.

The Jones Act requires all vessels transporting goods by waterway within the U.S. to be owned and operated by U.S. companies, manned by U.S. citizens, and built and repaired in the U.S.[81] Enacted in 1920, the Jones Act was a product of World War I and resolved two standing issues Congress faced at the time. First, by requiring all domestic ships to be U.S.-owned, the government created a fleet "capable of serving as a naval and military auxiliary in time of war and national emergency."[82] Second, at the end of World War I, the U.S. government was in possession of more than 1,750 ships that they had either built or confiscated for the war effort. The Jones Act created a market demand for U.S. ships to serve the domestic economy.[83] Since its passage, the Jones Act has been amended several times, sometimes to expand its scope and other times to create exceptions to its application.[84] In practice, the Jones Act has effectively insulated a $40-billion industry that employs 150,000 U.S. citizens from foreign competitors.[85]

In addition to controlling the waterways, the U.S. has enforced cabotage laws for air travel. The Federal Aviation Act was enacted in 1958 to "to provide for the regulation and promotion of civil aviation in

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80. BLACK'S LAW DICTIONARY (10th ed. 2014).

81. *See* 46 U.S.C. § 50101(a) (2006); *see also* Wakil Oyeleru Oyedemi, *Cabotage Regulations and the Challenges of Outer Continental Shelf Development in the United States*, 34 HOUS. J. INT'L L. 607, 617 (2012).

82. 46 U.S.C. § 50101(a)(2).

83. *See* Oyedemi, *supra* note 81, at 616.

84. For a in depth discussion of the Jones Act, see generally C. Todd Jones, *The Practical Effects on Labor of Repealing American Cabotage Laws*, 22 TRANSP. L.J. 403, 406-12 (1995).

85. *See* MARITIME ADMIN., DEPT. OF TRANS., U.S. CABOTAGE LAWS (2005), *available at* http://www.marad.dot.gov/documents/CabotageLaws.pdf.

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such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft, and for other purposes."[86] To accomplish these goals, the U.S. requires all air carriers to be owned and operated by U.S. citizens,[87] with "citizens of the U.S." being defined as "an individual who is a citizen of the United States," a partnership comprised entirely of U.S. citizens, or a U.S. corporation.[88] In addition, the corporation's president, at least two-thirds of its board of directors, and at least 75 percent of its voting interest all must be U.S. citizens.[89]

When compared to the cabotage laws governing U.S. waterways, the air prohibitions are not nearly as stringent. First, the air prohibition allows foreign corporations to own up to a 25 percent interest in air carriers. Presumably, this means that an amalgam of foreign companies could own up to 25 percent of Delta Airlines' stock, for example, whereas waterway carriers must be fully owned and operated by U.S. citizens. Second, the Jones Act forbids foreign corporations to own or operate *any* transportation between two U.S. ports, even if the ship makes an international stop along the way. Foreign airlines, however, "could carry the passenger from [Los Angeles] to New York if the passenger had a through Air France ticket to Paris and, following a stopover in New York, boarded another Air France flight to Paris."[90]

2. Natural Resources

Until 1920, the U.S. government authorized citizens to claim public lands in the west for purposes of prospecting oil.[91] However, in the midst of the oil rushes at the turn of the century, Congress and the President feared that oil prospecting would envelop all public lands. With the goal of preserving at least some public lands from private claims, Congress enacted the Mineral Leasing Act of 1920, which restricted millions of acres of public land from any further private claim related to oil.[92] Today, the General Mining Act of 1872 still allows

86. *See* Federal Aviation Act of 1958, P.L. 85-726, 72 Stat. 731 (codified as amended in scattered sections of 49 U.S.C.) (1958). In 1994, Congress repealed the Federal Aviation Act and recodified existing legislation relating to transportation in Title 49. *See* Revision of Title 49, U.S.CA., "Transportation," Pub. L. 103-272, 108 Stat. 745 (July 5, 1994).

87. *See* 49 U.S.C. § 40102(a)(2) (2006).

88. *See id.* § 40102(a)(15).

89. *See id.*

90. *See* U.S. DEPT. OF TRANS., CABOTAGE DEFINITION AND STANDARDS FOR EMERGENCY EXEMPTION (2011), *available at* http://www.doi.gov/oia/igia/2011/upload/20-AviationCabotageDOT-2.pdf.

91. *See* General Mining Act of 1872, 17 Stat. 91 (codified as amended in scattered sections of 30 U.S.C.).

92. 41 Stat. 437 (codified as amended in scattered sections of 30 U.S.C.).

private citizens to purchase public land from the government for specific types of prospecting,[93] but the Mineral Leasing Act of 1920 governs the disposal of land with respect to prospecting for "coal, phosphate, sodium, potassium, oil, oil shale, gilsonite (including all vein-type solid hydrocarbons), or gas."[94]

Under both acts, only U.S. citizens may mine for minerals or drill for oil. However, under the General Mining Act, foreign companies may purchase land from the U.S. government so long as they have a U.S. subsidiary incorporated under the laws of the U.S.[95] This is not the case for oil and gas. Under the Mineral Leasing Act, citizens of foreign countries may not lease public land from the government for purposes of prospecting for oil or gas unless that citizen's country of origin grants reciprocal rights to U.S. citizens.[96]

3. Export Control

The U.S. has always considered export control a vital part of national security. Throughout most of U.S. history, though, the government only sought to control exports during times of war or other crises.[97] At the start of the twentieth century, for example, the U.S. relied on the Trading with the Enemies Act of 1917 (TWEA), which prohibited U.S. citizens from trading directly or indirectly with enemies of the U.S. during times of war.[98]

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93. *See* 30 U.S.C. § 22 (2006). The purchase of land for prospecting is quite controversial in itself. Since the General Mining Act was enacted, the price the government charged per acre has not changed and citizens can still purchase public land from the government at the price of five dollars per acre. *See id*. § 29. Each attempt to reform the Act has failed. 145 Cong. Rec. E67-01 (daily ed. Jan. 19, 1999) (statement of Cong. Nick J. Rahill II) ("The bill we are introducing today is the very same which passed the House of Representatives by a three-to-one margin during the 103rd Congress[, but failed to pass the Senate]. Reintroduced during the 104th and 105th Congresses, it was held hostage by the Resources Committee."); *see also Unnecessary Business Subsidies: Hearing Before the H. Comm. on the Budget*, 106th Cong. 173 (1999) (testimony of Ralph Nader) ("No discussion of government giveaways can fail to take note of the absurd Mining Act of 1872. . . . The reason is simple: the Act allows companies to purchase Federal land for $5 an acre or less and to mine valuable mineral from Federal land without paying a cent in royalties.").

94. 30 U.S.C. § 181.

95. *See id.* § 24 ("Proof of citizenship . . . may consist, . . . in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.").

96. *See id.* § 181.

97. *See* Harold J. Berman & John R. Garson, *United States Export Controls- Past, Present, and Future*, 67 COLUM. L. REV. 791, 791 (1967) ("Traditionally, the United States Government has restricted exports only in time of war or in special emergency situations.").

98. *See* 50 App. U.S.C. § 1-39, 41, 44 (2013). Today, the TWEA has very little practical impact as it only lists Cuba as an enemy of the U.S. And while President Obama renewed TWEA restrictions against Cuba in 2014, *see Presidential Determination – Trading with the Enemy Act*, WHITEHOUSE.GOV, https://www.whitehouse.gov/the-press-office/2014/09/05/presidential-determination

Around the start of Cold War, however, Congress enacted the Export Control Act of 1949 (ECA),[99] which "was a formal recognition of the new security threat and of the need for an extensive peacetime export control system."[100] The reasons for imposing the first ever peacetime export controls were threefold: (1) to prevent the export of scarce goods that could impact the U.S; (2) to promote foreign policy goals, including "regional stability, human rights, anti-terrorism, missile technology, and chemical and biological warfare;" and (3) to protect national security.[101]

Under the ECA, the President was empowered to "'prohibit or curtail the exportation from the United States . . . of any articles . . . except under such rules as he shall prescribe.'"[102] This broad grant of power was initially intended as a short-term solution to, among other things, supply shortages after the war;[103] however, the ECA was renewed on several occasions thereafter.[104] Ultimately, the President exercised near complete authority to control most of foreign trade for 20 years. Not only did the President have the power to invoke the TWEA under the ECA,[105] but the Departments of Commerce, State, and Treasury each had a hand in implementing and drafting regulations that defined the boundaries of the Act.[106]

In 1969, Congress replaced the ECA and adopted the Export Administration Act (EAA),[107] representing a major shift in policy towards export controls. Though the ECA represented something of a presumption against trade, the EAA actively encouraged it, "unless it was detrimental to the national interest, national security, or domestic

-trading-enemy-act (last visited June 16, 2015), the recent relaxation of sanctions against Cuba raises the possibility that Cuba will also be de-designated an enemy of the United States. Ultimately, the President has the power to control which country is designated an "enemy." *See* 50 App. U.S.C. § 2 (2013).

99. Pub. L. No. 81-11, 63 Stat. 7 (1949).

100. IAN F. FERGUSSON, CONG. RESEARCH SERV., RL31832, THE EXPORT ADMINISTRATION ACT: EVOLUTION, PROVISIONS, AND DEBATE 2 (2009).

101. *Id*.

102. Paul H. Siverstone, *The Export Control Act of 1949:Extraterritorial Enforcement*, 107 U. PA. L. REV. 331, 332 (1959) (quoting Export Control Act of 1949 § 3(a), 63 Stat. 7 (1949)). Such broad power, however, was only "intended as a temporary measure that would give the president substantial powers to deal with the post-World War II security threat." *See* Matthew J. Peed, *Blacklisting As Foreign Policy: The Politics and Law of Listing Terror States*, 54 DUKE L.J. 1321, 1324 (2005).

103. *See* Berman & Garson, *supra* note 97, at 794–99 (recounting the history behind the passage of the Export Control Act and recounting the reasons given by Congress and the President for the need for peacetime export controls); Silverstone, *supra* note 102, at 332.

104. Berman & Garson, *supra* note 97, at 792 ("The Export Control Act was renewed in 1951, and again in 1953, 1956, 1958, 1960, 1962, and 1965.").

105. *See* 50 App. U.S.C. § 2 (2013); Berman & Garson, *supra* note 97, at 792.

106. *See* Berman & Garson, *supra* note 97, at 792–94 ("Probably no single piece of legislation gives more power to the President to control American commerce."); Silverstone, *supra* note 102, at 332–33.

107. Pub. L. 91-184, 83 Stat. 841 (codified as amended in scattered sections of 50 U.S.C.); *See* FERGUSSON *supra* note 100, at 2.

economy."[108] The law was largely rewritten in 1979, but the policy of encouraging trade remained the same. The 1979 version "forms the basis of the export control system today."[109]

Export controls today operate along two axes: types of goods and categories of countries. At one extreme, the U.S. has prohibited U.S. companies from exporting nearly all goods to a small list of countries.[110] In the majority of cases, however, where certain types of goods can be exported largely depends on the relationship the U.S. has with each country.

With respect to national security, the Department of Commerce has designated specific countries to which U.S. companies are prohibited from exporting goods or technology, if the goods or technology significantly contribute to the country's military capabilities.[111] Regardless of whether a country appears on the designated list, though, U.S. companies must receive export licenses to export certain goods to any foreign country. The type of goods that require export licenses are listed on the Commercial Control List (CCL), and include exports that the Department of Commerce deem vital to the U.S. for "national security, foreign policy, and short-supply purposes."[112] These products range from nuclear materials and toxins to computers and electronics,[113] all of which the Department of Commerce has concluded could have a detrimental impact on the U.S. if they inadvertently ended up in the wrong hands.[114]

In addition, the Department of State administers the International Traffic in Arms Regulations (ITAR) pursuant to the Arms Export and

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108. Scott L. Eisenstein, *The Export Administration Act Comes Under Fire: Can We Balance National Security and an Expanding High Technology Market?*, 4 INT'L LEGAL PERSP. 73, 76 (1992).

109. *See* FERGUSSON *supra* note 100, at 2. The EAA officially expired in the early 1990's; however, each President since its expiration has extended the Act's efficacy under the International Emergency Economic Powers Act (IEEPA). *See, e.g.*, Exec. Order No. 13222, 67 Fed. Reg. 44,025 (Aug. 17, 2001). President Barack Obama has made several amendments to Exec. Order No. 13222. *See* Press Release, *Office of the Press Secretary, White House, Fact Sheet: Implementation of Export Control Reform* (Mar. 8, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/03/08/fact-sheet-implementation-export-control-reform.

110. Countries that have "repeatedly provided state support for acts of international terrorism" are designated as state sponsors of terrorism by the Department of State. *See* Meredith Rathbone et al., *Sanctions, Sanctions Everywhere: Forging A Path Through Complex Transnational Sanctions Laws*, 44 GEO. J. INT'L L. 1055, 1067 (2013) (citation omitted). The countries currently designated as state sponsors of terrorism are Iran, Sudan, and Syria. *See State Sponsors of Terrorism*, DEP'T OF STATE, http://www.state.gov/j/ct/list/c14151.htm (last visited May 28, 2015). Cuba was also designated a state sponsor of terrorism, but was recently removed in May 2015. Julie Hirschfeld Davis, *U.S. Removes Cuba from State-Sponsored Terrorism List*, N.Y. TIMES (May 29, 2015).

111. *See* 15 C.F.R. § 740.9(b)(1)(i) (2013). Countries currently on this list include Burma, People's Republic of China, and Iraq. For a complete list see 15 C.F.R. § 740 Supp. No. 1 (2015).

112. *See* FERGUSSON, *supra* note 100, at 10.

113. *See* 15 C.F.R. § 744.

114. *See* FERGUSSON, *supra* note 100, at 8.

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Control Act (AECA). The Regulations are intended to control the "sale, export, and re-transfer of defense services as an integral part of safeguarding U.S. national security and furthering U.S. foreign policy objectives."[115] Specifically, ITAR controls the export and import of defense-related articles and services that are designated on the United States Munitions List.[116] And unlike the flexible license-based system administered by the Department of Commerce, ITAR "allows for very few license exceptions, and requires licenses issued pursuant to the ITAR to include provisos as to the detail and extent of technical information that can be shared or exchanged with non-U.S. persons, irrespective of their nationality or domicile."[117]

* * *

The compendium of laws discussed above demonstrates both the depth and scope of the regulatory landscape controlling foreign investment in the U.S. Indeed, the laws and regulations touch upon every aspect of foreign investment affecting U.S. interests. More importantly, the description above reveals how complicated the laws and regulations are in this area, and how their current application sometimes leads to undesirable results.

III. CRITIQUE OF THE CURRENT LAWS

The myriad laws and regulations outlined in the previous section are open to a number of criticisms. In many ways, the laws are both over- and under-inclusive, leading to arbitrary application and unfair results. The following Part highlights several of these criticisms.

A. Arbitrary Application

The first and least justifiable characteristic of the current laws and regulations is their inconsistent application. Arbitrary application can result in uncertainty, which significantly impacts a company's ability to invest within a country.[118] In this case, the arbitrary application of

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115. U.S. DEPT. OF DEF., GETTING STARTED WITH DEFENSE TRADE (2012), *available at* http://www.pmddtc.state.gov/documents/ddtc_getting_started.pdf.

116. 22 C.F.R. § 121.1 (2013). A number of countries are subject to U.S. arms embargos. *See* 22 C.F.R. § 126.1(c).

117. Dara Panahy, Bijan Ganji, *Itar Reform: A Work in Progress*, AIR & SPACE LAW., Dec. 2013, at 7–8.

118. *See, e.g.*, Lynda L. Butler, *The Politics of Takings: Choosing the Appropriate Decisionmaker*, 38 WM. & MARY L. REV. 749, 765 (1997) (noting the deterrent impact of uncertainty on investment as it relates to takings law); Willard K. Tom & Alexis J. Gilman, *U.S. and E.C. Antitrust Approaches to Patent Uncertainty*, 34 LAW & POL'Y INT'L BUS. 859, 890 (2003) (noting deterrent impact of uncertainty on investment in research and development with respect to patent laws).

national security laws and regulations can create untenable uncertainty for foreign companies seeking to invest within the United States. After all, how can a foreign company accurately assess its chance of successfully acquiring a U.S. company when precedential examples fail to reach uniform results?

The Department of Transportation, for example, has strictly enforced cabotage laws. This is especially true for the requirement that air carriers be owned and operated by U.S. citizens. And even though the statute carved out an emergency exception,[119] that exception has been interpreted narrowly. For example, the Department of Transportation denied a request by a foreign carrier to fly stranded passengers in Puerto Rico because there were "a sufficient number of non-certified air carriers (air taxis) on Puerto Rico which could provide extra flights."[120]

Based on this historical application of law alone, foreign investors would sensibly avoid attempts to invest in air carriers.[121] However, the occasional circumvention of the law can create uncertainty. Virgin America, for instance, was granted a license to fly passengers and cargo within the U.S.[122] To do so, Virgin restructured its entire company to make Virgin America an independent subsidiary; but even then, the Department of Transportation contested Virgin America's application.[123] Only after 18 months of arduous negotiation and documented proof that Virgin America was indeed substantially controlled by U.S. investors did the Department of Transportation stipulate that Virgin America met the citizenship requirement.[124]

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119. Congress enacted the emergency exception in 1980. *See* International Air Transportation Competition Act § 13, Pub. L. 96-192, 94 Stat. 35 (Feb. 15, 1980), *repealed* Pub. L. 103-272, 108 Stat. 745 (July 5, 1994).

120. Howard E. Kass, *Cabotage and Control: Bringing 1938 U.S. Aviation Policy into the Jet Age*, 26 CASE W. RES. J. INT'L L. 143, 158 (1994).

121. A number of foreign carriers avoid the cabotage laws by purchasing ownership stakes in American air carriers below the statutory maximum of 25 percent. *See* Jeffrey Donner Brown, *Foreign Investment in U.S. Airlines: What Limits Should Be Placed on Foreign Ownership of U.S. Carriers?*, 41 SYRACUSE L. REV. 1269, 1270 (1990) (listing a number of foreign airlines that own or are in the process of acquiring "large stakes in U.S. carriers").

122. *See* Katherine Hunt, *Virgin America Receives Final OK From Transportation Dept.*, MARKET WATCH (May 18, 2007), http://www.marketwatch.com/story/virgin-america-receives-final-ok-from-transportation-dept. For nearly a decade, Virgin Atlantic Airways chairman Richard Branson argued against U.S. cabotage laws and sought to start a low-cost interstate airline as early as 1998. *See Virgin Stirs U.S. Cabotage Debate*, FLIGHTGLOBAL.COM (Nov. 1, 1998), http://www.flightglobal.com/news/articles/virgin-stirs-us-cabotage-debate-44421/.

123. *See* Mark J. Andrews et al., *International Transportation Law*, 42 INT'L LAW. 631, 649-50 (2008).

124. *See supra* note 87-89 and accompanying text; Andrews et al., *supra* note 123, at 650-51. As part of the agreement, Virgin America's CEO, Fred Reid, agreed to step down from his post based on the fact that Reid "might be beholden to foreign interests . . . because he was hired by British billionaire Richard Branson, a part owner of the airline," even though Reid worked in the airline industry for more than 25 years for Delta Airlines and Lufthansa. *See* Eric Young, *Virgin America CEO Reid Wins*

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Inconsistency can also be observed in the operation of CFIUS. As the gatekeeper to foreign investment in the United States, inconsistent decision making by CFIUS creates uncertainty in the global market. CFIUS's impact is felt both in its actual recommendations to the President, as well as its mere threat of action.[125] Indeed, foreign corporations have been surprised by the stiff resistance they have faced when attempting to acquire U.S. companies.[126] Even though foreign corporations should always be prepared to face regulatory hurdles when entering a foreign market, arbitrary results from the CFIUS review process indicate that no amount of preparation can lead to predictable results.

In contrast with CFIUS's stiff resistant to CNOOC's acquisition of Unocal, the Committee permitted ARMZ, a Russian state-owned company, to purchase a company that owns uranium mines in Wyoming.[127] The acquisition placed more than half of U.S. uranium output in the hands of a foreign country,[128] and helped ARMZ become one of the top five uranium miners in the world.[129] In another recent example, CFIUS approved Chinese company Shuanghui International Holding's purchase of Smithfield Foods, making Shuanghui the world's largest pork producer.[130]

Standing alone, neither of these approved transactions raises serious questions regarding the legitimacy of CFIUS's investigative role. But when considered in connection with other transactions, such as CNOOC's bid for Unocal, foreign companies face the impossible task of assessing whether their transactions will insight the scrutiny of CFIUS. After all, there is no apparent unifying principle or defined reasoning behind CFIUS's decisions.

Further uncertainty is implicated when considering the statement by Senator Debbie Stabenow, Chairman of the Senate's Agriculture Committee. Although Senator Stabenow did not consider Shuanghui's acquisition of Smithfield a significant threat to U.S. security interests, she expressed concern with foreign companies one day owning a

Reprieve, SAN FRAN. BUS. TIMES (Sept. 19, 2007), http://www.bizjournals.com/sanfrancisco/stories/2007/09/17/daily26.html.

125. *See infra* 62-73 and accompanying text.

126. *See, e.g.*, White, *infra* note 137 ("But the sources said CNOOC Chairman Fu Chengyu and other executives and directors were shocked by the intensity of the negative reaction from Congress and by signals that the administration did not want to decide whether to accept or reject CNOOC's bid.").

127. *See* Ed Crooks, *Russians to Gain U.S. Uranium Foothold*, FIN. TIMES (Dec. 5, 2010), http://www.ft.com/cms/s/0/220fb72a-00b0-11e0-aa29-00144feab49a.html#axzz2kknUWEKx.

128. *See id.*

129. *See AMRZ Takes Hold of Uranium One*, WORLD NUCLEAR NEWS (June 9, 2010), http://www.world-nuclear-news.org/C-ARMZ_takes_hold_of_Uranium_One-0906107.html

130. *See* Doug Palmer, *U.S. Approves Chinese Company's Purchase of Smithfield*, POLITICO (Sept. 9, 2013), http://www.politico.com/story/2013/09/us-china-smithfield-96399.html.

substantial portion of the U.S. food supply.[131] This suggests that subsequent foreign companies seeking to acquire agricultural businesses within the U.S. cannot rely on Shuanghui's purchase of Smithfield as precedent, as the future acquisition may finally trigger concern over the cumulative foreign investment in the U.S. food supply.

B. Political Motivation

Politically motivated actors play significant roles in almost all foreign investment decisions in the United States. CFIUS, for example, is comprised of Presidential-appointed cabinet officials.[132] Political motivation not only adds another layer of uncertainty to foreign companies' investment decisions, but it also creates an unfair and uncompetitive marketplace. CNOOC's failed acquisition of Unocal is a glaring example of political motivation in national security decisions related to foreign investment.

At the time of CNOOC's attempted acquisition of Unocal, Congress was in the midst of an ongoing battle with China over the appreciation of the Chinese yuan.[133] There was also growing resentment within the U.S. over the outsourcing of American jobs to China and other developing nations.[134] Although unrelated in fact, these overlapping issues between China and the U.S. ostensibly impacted the outcome of CNOOC's bid for Unocal. Thus, although CNOOC's interest in Unocal was purely economic,[135] these unrelated economic and political issues ostensibly impacted the outcome of CNOOC's bid for Unocal.

The party set to benefit most from CNOOC withdrawing its bid to acquire Unocal was Chevron, another corporation that was poised to acquire Unocal.[136] It may come as no surprise then that members of

131. *Id.* ("China or other countries [may] seek to purchase our largest poultry, or dairy, or corn producers next[.]").

132. *See supra* note 48–49.

133. *See* Peter S. Goodman, *China Resists U.S. Pressure On Textiles, Currency*, WASH. POST (May 28, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/05/27/AR2005052701347.html; *China's Yuan Under Fresh Pressure*, BBC NEWS (May 6, 2005), http://news.bbc.co.uk/2/hi/business/4521969.stm.

134. The resentment of U.S. job loss even caused CNOOC to pledge to protect substantially all U.S. jobs if it successfully acquired Unocal. *See* Loretta Ng & Wing-Gar Cheng, *CNOOC Pledges to Protect U.S. Jobs in Unocal Takeover*, BLOOMBERG (June 24, 2005), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=agGmCkuvR_1U&refer=asia.

135. *See Is CNOOC's Bid for Unocal a Threat to America?*, THE WARTON SCH., U. PENN. (Nov. 21, 2005), http://knowledge.wharton.upenn.edu/article/is-cnoocs-bid-for-unocal-a-threat-to-america/ (noting that CNOOC's interest in Unocal stemmed from Unocal's presence in Asia which would have made capitalizing on Unocal's assets easier for CNOOC than non-Asian purchasers).

136. *See* Barboza & Sorkin, *supra* note 63.

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Congress were heavily lobbied by Chevron at the time.[137] Indeed, Chevron is one of the largest corporate political contributors in the U.S., spending more than $4 million on campaign contributions and over $9.5 million on lobbying in 2012.[138] Ultimately, Chevron was able to acquire Unocal for $1.5 billion less than CNOOC was offering based primarily on accusations that CNOOC's acquisition of Unocal would monopolize the U.S. oil supply. In reality, however, U.S. interest in oil was largely secure as Unocal accounted for only 0.2 percent of global oil production and less than 1 percent of U.S. domestic consumption.[139]

Denying foreign investments like CNOOC's based on largely political reasons can also have more wide-reaching repercussions. Foreign relations with the acquiring company's home country could be negatively impacted. As noted above, the U.S. was attempting to convince China to appreciate the value of the yuan at the time of CNOOC's bid for Unocal.[140] By precluding a Chinese company from entering the U.S. market, negotiations with China's government over broader economic or social issues may be blunted. Further, China is an industrializing nation and stymieing one acquisition will not prevent Chinese companies from seeking natural resources elsewhere. Quite the contrary, by preventing China from acquiring U.S. oil companies, it increases "China's interest in making energy deals with nations that Washington considers dangerous rogue states, such as Iran and Sudan."[141] Indeed, Iran is currently the third largest supplier of crude oil to China.[142]

C. Privatization of National Security

Today, a number of industries related to national security have been privatized. In many ways, this could simply be a product of necessity. There are, after all, more than 480,000 government contractors and an estimated five million Americans with access to some classified

137. *See* Ben White, *Chinese Drop Bid to Buy U.S. Oil Firm*, WASH. POST (Aug. 3, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/08/02/AR2005080200404.html; *see also* Barboza & Sorkin, *supra* note 63 ("Of course, the day CNOOC announced its offer, the reaction began. Chevron's lobbyists worked their political base in California.").

138. *See Chevron*, OPENSECRETS.ORG, http://www.opensecrets.org/orgs/summary.php?id=D000000015 (last visited May 28, 2015).

139. *See* HUFBAUER ET AL., *supra* note 71, at 50–51.

140. *See supra* note 133 and accompanying text.

141. White, *supra* note 137.

142. *See* Randy Gener, *China and Iran Negotiate $20 Billion Deal Despite US Nuke-Related Sanctions*, JOURNALIST (Nov. 4, 2013), http://thejournalist.ie/international-news/china-and-iran-negotiate-deal/; Jason Rezaian, *Iran Looks to Oil to Ease the Pressure of Economic Sanctions*, THE GUARDIAN (Nov. 5, 2013), http://www.theguardian.com/world/2013/nov/05/iran-oil-tehran-energy-sanctions.

government information.[143] In 2005, the value of private contracts related to intelligence was approximately $42 billion.[144] Simultaneously, regulations have excluded foreign competition from many of these newly privatized industries. This is disconcerting and apt for criticism in two respects.

First, privatization of national security jobs is not necessarily a desirable objective. Indeed, in many cases it has led to less than desirable outcomes. Take, for example, government background checks that are required for any contractors that have access to classified information. Although the Office of Personnel Management (OPM) is in charge of the overwhelming majority of background checks, OPM outsources most of them to private contractors.[145] At one point, a single private contract, USIS, conducts 65% of all U.S. background checks and was paid more than $200 million by OPM.[146] Therefore, not only is the U.S. government privatizing defense work, but the employees responsible for running the background checks of those private employees are also private.[147]

Of course, advocates of privatization may reflect positively on the shift of national security jobs from the public to the private sector. However, a closer look at recent scandals, such as that involving Edward Snowden, exemplify why privatization is not always beneficial. For one, private companies have obligations to shareholders, which can create perverse incentives when completing government contracts. USIS, for example, is currently being sued by the Department of Justice for "churning out incomplete background checks to hit revenue targets."[148] Employees of USIS have commented that the company

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143. *See* Peter Weber, *Edward Snowden and America's Security-Clearance Vetting Problem*, THE WEEK (June 21, 2013), http://theweek.com/article/index/245967/edward-snowden-and-americas-security-clearance-vetting-problem.

144. *See* Aubrey Bloomfield, *Booz Allen Hamilton: 70% of the U.S. Intelligence Budget Goes to Private Contractors*, POLICYMIC (June 14, 2013), http://www.policymic.com/articles/48845/booz-allen-hamilton-70-of-the-u-s-intelligence-budget-goes-to-private-contractors.

145. The OPM has a budget of $1 billion dollars to conduct background checks. *See* David Francis, *Here's How Edward Snowden Got 'Top Secret' Clearance*, FISCAL TIMES (June 21, 2013), http://www.thefiscaltimes.com/Articles/2013/06/21/Heres-How-Edward-Snowden-Got-Top-Secret-Clearance.

146. *Id.*

147. After cyber-attack on USIS's databases which potentially exposes thousands of employee records, decided not to renew its contracts with USIS. Senator Jon Tester noted that the termination of those contracts was a "welcome sign that the federal government is finally beginning to hold contractors accountable for taking millions in federal money and then failing to get the job done for the taxpayer." Christian Davenport, *USIS Contracts for Federal Background Security Checks Won't be Renewed*, WASH. POST (Sept. 9, 2014), http://www.washingtonpost.com/business/economy/opm-to-end-usis-contracts-for-background-security-checks/2014/09/09/4fcd490a-3880-11e4-9c9f-ebb47272e40e_story.html.

148. *See* Christian Davenport, *USIS Fires Manager for Pressuring Employees to Work Overtime*

would give them "impossible workloads and unrelenting deadlines."[149] Of course, this is not to suggest that public employees are error proof. However, government employees do not face the same pressure from shareholders to reduce costs and increase profits.

Second, by systematically excluding foreign competitors, those industries can suffer from inflated prices and less innovation. The Jones Act, for example, prevents foreign-made ships from carrying cargo between two U.S. ports.[150] Arguably, this has increased the price of cargo shipping in the U.S., while also reducing innovation within the industry.[151] A 1999 study by the U.S. International Trade Commission estimated that the "economy-wide effect of removing the Jones Act is a U.S. economic welfare gain of approximately $1.32 billion."[152] Even partial liberalization of the Jones Act (repealing the U.S.-build requirement) would result in significant economic gain.[153]

IV. A MULTI-PRONG SOLUTION

The patchwork of laws and regulations described above are intended to protect U.S. interests from foreign threats. However, their unpredictable and unfair application have stifled foreign investment and have untold negative consequences on foreign relations. A single statutory scheme is an unlikely solution because the myriad laws and regulations aim to protect U.S. interests in different ways. While CFIUS aims to prevent or permit the wholesale admittance of foreign companies into the U.S. market, the NISP regulations only seek to prevent foreign companies operating within the U.S. from accessing classified information. Other laws discussed earlier operate to prohibit foreign companies completely from specific industries or product

Without Pay, WASH. POST (Mar. 7, 2014), http://www.washingtonpost.com/business/economy/usis-fires-manager-for-pressuring-employees-to-work-overtime-without-pay/2014/03/07/2f20906e-a63f-11e3-9cff-b1406de784f0_story.html. USIS has since declared bankruptcy, and the U.S. government among others, continue to pursue their claims in the bankruptcy court. Christian Davenport, *DOJ Wants USIS Parent Company to Pay Damages Despite Bankruptcy Filing*, WASH. POST (June 22, 2015), http://www.washingtonpost.com/business/economy/doj-wants-usis-parent-company-to-pay-damages-despite-bankruptcy-filing/2015/06/22/33008434-18f6-11e5-93b7-5eddc056ad8a_story.html.

149. *Id.*

150. *See* Oyedemi, *supra* note 81.

151. *See, e.g.*, William H. Yost III, *Jonesing for A Taste of Competition: Why an Antiquated Maritime Law Needs Reform*, 18 ROGER WILLIAMS U. L. REV. 52, 62 (2013).

152. U.S. INT'L TRADE COMM., THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS 98 (1999).

153. *Id.* at 99–100. As pointed out in an earlier study, Alaska and Hawaii are effected most by the Jones Act requirements. The cost of the U.S. build requirement on Alaska alone was estimated to be between $134 million and $456 million per year. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-88-107, THE JONES ACT: IMPACT ON ALASKA TRANSPORTATION AND U.S. MILITARY SEALIFT CAPABILITY 3 (1988).

categories.

Because these laws aim to accomplish a diverse set of goals, a multi-prong solution is necessary. The first step is to repeal cabotage laws that prevent foreign competition. These anachronistic laws do little for the air and water transportation industries except increase costs and reduce innovation. Any national security interests that the government has in those industries could be protected through properly scrutinizing foreign companies seeking to enter those markets. Second, instead of relying on a politically motivated governing body, CFIUS should be replaced with an independent review board. This independent governing body would operate much like CFIUS does today; however, its independence would ensure that foreign transactions are reviewed without a political cloud overhanging the decision-making process. Lastly, because background checks play an important gatekeeper function in every foreign and domestic transaction involving classified information, those checks should be completed by properly trained and vetted government employees. This would not only increase accountability in the process, but also ensure that potential issues are discovered before classified information is divulged.

A. Deregulating Industries

Despite the outdated functions of cabotage laws, the government has failed to make any concerted efforts to repeal them. Ultimately, the lack of competition has resulted in monopolies in those protected industries, which detrimentally impacts U.S. competitiveness domestically and globally. These industries should be opened to any foreign competitors who pass an initial review process.

Congress initially passed the Jones Act and the Federal Aviation Act in the wake of World War I and the Cold War, respectively. The primary justification of both Acts was to ensure that the U.S. had sufficient air and water transportation during times of war. But other wartime provisions have long since been repealed.[154] And although future armed conflict may necessitate massive air and water fleets, preventing foreign competitors from operating air and water transport based on an unlikely future armed conflict is unwise. Indeed, foreign competitors already operate within the U.S. air industry in substance, if not in form.[155]

Nothing is more convincing for the need to repeal cabotage laws than

154. *See generally* Lowell Turrentine & Sam D. Thurman, Jr., *Wartime Federal Legislation*, 34 CAL. L. REV. 277 (discussing a number of wartime provisions that were repealed after World War II in the realms of taxation, war production, price control, labor, etc.).

155. *See supra* note 122-124 and accompanying text.

the negative impact the laws have had on U.S. competitors globally. Because cabotage laws have effectively insulated U.S. carriers from foreign completion, U.S. companies operating air and water fleets have had no incentive to develop, experiment, or upgrade their fleets. This is evident when comparing the success of U.S.-flagged container ships to that of foreign-flagged ships. In 2000, the U.S. only had 2,990 deadweight tons on container ships compared to the rest of the world's 63,967 deadweight tons.[156] As a result, although U.S. corporations operating within the industry may have reaped short-term gains from monopolies on the market, the long-term opportunities within those industries have floundered.

This is far from a novel proposal. In the early 1990s when several major U.S. airlines faced significant financial losses, Kenneth Mead, Director of Transportation Issues in the General Accounting Office, emphatically recommended a four-prong solution to domestic airlines' troubles.[157] In addition to assessing pricing practices and increasing access to foreign markets, Director Mead suggested allowing foreign competitors to invest in domestic carriers as well as reduce the barriers to competition domestically.[158]

B. Independent Review Board

Like all significant foreign investments in the U.S., foreign investments in newly deregulated industries would be required to undergo a thorough review process to ensure U.S. interests are protected. CFIUS should be replaced, however, with an independent review board to ensure fairness and non-political decisions. Currently, CFIUS is comprised of 16 members—all heads of executive-branch agencies.[159] Agency heads are political appointees of the president, meaning that CFIUS members are at the very least likely to harbor some degree of political motivation. In addition, the level of influence the President has on any one member is impossible to determine, just as is the level of influence Congress has on the President or individual

156. KATHLEEN MAGEE, U.S. CABOTAGE LAWS: PROTECTIVE OR DAMAGING 55 (2002), *non-paginated copy available at* http://www.commercialdiplomacy.org/ma_projects/magee1.htm.

157. *Financial Condition of the Airline Industry: Hearings Before the S. Comm. on Aviation of the H. Comm. on Pub. Works and Transportation*, 103d Cong. 263–67 (1993) (statement of Kenneth M. Mead, Director, Transportation Issues, Resources, Community and Economic Development Division, General Accounting Office).

158. *Id.* at 264. Director Mead recognized that there were several concerns with opening domestic markets to foreign competitors, including national security and economic concerns. However, Director Mead suggests that these problems can be addressed with existing antitrust and immigration laws. *See id.* at 265.

159. *See supra* note 48 and accompanying text.

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CFIUS members.

The establishment of an independent board to review foreign transactions would not only benefit the national interests of the U.S., but also further the goals of the free market system. Of course, absolute independence is difficult, if not impossible to obtain. In our two-party democracy, though, a review board comprised of representatives that are not political appointees of either party would at least be more likely to be independent and impartial. Indeed, the Congressional Budget Office (CBO) could serve as a model for any future change.

The CBO is a nonpartisan organization that produces "independent analyses of budgetary and economic issues to support the Congressional budget process."[160] Each CBO employee is appointed based on professional accomplishment rather than political affiliation. Further, the CBO Director is appointed jointly by the Speaker of the House and the President pro tempore of the Senate only after hearing recommendations from both the House and Senate budget committees.[161] The CBO has enjoyed a good reputation since its creation in 1975, and has been able to retain that reputation by remaining nonpartisan and never shying away from voicing an unpopular opinion.[162]

An independent review board similar to the CBO would ensure that investigations into significant foreign transactions are fair and impartial. Further, the independent review would be able to present its findings to the president and make recommendations based on that information absent political motivations. Of course, agency heads would still play a crucial role in the process. After all, heads of the Departments of Defense and Energy, for example, may have vital information that is crucial in making a decision. However, agency heads can present that information directly to the independent review board, which would then compile and analyze the input from all relevant agencies before making its ultimate recommendation. This way, the relevant information can still make its way into the decision-making process while ensuring any political or ulterior motives do not.

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160. *Overview*, CONG. BUDGET OFFICE, http://www.cbo.gov/about/overview (last visited May 28, 2015).

161. *Our Organization and People*, CONG. BUDGET OFFICE, http://www.cbo.gov/about/our-organization-and-people (last visited May 28, 2015).

162. *See* PHILLIP G. JOYCE, THE CONGRESSIONAL BUDGET OFFICE: HONEST NUMBERS, POWER, AND POLICYMAKING 56 (2011) (noting that by 1980, the CBO "challenged both a Republican and a Democratic president, and was beginning to be regarded as perhaps the most credible source on fiscal matters in Washington"); Suzy Khimm, *Why Does Anyone Trust the CBO?*, WASH. POST (July 28, 2011), http://www.washingtonpost.com/blogs/wonkblog/post/why-does-anyone-trust-the-cbo/2011/07/27/gIQARUVfeI_blog.html (CBO directors . . . have managed to retain the agency's reputation for nonpartisan analysis — in part by demonstrating their willingness to put forward inconvenient truths to the very party that appointed them.").

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C. Deprivatizing Background Checks

Any changes to the current laws and regulations would be incomplete without reforming the way background checks are completed. Background checks play a critical gatekeeping role with respect to classified information. For even if a foreign corporation insidiously acquires a strategic U.S. corporation, a properly completed background check would ensure that classified information stays out of hands of its employees.

Even though the majority of background checks are completed by private companies,[163] the entire process is overseen by the Office of Personnel Management (OPM). Therefore, as private companies come under increased scrutiny for critical failures, recognizing that the failure is just as much a failure of government oversight as it is of the private sector is important. Indeed, the one-billion dollar fund that OPM uses for background checks has never been audited,[164] so the true extent of wastefulness is still unknown. By requiring OPM to internally complete all background checks, the government can increase accountability while potentially reducing costs.

There are currently several private contractors performing background checks on behalf of OPM. OPM's delegation to private contractors, however, disperses responsibility for successfully completing background checks across the public and private sectors. Thus, when critical failures occur, it is difficult to determine where to lay the blame. Further, it may promote blame-shifting from one entity to another. Shortly after the Washington Navy Yard shooting, for example, a congressional investigation showed that USIS failed to conduct a proper background check of the shooter, even though USIS subsequently tried to deflect blame onto OPM.[165]

Blame-shifting can be avoided by requiring OPM to internally complete all background checks. This would increase accountability by concentrating all responsibility to OPM rather than spreading it across the public and private sectors. Although this would require an expansion of OPM's workforce, the proposal is not without support. For one, USIS originated as the investigative branch of OPM. It was not until 1996 that USIS "was outsourced during a wave of privatizations of federal government services."[166] Having OPM internally complete

163. *See supra* notes 145–146 and accompanying text.

164. *See* Francis, *supra* note 145.

165. *See* STAFF OF H.R. COMM. ON OVERSIGHT AND GOV'T REFORM, 113TH CONG., CONTRACTING OUT SECURITY CLEARANCE INVESTIGATIONS: THE ROLE OF USIS AND ALLEGATIONS OF SYSTEMIC FRAUD 7 (Comm. Print 2014).

166. *Id.* at 3–4.

background checks would therefore only represent a policy shift back to the way things were. There even appears to be a move in that direction already. OPM's current director has indicated a shift in policy such that "only federal employees will perform final reviews of background investigations."[167]

In addition to increasing organizational accountability, the government may be able to reduce costs by creating economies of scale. Instead of contracting with several different private contractors, the OPM would internally complete all background checks. All else being equal, this would result in cheaper background checks, because an increase in the number of units created reduces the per-unit cost.[168] That is, the more background checks the OPM does, the cheaper each background check should become. While OPM's director suggested that the private sector can complete background checks more efficiently than the government, no one has ever completed a cost-benefit analysis to support this assertion.[169]

V. CONCLUSION

Relying on a patchwork of laws and regulations to prevent foreign threats domestically clearly has its shortcomings. From background checks to government review, these laws, while well-intentioned, are either anachronistic or ineffective. Private corporations in charge of completing background checks have failed in several critical respects, and review procedures that are supposed to be impartial are oftentimes politically motivated. This has all culminated in a chill on foreign investment. Further, laws completely banning foreign investors from particular U.S. industries are grounded in wartime reasoning and stifle competition and innovation.

A new approach is necessary—one that allows the U.S. to benefit from foreign investment while also continuing to protect U.S. interests from foreign threats. Ultimately, the multi-prong solution advocated in this paper does just that. Deregulating certain U.S. industries ensures new investment in otherwise stale industries. Furthermore, instituting

167. *Id.* at 12.

168. *See* Aubrey Silberston, *Economies of Scale in Theory and Practice*, 82 ECON. J. 369, 369 (1972) ("Classic economies of scale relate to the effect on average costs of production of different rates of output, per unit of time, of a given commodity, when all possible adaptations have been carried out to make production at each scale as efficient as possible.").

169. *See* Francis, *supra* note 145. Even if internally completing background checks does not realize cost savings, this may be viewed as an acceptable cost based on the importance of background checks. After all, the recent critical failures demonstrate that the cost of critical errors is grave. The cost of increasing accountability can thus be viewed as counterbalancing the increase in cost.

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an independent review board modeled after the CBO makes an impartial review process more likely. Finally, because background checks serve as the backbone to any national security plan, the OPM should complete them internally, resulting in increased accountability and potentially reduced costs. While some of these recommended changes are modest, others are concededly more substantial. However, this multi-prong solution ensures the security of our while also staying current with the trends of the global marketplace.

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