

FDI Like You're FDR: CFIUS Review Under the Biden Administration's Rooseveltian Conception of National Security

Will Moreland*

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INTRODUCTION

The largest perceived invasion of the late 2010s was not of a country, but of a discipline. National security invaded economics. Following three decades of efforts to divide the two spaces, two consecutive American presidents made headlines declaring “[e]conomic security is national security.”¹ Driving this development has been

* J.D., Georgetown University Law Center, 2022; M.S.F.S., Georgetown University, 2015; B.A. Yale University, 2013. Special thanks to Professor Mary McCord for supervising and guiding the original research and drafting of this Note. Additionally, many thanks to Tarun Chhabra, Bruce Jones, Robert Kagan, and Thomas Wright; without their work and mentorship at the Brookings Institution, the early seeds for this Note would not have been planted. All mistakes or errors are mine alone. Finally, the greatest thanks and dedication are reserved for Kristen Belle-Isle, who tolerated far too many ramblings about CFIUS, economic security, and Franklin Roosevelt. © 2022, Will Moreland.

1. PRESIDENT DONALD J. TRUMP, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 17 (2017) [Hereinafter TRUMP NSS]; PRESIDENT JOSEPH R. BIDEN, JR., INTERIM NATIONAL SECURITY STRATEGIC GUIDANCE 15 (2021) (stating that “our policies must reflect a basic truth: in today’s world, economic security is national security”) [Hereinafter BIDEN INSSG]. While the Biden administration’s INSSG was published in 2021, its thinking was firmly grounded in an intellectual shift

China's emergence as a true great power competitor to the United States.² While the United States has confronted multi-domain competitors previously,³ the China challenge is distinct. Not only is China undertaking military modernization efforts⁴ and expanding its techno-authoritarian means of societal control,⁵ it also stands as the first modern competitor on track to equal, and likely surpass, the United States economically.⁶ Given the democratic world's recent internal discord,⁷ China presents open societies with a comprehensive clash of systems, rather than a narrower rivalry.⁸

The scale and nature of China's rise have reinvigorated debates over American economic policy, including the role of national security equities in that field.⁹ For several decades, American policy makers had cultivated a belief that national

of the late 2010s. *See infra* Section III.B. Regarding the multi-decade division between security and economics, see ROBERT BLACKWILL & JENNIFER HARRIS, *WAR BY OTHER MEANS 3-7* (2016) (viewing the global economy through a security lens began "to wane" around the Vietnam War).

2. *See* Uri Friedman, *The New Concept Everyone in Washington is Talking About*, *THE ATLANTIC* (Aug. 6, 2019), <https://perma.cc/3BHW-5GB4>. The Biden administration has emphasized a rhetorical shift toward "strategic competition." Daniel Lippman, Lara Seligman, Alexander Ward & Quint Forgey, *Biden's Era of "Strategic Competition"*, *POLITICO: NAT'L SEC. DAILY* (Oct. 10, 2021, 4:08 PM), <https://perma.cc/3AUR-LQ4Z>.

3. While the United States' most recent multi-domain competition was the Cold War, that experience was not the only one. *See* Markus Brunnermeier, Rush Doshi & Harold James, *Beijing's Bismarckian Ghosts: How Great Powers Compete Economically*, *WASH. Q.*, Fall 2018, at 161. Recently, to speak of the current U.S.-China dynamic and the Cold War is to be charged with advocating for a "new cold war." *E.g.*, Alexandra Hutzler, *Tulsi Gabbard Implores Joe Biden to "Ratchet Down New Cold War with Russia and China."* *NEWSWEEK* (Apr. 15, 2021, 12:11 PM), <https://perma.cc/5RJF-F3B9>. This author has maintained the United States cannot simply port over yesterday's Cold War strategy to today's challenges. *See* Will Moreland, *"Strategic Competition with China" – Necessary But Not Sufficient*, *BROOKINGS ORDER FROM CHAOS BLOG* (Oct. 19, 2018), <https://perma.cc/ZS34-FW33>. However, Washington should examine its history to identify mistakes to avoid repeating as much as policies to adopt.

4. *See, e.g.*, OFFICE OF THE SECRETARY OF DEFENSE, *MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 2017 ii* (Dep't of Def. 2017).

5. *See* ALINA POLYAKOVA & CHRIS MESEROLE, *EXPORTING DIGITAL AUTHORITARIANISM: THE RUSSIAN AND CHINESE MODELS 1* (Brookings Inst. 2019) (outlining "digital authoritarianism").

6. ANDREW F. KREPINEVICH, *PRESERVING THE BALANCE: A U.S. EURASIA DEFENSE STRATEGY 38-39* (Ctr. for Strategic and Budgetary Assessment 2017) (outlining, as of 2014, China reflected 59.4 percent of U.S. GDP, whereas the Soviet Union and Nazi Germany only possessed 40.4 percent and 26.2 percent of U.S. GDP, respectively, at their height).

7. *See generally* EDWARD LUCE, *THE RETREAT OF WESTERN LIBERALISM* (2017).

8. A clash of systems does not mean China seeks to export its model to the United States or the world. There is good evidence it is not. *See* RYAN HASS, *STRONGER: ADAPTING AMERICA'S CHINA STRATEGY IN AN AGE OF COMPETITIVE INTERDEPENDENCE 50-59* (2021). Nevertheless, in an interconnected world, "making the world safe for authoritarianism," even in self-defense, has serious implications for the world's democracies.

9. This policy conversation has been bipartisan. Among Democrats, see Jake Sullivan & Jennifer Harris, *America Needs a New Economic Philosophy, Foreign Policy Experts Can Help*, *FOREIGN POL'Y* (Feb. 7, 2020), <https://perma.cc/XK8Y-PT9A>; Jared Bernstein, *The Time for America to Embrace Industrial Policy Has Arrived*, *FOREIGN POL'Y* (Jul. 22, 2020), <https://perma.cc/2DKJ-J7TG>. Among Republicans, see SENATOR TOM COTTON, *BEAT CHINA: TARGETED DECOUPLING AND THE ECONOMIC LONG WAR* (2021), <https://perma.cc/8WTR-S5L7>; S. COMM. ON SMALL BUS. AND ENTREPRENEURSHIP, *MADE IN CHINA 2025 AND THE FUTURE OF AMERICAN INDUSTRY* (2019) (report published under the chairmanship of Senator Marco Rubio), <https://perma.cc/PX8G-TSJ8>.

security policy and economic affairs should remain separated.¹⁰ That narrative particularly shaped the Committee on Foreign Investment in the United States (CFIUS). In theory, CFIUS has narrowly cabined its review of foreign investment on national security grounds, supporting a wider open investment climate.¹¹ Yet, coming on the heels of the Trump administration's announcement that "economic security is national security," the latest update to CFIUS – the Foreign Investment Risk Review and Modernization Act of 2018 (FIRRMA)¹² – raised the prospect of a wider remit for national security concerns in economic policy decisions. A direct response to China's growing global assertiveness, FIRRMA grappled with concerns surrounding Chinese foreign direct investment (FDI) in U.S. businesses involved in the research and development of advanced technologies.¹³ Then, when the new Biden administration likewise emphasized "economic security is national security," what might have appeared a Trump-era blip seemed to reflect a larger sea change.

Closer examination shows a more complex picture. Since its founding, CFIUS consistently has wrestled with the boundaries of "national security," up to and including FIRRMA. Drawing a bright line has never been simple. Furthermore, despite common interpretations that CFIUS sought to remove national security considerations from the larger economy,¹⁴ it is more accurate to describe certain national security assumptions as baked in *sotto voce*. Minimizing intervention in the economy on national security grounds would avoid hindering growth, which would, in turn, support U.S. military power.¹⁵ In the closing days of the Cold War and the heyday of the unipolar moment, those assumptions were unchallenged.

Today, however, a paradigm shift is unfolding. China's rise has not only challenged assumptions about the U.S.-China relationship, but also suppositions surrounding the international economy – ones that supported the economic-national security divide.¹⁶ Both the Trump and Biden administrations have recognized this development. In particular, President Biden's Foreign Policy for a Middle Class

10. See BLACKWILL & HARRIS, *supra* note 1, at 166-78 (describing the decline of geoeconomics and the "separation of economics from U.S. foreign policy and security policy" (quoting Robert Zoellick, *The Currency of Power*, FOREIGN POL'Y (Oct. 8, 2012), <https://perma.cc/7XD3-642A>)).

11. EDWARD M. GRAHAM & DAVID M. MARCHICK, U.S. NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 20 (Inst. for Int'l Econ. 2006).

12. Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, § 1702(c), 132 Stat. 2174 (2018) [Hereinafter FIRRMA].

13. *CFIUS Reform: Examining the Essential Elements: Hearing Before S. Comm. on Banking, Housing, and Urban Aff.*, 115th Cong. (2018) (testimony of FIRRMA sponsor John Cornyn, U.S. Senator (R-TX)) [Hereinafter Cornyn CFIUS Testimony]. Senator Cornyn emphasized China as the "context for this legislation"; "the *kind of threat* [posed] is unlike anything the [United States] has ever before faced – a powerful economy with coercive, state-driven industrial policies that distort and undermine the free market, married up with an aggressive military modernization and the intent to dominate its own region and potentially beyond." *Id.* (italics original).

14. See, e.g., THEODORE MORAN, CFIUS & NATIONAL SECURITY: CHALLENGES FOR THE UNITED STATES, OPPORTUNITIES FOR THE EUROPEAN UNION (Peterson Inst. for Int'l Econ. 2017).

15. See *infra* Section I.

16. See, e.g., Mark Wu, *The 'China, Inc.' Challenge to Global Trade Governance*, 57 HARV. INT'L L. J. 1001 (2016).

agenda¹⁷ appears to respond to this emerging moment by harkening back to an earlier, and broader, perspective of national security last seen in the 1930s under President Franklin D. Roosevelt.¹⁸ A “Rooseveltian” conception of national security appreciates that economic security – a healthy American middle class – is essential to the American constitutional system’s survival. A lack of belief in economic opportunity saps public faith in the market democracy model, endangering American democracy and the Constitution that undergirds it. Absent sufficient faith, as Roosevelt knew well, people may “distrust the future of essential democracy,”¹⁹ opening the gate to what one of Roosevelt’s predecessors knew to be the greatest danger to the nation – internal division and breakdown.²⁰

This Note examines CFIUS’s role in light of the Biden administration’s resurrection of the Rooseveltian vision. Part I traces CFIUS’s history grappling with the boundary separating economic areas inherently intertwined with national security concerns from the general economy, a period stretching from CFIUS’s modern founding under the Exon-Florio Amendment through the 2007 Foreign Investment and National Security Act (FINSAs).²¹ Part II then examines how FIRRMA responded to the new U.S.-China geopolitical rivalry by expanding the scope of national security to better guard against investment in U.S. businesses pursuing advanced technologies with the potential for military dual-use or digital authoritarianism concerns. Part III elaborates on the Biden administration’s revival of a Rooseveltian understanding of national security, seeking to guard the people’s faith in democracy as much as their physical security against conventional foreign threats. Finally under that more expansive vision of national security, Parts IV and V, respectively, consider whether CFIUS can and should act to further those goals.

This Note concludes that CFIUS’s authority to review FDI for an understanding of national security extending to broader, more individualized economic security is tenuous. However, that obstacle is no significant issue. An overactive CFIUS likely would hinder the Biden administration’s aim of bolstering middle class economic opportunities, essential to reinforcing public faith in democracy. Every tool has its time and place. CFIUS as currently constituted under FIRRMA is situated to serve an important auxiliary role, indirectly

17. Joseph R. Biden, Jr., President of the United States, Remarks on America’s Place in the World (Feb. 4, 2021), <https://perma.cc/RTK5-VL5S> (“Advancing a foreign policy for the middle class demands urgent focus on our domestic economic renewal.”).

18. See *infra* Section III, defining and outlining the Rooseveltian view and then examining the Biden administration’s actions through that lens.

19. Franklin D. Roosevelt, “First Inaugural Address,” MILLER CENTER, UNIVERSITY OF VIRGINIA at 17:20 (Mar. 4, 1933), <https://perma.cc/5LJS-PFCY>.

20. See Abraham Lincoln, Address Before the Young Men’s Lyceum of Springfield, Illinois: The Perpetuation of Our Political Institutions (Jan. 27, 1838) (“If destruction be our lot, we must ourselves be its author and finisher. As a nation of freemen, we must live through all time, or die by suicide.”).

21. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 3, 121 Stat. 246, 252-53 (2007) [hereinafter FINSAs].

supporting the larger Rooseveltian aim in its more targeted protection of U.S. economic competitiveness.

I. THE PATH TO THE PRESENT: CFIUS PRE-FIRRMA

Despite modern notions that national security concerns should be cabined off from the broader American economy in the name of efficiency, economics and national security have been intertwined from the republic's founding.²² Since the Washington administration, the guiding star for national security has been to maintain the American constitutional system against threats, both foreign and domestic, as a necessary precondition for citizens' pursuit of life, liberty, and the pursuit of happiness.²³ Whether ensuring a financial base to support the armed forces²⁴ or girding the United States against economic coercion from abroad,²⁵ American leaders could ill afford to ignore economic realities in national security considerations. As the United States increasingly became a global financial power in the twentieth century, the blurred boundaries between economics and

22. The cabining impulse, particularly since the 1980s, has been to seek to minimize the number of circumstances where national security equities are a factor in market decisions, as they dampen market efficiency. That view is built on particular assumptions of how an unimpeded market can, in turn, best advance national security. See *infra* Section I.A.

23. This conception of national security draws on the work of Professor Laura Donohue. Laura Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1574-77 (2011). Under this framework, national security is best understood as an "*object* that is to be secured and the *reason* for its preservation – the purpose for which such object exists." *Id.* at 1584 (italics original). For the United States, the object is the "political structure of government" as reflected in the Constitution. *Id.* The maintenance of those processes and institutions by which the United States exists as a democratic republic is the *sine qua non* for Americans to be able to exercise the rights and liberties that the Constitution was intended to further. U.S. Const. pmb. (establishing the aim "to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity"); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (declaring "certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness"). On this guiding principle existing since the Washington administration, see Donohue, *supra*, at 1589-93; GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776 56-57 (2008).

24. See MICHAEL J. MEESE, SUZANNE C. NIELSEN & RACHEL M. SONDEHEIMER, AMERICAN NATIONAL SECURITY 288-89 (Johns Hopkins Univ. Press, 7th ed. 2018) ("[T]he connection between economic power and military power is quite direct: greater economic capacity can provide greater military capacity.").

25. See Donohue, *supra* note 23, at 1588 (describing, in support of the early Republic's primary goal of protecting the Union, the secondary aim of "international independence and economic growth"). On viewing efforts to support economic growth and independence as a national security matter, see ALEXANDER HAMILTON, REPORT ON THE SUBJECT OF MANUFACTURES (1791), reprinted in THE PAPERS OF ALEXANDER HAMILTON, VOL. 10, DECEMBER 1791–JANUARY 1792 (Harold C. Syrett, ed., 1966) ("Not only the wealth; [sic] but the independence and security of a Country, appear to be materially connected with the prosperity of manufactures. Every nation, with a view to those great objects, ought to endeavour [sic] to possess within itself all the essentials of national supply."). See also Mark R. Shulman, *The Progressive Era Origins of the National Security Act*, 104 DICK. L. REV. 289, 291 (2000) ("Yale undergraduates of the 1790s were debating the question, 'Does the National Security depend on fostering [d]omestic industries?'").

national security became only more acute.²⁶ CFIUS's story is that of seeking to set optimal (i.e. minimal) national security constraints on foreign investment amid those hazy borders. Reviewing that history, the Committee's modern establishment under the 1988 Exon-Florio Amendment demonstrates the difficulty of narrowly cabinning the scope of that investment review authority, even when there is strong intent to do so. Similarly, reforms under FINSIA likewise illustrate the practical difficulty in drawing overly strict lines distinguishing portions of the economy intrinsically tied to national security from the broader economy.

A. *The Exon-Florio Amendment: The False Divide*

Even today, CFIUS is the house that the Exon-Florio Amendment built.²⁷ From the beginning, debate over the scope of the new entity's authority was the most contentious element. Foremost behind the legislative push lay a sense of economic insecurity.²⁸ By the mid-1980s "a weak dollar following the 1985 Plaza Accord, mounting U.S. indebtedness, and attractive stock prices were working together to create an impression that American businesses were 'increasingly vulnerable to takeover.'"²⁹ Thus, when Senator James Exon sought to empower the president to, at his discretion, "review and act upon foreign takeovers, mergers, acquisitions, joint ventures and licensing agreements,"³⁰ in response to this perceived challenge, it was little surprise that investment review for "national security" was the odd-man-out compared to the prongs of "essential commerce" and "economic welfare."³¹

26. For an account of the growing role of FDI in twentieth century America and the role of the Trading With the Enemy Act as the main statute regulating FDI for national security reasons prior to the creation of CFIUS, see GRAHAM & MARCHICK, *supra* note 11, at 2-21.

27. The Exon-Florio Amendment amended the Defense Production Act of 1950, Pub. L. No. 81-774, 164 Stat. 798 (1950). CFIUS was established under President Gerald Ford in 1975 in Executive Order 11858(b). JAMES K. JACKSON, CONG. RSCH. SERV. RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 4 (2020). Reacting, in part, to concerns about investments from the Organization of Petroleum Exporting Countries (OPEC) in the wake of the 1970s oil shocks, the original CFIUS was responsible "for monitoring the impact of foreign investment in the United States . . . and for coordinating the implementation of United States policy on such investment." *Id.* at 5 (quoting Exec. Order No. 11858(b), 40 Fed. Reg. 20263 (May 7, 1975)). On OPEC concerns partially motivating the move, see Jonathan Wakely & Andrew Indorf, *Managing National Security Risk in an Open Economy: Reforming the Committee in Foreign Investment in the United States*, 9 HARV. NAT'L SEC. J. 1, 20 (2018). As proposed, and then enacted, the Exon-Florio Amendment did not give power directly to CFIUS, but to the president. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1425, 1426 (1988). President Reagan later delegated the authority provided to the president under the Exon-Florio Amendment to CFIUS in Executive Order 12661, 54 Fed. Reg. 779 (December 27, 1988).

28. GRAHAM & MARCHICK, *supra* note 11, at 40.

29. *Id.* at 40-41. Japan particularly concerned many Americans as an economic competitor. HAL BRANDS, MAKING THE UNIPOLAR MOMENT: U.S. FOREIGN POLICY AND THE RISE OF THE POST-COLD WAR WORLD 172-98 (2016); PETER BAKER & SUSAN GLASSER, THE MAN WHO RAN WASHINGTON: THE LIFE AND TIMES OF JAMES A. BAKER III 254-58 (2020) (outlining the economic climate confronting then-Treasury Secretary James Baker as he negotiated the Plaza Accords).

30. GRAHAM & MARCHICK, *supra* note 11, at 41 (citing statement of Senator James Exon, *Foreign Investment, National Security and Essential Commerce Act*, HR 3, 100th Congress, 1st sess. (1987)).

31. *Id.* at 42 (stating the categories for investment review under Senator Exon's original proposal).

Similarly unsurprising was the Reagan administration's veto of the bill until pared down to apply only to "national security."³² Greater scrutiny of FDI conflicted with the Reagan administration's international economic stance, particularly its open investment policy.³³ Yet, focusing on this position as *purely* an economic policy rationale obscures the national security elements baked into the Reagan administration's economic analysis. Maintaining competitiveness in the types of distressed industries driving Exon's concern did not outweigh preserving the interdependence of the collective market economies, making "national economic strength . . . a shared strength."³⁴ As the 1988 National Security Strategy laid out, "[h]istory has shown that free, open economies with unrestricted trade are strong economies, which grow faster and have the resources with which to defend themselves."³⁵ Thus, viewing the Reagan administration as drawing a formalistic division between national security and economics as "non-overlapping magisteria" provides an incomplete picture.³⁶ Even in establishing a framework that purported to draw a line limiting the role of national security equities to shape market decisions, national security considerations were inherent in that economic assessment.

That framing helps explain the final Exon-Florio text's considerable flexibility. The bill removed the "essential commerce" and "economic welfare" language while not defining "national security." Instead, it listed three factors for consideration in assessing foreign investment. First, consideration of domestic production necessary for "national defense requirements."³⁷ Second, the "capability and capacity" of domestic industries to meet those defense requirements.³⁸ Third, the impact of control of "domestic industries and commercial activity by foreign

32. JACKSON, *supra* note 27, at 7. The Reagan administration opposed the original Exon-Florio language; however the issue was contested within executive branch discussions. See GRAHAM & MARCHICK, *supra* note 11, at 43 (Treasury and Commerce Secretaries publicly decrying the bill); Matthew J. Baltz, *Institutionalizing Neoliberalism: CFIOUS and the Governance of Inward Foreign Direct Investment in the United States Since 1975*, 24 REV. OF INT'L POL. ECON. 858, 871-72 (2017) (voices in the Pentagon and the Commerce Department emphasizing a broader need to protect the U.S. industrial base). On Reagan vetoing the bill until the language was changed, see GRAHAM & MARCHICK, *supra* note 11, at 40.

33. Congress's seeking the executive branch's intervention to stop Japanese FDI in the United States was directly opposed to the Reagan administration's open economic policy, including its *active pursuit* of Japanese investment. BRANDS, *supra* note 29, at 192 ("During the [U.S.-Japan] negotiations, [Treasury Secretary Donald Regan] had urged Japanese officials to 'open up your capital markets and learn to share.'").

34. PRESIDENT RONALD REAGAN, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 11 (1988) [Hereinafter REAGAN 1988 NSS]. As Brands outlines, in "Reagan's eyes, the U.S. economy was 'one of the great wonders of the world,' and . . . [t]he president was equally committed to the advance of free markets overseas, viewing this as the route to sustained prosperity 'everywhere in the world.' The market was 'the one true path,' Reagan would say, 'where I believe we can find the map to the world's future.'" BRANDS, *supra* note 29, at 175.

35. REAGAN 1988 NSS, *supra* note 34, at 12-13.

36. An homage to Stephen J. Gould's formulation in *Nonoverlapping Magisteria*, 106 NAT. HIST. 6 (1997).

37. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1425, 1426 (1988).

38. *Id.* That capability and capacity included "human resources, products, technology, materials, and other supplies and service." *Id.*

citizens” on the aforementioned capability and capacity.³⁹ Declining a set definition was controversial, but intentional.⁴⁰ As Senator Exon made clear, “national security” was to be “read in a broad and flexible manner”⁴¹ – and CFIUS embraced that intention in practice, undertaking reviews beyond the defense industrial base to sectors including telecommunications, energy and natural resources, manufacturing, and even transportation.⁴²

Consequently, the lesson from the Exon-Florio debates is not that Congress drew an apocryphal clear line between national security and economic interests in 1988. Rather, the established border specifically incorporated the Reagan administration’s perception of national security, which saw alignment between national security interests and relatively unimpeded foreign investment in order to spur economic growth.

B. *FINSA: More Continuity Than Change*

The Cold War’s end and rise of the “unipolar moment” only reinforced the Reagan era perception that national security and economic interests pointed in the same direction. CFIUS, therefore, would continue to operate under the Exon-Florio framework, and its underlying assumptions, with only moderate changes.

While the economic malaise of the early 1990s and continued challenge from Japan⁴³ spurred four calls to revisit the Exon-Florio framework, only the 1992 Byrd Amendment came into law.⁴⁴ The Byrd Amendment is mostly known for a change in *when* the Committee should investigate, rather than *how*.⁴⁵ However, the legislation also added new factors for a national security assessment.⁴⁶ Going

39. *Id.*

40. JACKSON, *supra* note 27, at 7 (noting that the lack of a definition of “national security” was “the most controversial and far-reaching” debate over the legislation).

41. GRAHAM & MARCHICK, *supra* note 11, at 38 (quoting 134 Cong. Rec. S4833 (Apr. 25, 1988) (statement of Sen. James Exon)). Furthermore, the preamble of the Treasury Department’s first regulations implementing the final statute specifically cited Congress’s intention to not “improperly curtail the President’s broad authority to protect the national security” with a definition). *Id.* at 38 (citing Regulations Implementing Exon-Florio, 33 C.F.R. § 800 App. A (1988)).

42. GRAHAM & MARCHICK, *supra* note 11, at 38.

43. Japan’s economic challenge did not collapse alongside the Soviet Union. Consider the campaign quip of Senator Paul Tsongas as late as 1992 that the “Cold War is over; Japan won.” Charles Krauthammer, *The Unipolar Moment Revisited*, THE NAT’L INT., Winter 2002/03, at 5, 5 (quoting the late senator).

44. GRAHAM & MARCHICK, *supra* note 11, at 48 (detailing unsuccessful efforts to amend the Exon-Florio framework in 1990 and 1991); JACKSON, *supra* note 27, at 9 (describing the passage of the Byrd Amendment in 1992 under the National Defense Authorization Act for Fiscal Year 1993).

45. Diverging from the Exon-Florio Amendment’s grant of authority to the executive branch to act in its discretion, the Byrd Amendment required a mandatory investigation of a proposed merger, acquisition, or takeover, where the acquiring entity is “controlled by or acting on behalf of a foreign government” and the transaction “could result in control of a person engaged in interstate commerce” within the United States that “could affect [U.S.] national security.” National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837(a), 106 Stat. 2463, 2464 (1992) [Hereinafter Byrd Amendment]; JACKSON, *supra* note 27, at 9.

46. Byrd Amendment § 837(b) (amending Section 721(f) of the Defense Production Act of 1950).

forward, CFIUS would consider a transaction's potential impact on the sales of export restricted goods, as well as on U.S. "international technological leadership" related to national security.⁴⁷ Those additions, and the rejection of more sweeping reform,⁴⁸ speak to the assumptions underlying post-Cold War conceptions of national security. By the mid-1990s the United States appeared economically triumphant. Growing economic and political liberalization drove faith in a blossoming convergence theory, under which the gravitational pull of markets and democracy would draw the world toward the Western model.⁴⁹ Only a few outlying "rogue states"⁵⁰ persisted, hence the Byrd Amendment's addition of a factor aligned with non-proliferation interests.⁵¹ In a climate where U.S. policy makers hoped even China would become a "responsible stakeholder"⁵² along the Western model, there were few compelling dangers on the horizon to provoke revisiting the open investment environment.

The shock of the September 11th attacks reshaped much of the official and public conceptions of national security.⁵³ Its reverberations would touch nearly

47. *Id.*

48. Particularly interesting among the other three rejected proposals, Representative Doug Wilson's 1990 proposal resolutely declared "military and economic dimensions of national security are inseparable," a stance which would have openly moved away from the Reagan era formulation. GRAHAM & MARCHICK, *supra* note 11, at 48.

49. See THOMAS WRIGHT, *ALL MEASURES SHORT OF WAR: THE CONTEST FOR THE 21ST CENTURY AND THE FUTURE OF AMERICAN POWER* 1-15 (2017) (outlining the rise of convergence theory and its persistence across the Clinton, Bush, and Obama administrations); MICHAEL MANDELBAUM, *THE IDEAS THAT CONQUERED THE WORLD: PEACE, DEMOCRACY, AND FREE MARKETS IN THE TWENTY-FIRST CENTURY* 5 (2004) ("The commanding position of free markets . . . , the dramatic devaluation of war, and the absence of a plausible alternative to the global order of which these are the main elements characterize the conduct of human affairs at the outset of the third millennium.").

50. The concept of "rogue states" is quite fluid, stretching back to the late Cold War. In 1994, Tony Lake, National Security Advisor to President Clinton, identified five "backlash states" that would typically appear in the post-Cold War rogues' gallery: Cuba, North Korea, Iran, Iraq, and Libya. Anthony Lake, *Confronting Backlash States*, FOREIGN AFF., Mar.-Apr. 1994, at 45. For a history of the notion of rogue states through the Clinton administration, see generally ROBERT LITWAK, *ROGUE STATES AND U.S. FOREIGN POLICY: CONTAINMENT AFTER THE COLD WAR* (2000).

51. The new fourth factor called for consideration of the impact on the sale of "military goods, equipment, or technology to any country" identified by the Secretary of State as supporting terrorism, constituting a country of concern regarding missile proliferation, constituting a country of concern regarding chemical/biological weapons proliferation, or being listed on the Nuclear Non-Proliferation Special Country List. Byrd Amendment, § 837(b). Such language speaks to the types of the broad non-proliferation threats at which the Byrd Amendment was aimed.

52. Robert B. Zoellick, Deputy Sec'y of State, Remarks to the National Committee on U.S.-China Relations: Whither China: From Membership to Responsibility? (Sept. 21, 2005) (The United States "now need[s] to encourage China to become a responsible stakeholder in the international system.").

53. Although debated how much of a change it truly was, the most common articulation of the change in American perception and policy is found in the 2002 National Security Strategy. PRESIDENT GEORGE W. BUSH, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 6 (2002) (asserting the United States "will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against" terrorist threats). See generally, Robert Malley & Jon Finer, *The Long Shadow of 9/11: How Counterterrorism Warps U.S. Foreign Policy*, FOREIGN AFF., Jul.-Aug. 2018, at 58-69 (retrospective on how the events of September 11th changed, and came to dominate, the American national security horizon); JOHN LEWIS GADDIS, *SURPRISE, SECURITY, AND THE AMERICAN EXPERIENCE* 70-113 (2004).

every part of the U.S. national security apparatus.⁵⁴ For CFIUS, that impact would come in 2007's FINSA.⁵⁵ Yet, even after September 11th, FINSA's changes to the CFIUS framework reflected more affirmation than revolution. The reforms continued under the assumption that economic and national security interests ran largely parallel; the relevant threats requiring mitigation were primarily (though not exclusively) tied to the battlefield, albeit one broadened in the fight against terrorism.

FINSA's modifications spoke to the post-9/11 zeitgeist. While "national security" remained undefined, Congress clarified the term as including "those issues relating to 'homeland security,' including its application to critical infrastructure."⁵⁶ New factors for national security assessments also reflected concerns of terrorist access to technologies with destructive kinetic application. Thus, FINSA provided for enhanced consideration of not only the "potential national security-related effects on [U.S.] critical technologies," but of non-proliferation aspects, the record of counterterrorism cooperation by the prospective acquirer/investor's home country, and the potential for diversion of technologies with military application.⁵⁷ When combined with a further factor mandating consideration of "potential national security-related effects on [U.S.] critical infrastructure," including "major energy assets,"⁵⁸ the picture painted was one primarily focused on combatting dangers to more concrete, physical systems.⁵⁹ The actual battlefield had changed from the Cold War, but the notion of the battlespace itself remained central, now augmented to include the "soft targets" of infrastructure that motivated FINSA.⁶⁰ The enduring Reagan era assumption was that threats from FDI would relate to traditional security domains, where the new enemy was terrorism, not state actors. As global terrorism took center stage as the principal shared global challenge, it decreased the incentive to consider new threat vectors.⁶¹

54. See generally Malley & Finer, *supra* note 53; ROSA BROOKS, *HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING* (2016); DAVID ROTHKOPF, *NATIONAL INSECURITY: AMERICAN LEADERSHIP IN AN AGE OF FEAR* (2014).

55. While FINSA was the first successful CFIUS reform legislation since the Byrd Amendment, it was not the only effort. Two separate 2005 bills, by Senator James Inhofe (R-OK) and Richard Shelby (R-AL), sought significant reforms, including overtly reopening the "economic security" dimension in response to the 2005 sale of IBM's personal computer division to Lenovo, a Chinese business, and an offer by China National Offshore Oil Company to buy Unocal. GRAHAM & MARCHICK, *supra* note 11, at 146. However, the important element is that those bills did not move forward, highlighting the lack of impetus to break out of the existing national security-economic paradigm. See *id.*

56. FINSA § 2(a)(5).

57. *Id.* § 4(4).

58. *Id.*

59. A primary focus on the physical security impacts is not an exclusive focus.

60. FINSA emerged in response to a congressional firestorm over Dubai Ports World, a UAE-based company, seeking to acquire control of operations of several U.S. ports. For an overview of that episode, see JACKSON, *supra* note 27, at 9-10; Wakely & Indorf, *supra* note 27, at 22; David Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. TIMES (Mar. 10, 2006), <https://perma.cc/VXW8-9T93>.

61. WRIGHT, *supra* note 49, at 1. A belief in countering terrorism as a global unifier was strong in the George W. Bush administration. *Id.* at 12-13 ("Bush believed that the common threat of terrorism would

Yet simultaneously, FINSA's expanded number of factors reinforced the difficulty in drawing a clean line between those economic sectors inherently entangled with national security equities and the broader economy that should operate free of such concerns. Mandating consideration of the "potential national security-related effects on [U.S.] critical infrastructure," including "major energy assets" and the "long-term projection of [U.S.] requirements for sources of energy,"⁶² was sensical amid a conflict centered on civilian targets and contemporary energy geopolitics.⁶³ Nonetheless, it reflected the challenge in purporting to cabin the reach of national security. CFIUS's jurisdiction over "critical infrastructure" opened the door to eleven areas defined by the Department of Homeland Security, estimated to constitute 24.4 percent of the total American economy.⁶⁴

While responding to distinct contexts, both Exon-Florio and FINSA shared a common foundation and assumptions. Foreign investment was seen as a key ingredient for economic growth. In turn, economic growth and international economic interconnection served as pillars of U.S. national security. Restrictions, therefore, should be minimal – only those actions necessary to preserve certain industrial capacities for times of conflict, or later to secure soft target infrastructure against terrorist attack. Yet, even with these principles pressing toward "silencing" CFIUS's reach in theory, in practice those lines always have been more hazy than clear. Whether it was the flexibility built in the Exon-Florio factors or the potential for a broad definition of critical infrastructure under FINSA, maintaining a stark divide was easier said than done.

II. FINALLY, FIRRMA

By 2018 a geopolitical (and domestic political) sea change left Washington once again ripe to grapple with investment review. This time, however, one element defined that debate: China.⁶⁵ For over a decade, China's rise as a competitor had accelerated.⁶⁶ But the proverbial dam broke in the wake of the 2016 presidential election.⁶⁷

reduce regional rivalries . . . [It] was in the Middle East where the Bush administration most controversially sought to give convergence a push.”)

62. FINSA § 4(4).

63. Energy geopolitics were a long-standing factor in U.S. foreign policy. *See generally* DANIEL YERGIN, *THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, AND POWER* 571-762 (2009) (detailing the geopolitical moves surrounding oil and energy access from the Yom Kippur War to the Gulf War). Nonetheless, the environment of the 2000s with two active wars in the greater Middle East heightened energy geopolitics' importance.

64. DEP'T OF HOMELAND SEC., *THE NATIONAL SECURITY STRATEGY FOR THE PHYSICAL PROTECTION OF CRITICAL INFRASTRUCTURES AND KEY ASSETS* 35-70 (2003); GRAHAM & MARCHICK, *supra* note 11, at 148-49 (citing the 24.4 percent figure).

65. Cornyn CFIUS Testimony, *supra* note 13, at 2.

66. *See* JONATHAN KIRSHNER, *AMERICAN POWER AFTER THE FINANCIAL CRISIS* 1-3, 131-56 (2014) (outlining the 2008 Financial Crisis as a turning point in Sino-American relations); WRIGHT, *supra* note 49, at 68-70 (describing China's increasing military activities during the 2010s).

67. U.S. policy toward China was not the sole foreign policy issue of the 2016 campaign, but it loomed largest. The notion of China as "stealing American jobs" played a prominent role in the Trump campaign's "America First" rhetoric. *See, e.g.,* Emily Rauhala, *Trump Blasts China, China, China in Republican Convention Speech*, WASH. POST (July 22, 2016), <https://perma.cc/6NLD-QSCG>. However,

By 2017, classifications of the Sino-American relationship as a “strategic competition” were increasingly common,⁶⁸ raising concerns around then-growing Chinese investment in the United States.⁶⁹ In 2018, Congress responded with FIRRMA, which was centered on three fundamental changes in the international environment – ones that persist today. First, China presented a unified economic and military challenger. Second, that combined challenger was a non-democracy, straining an already stressed democratic model. Third, the development and use of advanced technologies had shifted considerably from the days of the Exon-Florio Amendment, upsetting foundational assumptions surrounding critical technology. Together, these dynamics reflected a climate in which national security equities were more apparent across a wider cross section of the U.S. economy. FIRRMA expanded CFIUS’s jurisdiction regarding advanced technologies in response to that new reality. In doing so, the legislation both maintained the traditional “national security as defense” line of effort and expanded the CFIUS framework to counter new digital authoritarianism risks.⁷⁰ Yet, when combined, those two aspects subtly provided CFIUS with a broader reach to support U.S. economic competitiveness against external rivals.

A. *Not Back to the Future*

At first glance, China’s emergence as a systemic rival to the United States might incline one to harken back to the Exon-Florio debate.⁷¹ Then the United States faced simultaneous military and economic pressures from abroad. However, the current circumstances diverge considerably from the late 1980s. While the question remains the same – how to protect national security equities when it comes to FDI without hobbling a key ingredient for economic growth – the board is arrayed quite differently. FIRRMA reflects three essential shifts.

a bipartisan shift on China had been occurring in the foreign policy community for several years prior to the 2016 election. For instance, this author supported a Brookings Institution bipartisan task force to craft a draft national security strategy beginning in 2015. That group dealt regularly with these ideas, endorsing a more competitive posture in its 2017 final report. See DEREK CHOLLET, ERIC EDELMAN, MICHÈLE FLOURNOY, STEPHEN HADLEY, MARTIN INDYK, BRUCE JONES, ROBERT KAGAN, KRISTEN SILVERBERG, JAKE SULLIVAN & THOMAS WRIGHT, BUILDING “SITUATIONS OF STRENGTH”: A NATIONAL SECURITY STRATEGY FOR THE UNITED STATES (Brookings Inst. 2017).

68. TRUMP NSS, *supra* note 1, at 2-4. By December 2017, the Trump administration would formalize the concept in its National Security Strategy. *Id.*

69. See, e.g., DEREK SCISSORS, CFIUS, CHINESE INVESTMENT, AND HOW TO IMPROVE BOTH 1-2 (Am. Enter. Inst. 2017) (finding “stark changes” in the amount of Chinese investment by 2017 from previous lower levels).

70. See POLYAKOVA & MESEROLE, *supra* note 5, at 1; Andrea Kendall-Taylor, Erica Frantz & Joseph Wright, *The Digital Dictators: How Technology Strengthens Autocracy*, FOREIGN AFF., Mar.-Apr. 2020, at 104 (arguing that led “by China, today’s digital autocracies are using technology – the Internet, social media, AI – to supercharge long-standing authoritarian survival tactics”).

71. On systemic rivalry, see Hal Brands, *Democracy vs. Authoritarianism: How Ideology Shapes Great-Power Conflict*, SURVIVAL, Oct.-Nov. 2018, at 61, 61-62; Thomas Wright, *The Return to Great-Power Rivalry Was Inevitable*, THE ATLANTIC (Sept. 12, 2018), <https://perma.cc/5QAL-U5ZX>. Notably, President Biden appears focused on the same systemic framing. See Joseph R. Biden, Jr., President of the United States, Remarks on the American Jobs Plan (Mar. 31, 2021), <https://perma.cc/3GLB-S3Q2> (“That’s what competition between America and China and the rest of the world is all about. It’s a basic question: Can democracies still deliver for their people?”) [hereinafter American Jobs Plan Remarks].

First, where the United States faced separate economic and military challengers in 1988, today they are united. Japan was an economic rival in the 1980s, but a security ally. Conversely, by the 1980s, the United States and Soviet Union remained acute security rivals, but not real economic competitors.⁷² Nor were U.S.-Soviet economic ties akin to the deep relationship that the United States has developed with China.⁷³ Thus, where the logic of seeking to divide questions of economic competitiveness from those of national security fit the context of the 1980s, that calculus had become distinctly different in the late 2010s.

Second, today the economic challenger is an authoritarian regime vigorously contesting the democratic model. Japan in the late 1980s may have been seen to menace American industry, but it was not attacking democracy as a form of governance. The international climate differs today when democracy is under assault around the globe.⁷⁴ As the bruising 2016 presidential campaign revealed,⁷⁵ a portion of the American public has acutely felt the economic pain resulting from a host of Chinese economic practices⁷⁶ – from state subsidies⁷⁷ to a campaign of intellectual property theft and forced technology transfer.⁷⁸ That pain is particularly concerning from a national security perspective when it tracks with growing disillusionment in democracy.⁷⁹

72. KREPINEVICH, *supra* note 6, at 39 (By 1980 “the USSR’s economy was barely 40 percent that of the United States.”).

73. See Zachary Karabell, *There’s No Cold War With China*, FOREIGN POL’Y (Aug. 14, 2020), <https://perma.cc/8HZ3-KV6L> (contrasting U.S.-Soviet trade as “so negligible as to be all but nonexistent” from the “extraordinary economic interdependence” of the U.S.-China relationship).

74. In the late 1980s, the world was in the midst of the third wave of democratization. Samuel P. Huntington, *Democracy’s Third Wave*, J. OF DEMOCRACY, Spring 1991, at 12, 12 (between 1974 and 1990 the number of democracies doubled worldwide). Today, democracy is backsliding. SARAH REPUCCI & AMY SLIPOWITZ, FREEDOM IN THE WORLD 2021: DEMOCRACY UNDER SIEGE 1 (Freedom House 2021), <https://perma.cc/E3EH-MBGA> (recording the fifteenth consecutive year of decline in global freedom).

75. The 2016 Trump campaign capitalized on this sentiment. See Nick Corasaniti, Alexander Burns & Binyamin Appelbaum, *Donald Trump Vows to Rip Up Trade Deals and Confront China*, N.Y. TIMES (June 28, 2016), <https://perma.cc/V9GL-K5WM>; *Trump Accuses China of “Raping” U.S. with Unfair Trade Policy*, BBC (May 2, 2016), <https://perma.cc/2QHD-6UGN>. It was not unknown that the developed economies’ middle classes were not prospering during this past period of rapid and intensifying globalization. Branko Milanovic and Christoph Lakner’s “elephant chart” illustrated this issue as early as 2013. Christoph Lakner & Branko Milanovic, *Global Income Distribution: From the Fall of the Berlin Wall to the Great Recession* 30 WORLD BANK ECON. REV. 203, 216 (2015) (2013 working paper) (graph (a)).

76. See, e.g., David Autor, David Dorn & Gordon H. Hanson, *The China Shock: Learning from Labor Market Adjustment to Large Changes in Trade* (Nat’l Bureau of Econ. Rsch., Working Paper No. 21906, 2016); Daron Acemoglu, David Autor, David Dorn, Gordon H. Hanson & Brendan Price, *Import Competition and the Great U.S. Employment Sag of the 2000s*, 34 J. OF LABOR ECON. 141 (2016).

77. WAYNE M. MORRISON, CONG. RSCH. SERV. RL33536, CHINA-U.S. TRADE ISSUES 29-31 (2018).

78. See, e.g., COMM’N ON THE THEFT OF AM. INTELL. PROP., UPDATE TO THE IP COMM’N REP. (Nat. Bureau of Asian Rsch., 2017) (updating the 2013 commission report).

79. Yascha Mounk & Roberto Stefan Foa, *This Is How Democracy Dies*, THE ATLANTIC (Jan. 29, 2020), <https://perma.cc/K6RG-Z4NK> (noting “the fall in democratic satisfaction has been especially pronounced in those countries that were supposed to be especially stable: high-income, developed democracies”). For the connection between economic malaise driving populist or outsider candidates, who then foster democratic deconsolidation, see Christopher Ingraham, *The American Dream is Dying, and It’s Taking Democracy With It*, WASH. POST (Mar. 5, 2021, 11:04 AM), <https://perma.cc/Q46P->

Third, the technological environment has changed profoundly since the 1980s. Then, advanced technologies providing a battlefield edge came from entities close to the Defense Department; today, many advances emerge from the private sector, focused on civilian uses.⁸⁰ Though dual-use concerns were not new to CFIUS,⁸¹ the equilibrium shift from 1988 to 2018 was tangible.⁸² No longer the “dominant driver of technology innovation,” the Defense Department must look beyond traditional private sector partners to maintain its military edge.⁸³ Simultaneously, a more digitalized world has opened new national security vulnerabilities via digital authoritarianism’s tendrils.⁸⁴ Espionage was a long-standing challenge, but the technology revolution of the 2010s opened a surfeit of new vectors for malign actors to harvest information on Americans – and the ends toward which that data could be put. Digital tools facilitated intelligence gathering against not only the state,⁸⁵ but against Americans writ large as their lives become more intertwined with data-intensive services.⁸⁶

A more digital and interconnected world brought new opportunities, but also the dangers of “the expansion and export of data-guzzling platforms subject to authoritarian governments . . . [and] . . . the proliferation of intrusive surveillance technology.”⁸⁷ In this new environment, even a seemingly innocuous application like FaceApp – a frivolous photo editing tool – carries national security concerns in light of its privacy terms and roots in Russia.⁸⁸ Suddenly, new civilian digital

PFJZ; Christopher Ingraham, *The United States is Backsliding into Autocracy Under Trump*, *Scholars Warn*, WASH. POST (Sept. 18, 2020, 4:45 AM), <https://perma.cc/DD9K-9TC3>.

80. See PAUL SCHARRE & AINIKKI RIIKONEN, DEFENSE TECHNOLOGY STRATEGY (Ctr. for a New Am. Sec. 2020); Adam Jay Harrison, Jawad Rachami & Christopher Zember, *A New Defense Innovation Base, WAR ON THE ROCKS* (Aug. 21, 2014), <https://perma.cc/HA6R-8E2X> (“[O]ver the previous two decades, U.S. federal and defense spending has failed to keep pace with the explosion of commercial market-based R&D investment.”).

81. See Byrd Amendment, § 837(b)(3).

82. SCHARRE & RIIKONEN, *supra* note 80, at 6 (Today’s Department of Defense “is no longer the dominant player in the U.S. [research and development] landscape,” unlike the 1960s, when the Pentagon funded “about half of national” research and development).

83. *Id.* at 7.

84. See Kendall-Taylor, Frantz & Wright, *supra* note 70. The Biden administration also has recognized digital authoritarianism’s threat. See Anne Neuberger, Deputy Na’l Sec. Advisor for Cyber and Emerging Tech., Keynote Remarks at the 2021 Future Strategy Forum (May 10, 2021) (warning that technology “can be used by authoritarian regimes to advance mass surveillance, facilitate arbitrary detention, and systematize oppression”).

85. State-focused hackings still impacted individuals. See Ellen Nakashima, *Hacks of OPM Databases Compromised 22.1 Million People, Federal Authorities Say*, WASH. POST (July 9, 2015), <https://perma.cc/J94P-CL37>.

86. See Maya Wang, *China’s Techno-Authoritarianism Has Gone Global*, FOREIGN AFF. (Apr. 8, 2021), <https://perma.cc/ZMJ3-LUFE>.

87. KARA FREDERICK, DEMOCRACY BY DESIGN: AN AFFIRMATIVE RESPONSE TO THE ILLIBERAL USE OF TECHNOLOGY FOR 2021 5 (Ctr. for a New Am. Sec. 2021).

88. Laura Rosenberger, *Making Cyberspace Safe for Democracy: The New Landscape of Information Competition*, FOREIGN AFF., May-Jun. 2020, at 146, 150 (“In 2019, the popularity of FaceApp – an application designed and distributed by a Russian company that encouraged users to upload pictures of their faces – raised questions about whether the Russian government could use it to gather facial recognition data from around the world.”).

technologies, and the data that enable them,⁸⁹ have expanded the scope of technology with significant national security implications. Where investment controls in the late Cold War guarded against dissemination of technology that could bolster Moscow's military might, today policy makers must consider advanced technologies' intelligence implications.⁹⁰

These combined shifts have made national security concerns much more difficult to disentangle from the broader "civilian" economy. In crafting FIRRMA, legislators confronted an environment where it was, and remains, no longer sufficient to protect a relatively small group of technologies and industries with military applications. A broader set of defenses was required.

B. The Road to Economic Competitiveness Winds Through Advanced Technologies

That broader set of defenses was grounded in FIRRMA's expansion of CFIUS's authority around advanced technologies, termed "critical technologies."⁹¹ Inclusion of critical technologies was not entirely new; FINSA introduced the term.⁹² While FIRRMA updated the definition of critical technologies,⁹³ its most important change concerning advanced technologies was the introduction of six new factors for CFIUS's consideration in making a

89. Authoritarian powers' collection of Americans' data presents a multilayered threat. At first, there is the potential for the gathered information in and of itself to compromise an individual; this is a new method of collecting traditional information (unpaid loans, personal indiscretions, etc.). But in an era of big data and advanced algorithms, collected information serves more than that single, discrete use. "To train algorithms and feed machine-learning processes, developers need more and more data from diverse sources." *Id.* at 151. Thus, collected data, even on Americans, can help advance the power of authoritarian surveillance states at home, as well as train better algorithms for future surveillance on American persons.

90. Brendan Thomas-Noone, *What the Cold War Can Teach Washington About Chinese Tech Tensions*, BROOKINGS: TECH STREAM (Jan. 12, 2021), <https://perma.cc/5QPJ-485E> ("China's growth into a digitally enabled authoritarian state presents new challenges that the Soviet Union did not, largely due to the types of technologies and wide accessibility of data available today. High-tech trade and scientific interactions in the Cold War may have helped Moscow grow its military and strategic power, but they were less directly related to its authoritarian grip than similar exchanges with China today.").

91. FIRRMA § 1703(a)(6).

92. FINSA defined "critical technologies" as "critical technology, critical components, or critical technology items essential to national defense." FINSA § 2(7).

93. FIRRMA § 1703(a)(6)(A)(i)-(v). FIRRMA simultaneously provided more specificity and more opacity to the term "critical technologies." It crystalized certain aspects, including defense articles or defense services on the Munitions List under the International Traffic in Arms Regulations, items on the Commerce Control List under the Export Administration Regulations, special nuclear-related items under Parts 110 and 810 of Title 10, and "select agents and toxins." *Id.* More nebulously, but crucially, the definition also added those "[e]merging and foundational technologies controlled" by Section 1758 of the Export Reform Act of 2018 (ECRA). *Id.* § 1703(a)(6)(A)(vi). Therefore, FIRRMA's "critical technologies" are defined not by CFIUS, but by the Secretary of Commerce "lead[ing] a 'regular and ongoing' interagency process to identify 'emerging and foundational' technologies that are 'essential to the national security of the United States' and thus should be subject to export controls." Robert Williams, *In the Balance: The Future of America's National Security and Innovation Ecosystem*, LAWFARE (Nov. 30, 2018, 3:01 PM), <https://perma.cc/YR68-Y6GX>.

national security assessment.⁹⁴ Most relevantly, in reviewing a transaction, CFIUS may consider if a party is a “country of special concern” possessing a “demonstrated or declared strategic goal of acquiring a type of critical technology” that would impact U.S. leadership in a national security area; the potential national security effects of a pattern of transactions, or cumulative control, over one type of critical technology or critical material; whether foreign control of the industry/commercial activity could negatively impact the United States’ ability to meet national security requirements – including the loss of human capital in that space; and whether a transaction is likely to “expose, either directly or indirectly, personally identifiable information” or other sensitive data of U.S. citizens to a foreign government.⁹⁵ Collectively, these factors create an even broader expansion of CFIUS’s jurisdiction than that under FINSAs. Specifically, inherent uncertainties about potential military dual-use and the growing pervasiveness of personal data in throughout economic activity inspired a need for wider remit.

FIRRMA has continued the thread of investment review to protect technologies providing a military edge. However, the shift in leading technological developments to primarily civilian-oriented U.S. businesses necessitates a wider scope to perform that same task. At the core is the unknown applicability of cutting edge research and development.⁹⁶ Just as defense researchers developing the internet or GPS decades ago could only speculate at how those tools could be spun off later for civilian use, today’s national security policy makers face the same challenge in reverse.⁹⁷ Such concerns are not theoretical. In April 2021, *The Washington Post* reported China’s use of U.S.-developed software for civilian purposes in computer simulations for its hypersonic missile program.⁹⁸ Private sector civilian-oriented advances in the key areas of artificial intelligence, biotechnology, and quantum technology likewise could be co-opted for rivals’

94. FIRRMA § 1703(a)(1). FIRRMA again declined to define “national security,” though it did offer a clarification that “‘national security’ shall be construed as to include those issues relating to ‘homeland security’ including its application to critical infrastructure.” *Id.* Notably, the six new “factors” for consideration in assessing whether a prospective covered transaction involves national security equities are not formal factors of the type established under the Exon-Florio Amendment or FINSAs. Rather they are included as a “sense of Congress” provision. *Id.* § 1702(c). Despite that distinction, the six seem to be treated as if they were “full” factors. *See* JACKSON, *supra* note 27, at 14-15; DAVID MORTLOCK, NOMAN GOHEER, & AHMAD EL-GAMAL, EXPANDED CFIUS JURISDICTION UNDER FIRRMA REGULATIONS: AN OVERVIEW 14 (Willkie, Farr & Gallagher 2020).

95. FIRRMA § 1702(c). Two additional factors include whether the “foreign person engaging in a covered transaction . . . has a history of complying with” U.S. law and whether the transaction exacerbates or creates new cyber vulnerabilities. *Id.* § 1702(c)(3), (6). FIRRMA’s list is more expansive than FINSAs’ mandate to consider the “potential national security-related effects [of FDI] on United States critical technologies.” FINSAs § 4(4).

96. Williams, *supra* note 93 (discussing the unknowability regarding multiple areas of cutting-edge research).

97. As Paul Rosenzweig has framed the issue: “I knew what was critical in 1958 — tanks, airplanes, avionics. Now, truthfully, everything is information. The world is about information, not about things.” *Quoted in* Cory Bennett & Bryan Bender, *How China Acquires the “Crown Jewels” of U.S. Technology*, POLITICO (May, 22, 2018, 5:10 AM), <https://perma.cc/T263-FANG>.

98. Ellen Nakashima & Gerry Shih, *China Builds Advanced Weapons Systems Using American Chip Technology*, WASH. POST (Apr. 9, 2021, 6:52 AM), <https://perma.cc/6EVG-G6RM>.

military use.⁹⁹ FIRRMA sought to reduce that risk by closing a previous loophole where investment in early stage research could provide access to insights that could be taken back to an investor's rival home country before the export control regime could recognize the danger.¹⁰⁰ Based on such concerns, FIRRMA provided CFIUS broader authority to cast a wider gaze in considering the risk of foreign investment when protecting traditional defense areas.¹⁰¹

Simultaneously, FIRRMA's new factors reckon with a threat of digital authoritarianism without precedent in the 1980s. A more digitized world has created direct nexuses between national security considerations and a wide range of economic activity. China's data collection practices to further its unprecedented surveillance and censorship regime are well-known.¹⁰² In charging CFIUS to consider whether a transaction "expose[s], either directly or indirectly, personally identifiable information, genetic information, or other sensitive data" of U.S. citizens to access by a foreign government in a manner that implicates national security,¹⁰³ FIRRMA opened a door for the Committee to respond to this growing

99. CONG. RSCH. SERV., R46458, EMERGING MILITARY TECHNOLOGIES: BACKGROUND ISSUES FOR CONGRESS i (2020) (listing artificial intelligence (AI), biotechnology, and quantum technology as three key emerging military technologies alongside lethal autonomous weapons, hypersonic weapons, and directed energy weapons). Both China and Russia have declared AI a "strategic technology." Russian President Vladimir Putin has declared that "whoever becomes the leader in this field will rule the world." CONG. RSCH. SERV., R45178, ARTIFICIAL INTELLIGENCE AND NATIONAL SECURITY 1 (2020). In the United States, leading AI research is centered in the private sector, at laboratories like DeepMind and OpenAI. Sam Shead, *Artificial Intelligence Researchers Rank the Top A.I. Labs Worldwide*, CNBC (Jan. 21, 2021, 5:49 AM), <https://perma.cc/E8XV-4ZN3> (reporting DeepMind, OpenAI and FAIR (Facebook AI Research) perceived to be the top three global research laboratories on AI).

100. FIRRMA plugs that gap by defining "control," reflecting the power an investor might have over an entity, in a manner that provides regulators expansive remit. FIRRMA § 1703(a)(3) ("The term 'control' means the power, direct or indirect, whether exercised or not exercised, to determine, direct, or decide important matters affecting an entity, subject to regulations prescribed by the Committee"). Under that new definition, the latest regulations promulgated by the Treasury Department reinforced a broad definition of control. *See Provisions Pertaining to Certain Investments in the United States by Foreign Persons*, 85 Fed. Reg. 3112, 3126-27 (Jan. 17, 2020) (to be codified at 31 C.F.R. part 800) (defining "control").

101. Certainly, overuse of that authority could stifle the more open environment conducive to innovation. *See Williams, supra* note 93 ("[The] question boils down to whether the United States can figure out a way to protect strategically sensitive emerging technologies without undermining the economic ecosystem that gives rise to those technologies."); *China's Threat to American Government and Private Sector Research and Innovation Leadership: Hearing Before H. Permanent Select Comm. on Intel.*, 115th Cong. 5 (2018) (testimony of Elsa Kania, Adjunct Fellow, Technology and National Security, Center for a New American Security) (noting a need for balance as "Chinese investments, as well as tech incubators and targeted acquisitions, can enable access to U.S. technologies that conveys a level of risk, but may provide valuable opportunities for U.S. companies as well").

102. Joshua Geltzer & Bryan Jones, *Weapons of Mass Consumerism: Why China Wants Your Personal Information*, JUST SEC. (Jan. 10, 2019), <https://perma.cc/AEC3-V7C2> (noting a shift in Chinese gathering of information on U.S. governmental individuals to the general public); Maggie Miller, *Intel Agency Warns of Threats from China Collecting Sensitive U.S. Health Data*, HILL (Feb. 2, 2021, 6:10 PM), <https://perma.cc/U5M7-XF6S> (reporting the National Counterintelligence and Security Center's warning that China has stepped up its gathering, legally and illegally, of American healthcare data). *But see* Samm Sachs, *Data Security and U.S.-China Tech Entanglement*, LAWFARE (Apr. 2, 2020, 8:00 AM), <https://perma.cc/RJ28-SSGD> (cautioning not all data gathered by Chinese businesses immediately goes to the Chinese state; private actors do dispute state claims for access).

103. FIRRMA § 1702(c)(5).

abuse of individuals' sensitive data for national security ends. The scope of that challenge is broad. In 2019, as remote a matter as a Chinese entity's acquisition of LGBTQ dating app Grindr caused consternation at the prospect of access to data on governmental and military personnel, including sexual orientation or HIV status.¹⁰⁴ Today's national security environment includes a host of new threat vectors hidden in plain sight; FIRRMA's additional factors enable CFIUS to act in that space.

In providing CFIUS jurisdiction over both a range of advanced technologies that could have military application and Americans' sensitive data, FIRRMA subtly provides CFIUS power to review FDI for somewhat broader advanced technological competitiveness concerns.¹⁰⁵ While such an expansive interpretation runs against the historical narrative, it is not inconsistent with FIRRMA. A "sense of Congress" provision highlights the benefits of foreign investment, and Congress's intent to maintain its open investment climate;¹⁰⁶ however, the limiting principle established is to not consider matters "absent a national security nexus."¹⁰⁷ Current technological realities create numerous direct ties between national security and the broader economy. In a digitalized world, the nexus between advanced technologies – particularly in the information and communications technology space – and national security is as robust as that for a traditional defense manufacturer. As the choice of digital services, from baseline hardware to the applications on one's phone, becomes as important as hard power for a government in projecting influence abroad, the power of advanced technologies should loom as large in the minds of national security policy makers as the latest smart bomb.¹⁰⁸

III. RESURRECTING ROOSEVELT: ECONOMIC SECURITY AS DEFENSE OF DEMOCRACY

While FIRRMA expanded CFIUS's scope deeper into the American economy, the question remains whether the expansion sufficiently supports the objectives of the Biden administration's Foreign Policy for the Middle Class concept. On

104. Eric Platt, *Shadowy U.S. Security Committee Opens New Front with Grindr Sale*, FIN. TIMES (Mar. 29, 2019), <https://perma.cc/L6SZ-ERZK>. In 2020 Chinese-based owner Beijing Kunlun Tech signed an agreement with CFIUS to sell the application by June 2020. Yuan Yang & James Fontanella-Khan, *Grindr Sold by Chinese Owner After U.S. National Security Concerns*, FIN. TIMES (Mar. 7, 2020), <https://perma.cc/R665-FHRS>.

105. On economic competitiveness concerns, see Williams, *supra* note 93 ("Part of the concern is that Chinese policies and practices distort markets and undermine the ability of U.S. businesses to compete fairly in key technology sectors that are poised to be the main drivers of economic growth into the future – semiconductors, artificial intelligence, robotics, quantum computing and the like.")

106. FIRRMA § 1702(b)(2)-(3). The Biden administration likewise has reaffirmed its commitment to an open investment climate. Press Release, White House, Statement by President Joe Biden on the United States' Commitment to Open Investment (June 8, 2021).

107. FIRRMA § 1702(c)(1)-(2), (9).

108. Out of Order, *Defending Democracy in the Digital World: A Conversation with Marietje Schaake*, THE GERMAN MARSHALL FUND, at 11:10 (Dec. 23, 2020), <https://perma.cc/SX2F-3ZXE> (discussing the notion that a state's ability to project influence via technology is increasingly as important for national security as traditional hard power).

the surface, CFIUS's new bandwidth to bolster technological competitiveness may better serve the charge that "economic security is national security."¹⁰⁹ However, the Biden team is considering a broader understanding of economic security as required to protect the American constitutional structure.¹¹⁰ The United States' continuance as a democratic republic requires faith in the market democratic model – faith undercut if a significant portion of citizens experience prolonged economic insecurity. In that context, "economic security" would entail bolstering the people's belief that market democracies can economically deliver as a national security imperative. The last time that the United States embraced this conception of national security was under Franklin D. Roosevelt. President Biden, it seems, is actively picking up that mantle.

A. "I am thinking of our democracy."

The 2016 election tore back the curtain to reveal a public perception of economic inequality and consonant discontent.¹¹¹ In isolation, one might view the Reagan era economic paradigm's failure to deliver for the American middle class as a domestic economic matter.¹¹² However, amid an international clash of systems, the weakening of the American middle class – and consequently public faith in the American model – becomes a national security issue. Domestic unease forces leaders to focus resources at home when international competitors are pressing forward abroad.¹¹³ However, even more elementary is that if those economic woes sap domestic faith in democracy, then even a perfectly executed foreign policy would be for naught.

No president appreciated this imperative more than Franklin Roosevelt. While his presidency is commonly divided into separate eras of the New Deal battle against the Great Depression and the Second World War struggle against fascism, the two cannot be separated. The New Deal was as much an international project as a domestic one.¹¹⁴ Roosevelt's efforts reflected an agenda of democratic defense amid a global clash of systems.¹¹⁵ From the very beginning of his

109. See TRUMP NSS, *supra* note 1, at 17; BIDEN INSSG, *supra* note 1, at 15.

110. See *supra* note 23, regarding Laura Donohue's framework of the republic's constitutional structure as the *object* of national security in order to serve the *purpose* of individual rights.

111. See, e.g., Corasaniti, Burns & Appelbaum, *supra* note 75.

112. See Mike Konczal, "Neoliberalism" Isn't an Empty Epithet. It's a Real, Powerful Set of Ideas, VOX (Dec. 20, 2017), <https://perma.cc/T8FZ-6TKQ>; KIRSHNER, *supra* note 66, at 82-105; Lakner & Milanovic, *supra* note 75.

113. STEPHEN SESTANOVICH, MAXIMALIST: AMERICA IN THE WORLD FROM TRUMAN TO OBAMA 302-24 (2014). In 2009, 79 percent of Republicans and Democrats believed the United States "should pay less attention to problems overseas and concentrate on problems here at home." *Id.* at 302.

114. IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 5 (2013) (arguing the New Deal's "battles were fought on many fronts . . . [but its] international objectives were no less weighty, from the mission to defeat Nazi Germany, Fascist Italy, and militarist Japan to the desire to keep Soviet Communism in check, while maintaining internal solidarity and security in the process").

115. *Id.* (positing that the "New Deal's arrangement of values and institutions, and its support for the Western political tradition answered" the challenge of whether constitutional democracy could survive and thrive in the modern era against the rise of alternative models).

presidency, Roosevelt spoke in terms of restoring faith in the constitutional system and trust in democracy – with economic hardship as the principal adversary.¹¹⁶

Perhaps nowhere did Roosevelt draw a clearer connection between his domestic economic agenda and international affairs than an April 1938 fireside chat. Speaking as the march of fascism extinguished the candles of democracy around the globe, he told the nation that in “recommending this [spending] program . . . I am thinking of our democracy. I am thinking of the recent trend in other parts of the world away from the democratic ideal.”¹¹⁷ Democracy, Roosevelt asserted, collapsed not because people “disliked democracy, but because they had grown tired of unemployment and insecurity, of seeing their children hungry while they sat helpless in the face of government confusion, government weakness – weakness through lack of leadership in government.”¹¹⁸ Roosevelt’s words struck on the inseparability of basic economic security and the Republic’s survival. The fear was not invasion, but that external pressures would contribute to internal strains, causing the United States to tear itself asunder. Internal strife would aid and abet the rise of domestic illiberal extremists, facile at channeling popular unrest to undermine democracy – a prospect that resonates today following the January 6th, 2021, attack on the Capitol.¹¹⁹ The government, therefore, had to “to prove that the practical operation of democratic government is equal to the task of protecting the security of the people.”¹²⁰

B. Biden’s National Security: Build Back Better (and Broader)

Such concerns may appear valid but tangential to CFIUS’s national security remit. However, even more so than in Roosevelt’s time, the two issues are inherently interlocked.¹²¹ In today’s more economically interconnected world

116. Roosevelt, *supra* note 19. Four years later in his Second Inaugural, Roosevelt presented the clear “challenge to our democracy: In this nation I see tens of millions of its citizens – a substantial part of its whole population – who at this very moment are denied the greater part of what the very lowest standards of today call the necessities of life.” Franklin D. Roosevelt, “Second Inaugural Address,” MILLER CENTER, UNIVERSITY OF VIRGINIA, at 11:37 (Jan. 20, 1937), <https://perma.cc/VVJ6-W5CM>. Roosevelt was not alone in this concern. See WILLIAM YANDELL ELLIOTT, *THE NEED FOR CONSTITUTIONAL REFORM: A PROGRAM FOR NATIONAL SECURITY* 22-23 (1935) (arguing to avoid the extremes of fascism and communism, “security, under the American system, seems to imply at least the opportunity to earn a decent living”).

117. Franklin D. Roosevelt, “Fireside Chat 12: On the Recession,” MILLER CENTER UNIVERSITY OF VIRGINIA, at 17:17 (Apr. 14, 1938), <https://perma.cc/6WXU-VYDJ>.

118. *Id.*

119. Concerns of an internecine conflict were not remote in the 1930s. Only a year after Roosevelt’s First Inaugural Address, *Modern Monthly* hosted a symposium entitled “Will Fascism Come to America?” In 1935, Sinclair Lewis published *It Can’t Happen Here*, which sold 320,000 original copies. Michael Meyer, *Introduction to SINCLAIR LEWIS, IT CAN’T HAPPEN HERE* vi-vii (Signet Classics 2005). See also Katznelson, *supra* note 114, at 54-57 (noting that the “seeming success” of dictatorships attracted “tens of thousands” of Americans).

120. Roosevelt, *supra* note 117.

121. Foundationally, an international clash of systems provides more space for contemplating alternatives to market democracy. Whether fascism and communism in the 1930s or techno-authoritarianism and illiberal strongman rule today, the existence of those alternatives impacts the

than that of the 1930s, unfair economic practices that contribute to the hollowing out U.S. middle class jobs represent a factor in eroding faith in the democratic system.¹²² That element is not the *sole cause* of the strains besetting the nation;¹²³ but economic hardship is undoubtedly a serious contributor. As the 2021 Democracy Perception Index found, the most significant perceived threat to democracy across fifty-three countries is economic inequality.¹²⁴ Therefore, under a broader, Rooseveltian notion of national security, Chinese economic behaviors – including investment inimical to U.S. employment interests – could constitute a national security concern in terms of defense of democracy.

Signs indicate that President Biden and his national security team entered office embracing this more comprehensive understanding of economic security and its ties to preserving democracy. The period following the 2016 election saw a profound shift in Democratic national security circles, leading to the rise of what Thomas Wright has termed the “2021 Democrats.”¹²⁵ Uniting and defining that group is an effort to respond to a reality where “democracy has eroded, nationalist populism has grown in the West, and authoritarianism has strengthened globally . . . [and economic] discontent has increased even though the [United States], until recently, experienced growth and high levels of employment.”¹²⁶ Accordingly, there emerged intellectual space for challenging assumptions – including the long-running narrative of (at least in principle) bifurcating national security concerns from macro-economic policy discussions.

domestic Overton Window as to what America *could realistically be*. For a summary of the Overton Window, see Maggie Astor, *How the Politically Unthinkable Can Become Mainstream*, N.Y. TIMES (Feb. 26, 2019), <https://perma.cc/W4LH-WZQM>.

122. See James Traub, *Biden's "Foreign Policy for the Middle Class" is a Revolution*, FOREIGN POL'Y (Mar. 17, 2021, 8:53 AM), <https://perma.cc/WP5J-FT9E> (Noting that in addition to cultural issues, “the surging popularity of populists of the left and right in Europe, brought home the political consequences of the rapid decay of the 20th-century industrial middle class”). It also is important to clarify that the emphasis must be on *unfair* economic practices, not *all* practices. A market-based economy inherently includes winners and losers. The market cannot be preserved in amber; jobs will be created and destroyed. But that churn must occur under fair rules of competition.

123. To assert unfair foreign economic practices are the sole cause would ignore other economic and non-economic drivers, including market shifts accompanying the rise of automation and long-standing cultural/racial animus. See Sean Fleming, *A Short History of Jobs and Automation*, WORLD ECON. F. (Sept. 3, 2020), <https://perma.cc/29XZ-246A> (on the impact of automation); Ronald F. Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash*, (Harv. Kennedy Sch. Fac. Rsch. Working Paper No. RWP16-026, 2016) (discussing whether illiberal populism is grounded in economic discontent or cultural backlash).

124. LATANA & ALLIANCE OF DEMOCRACIES, DEMOCRACY PERCEPTION INDEX 2021 16 (2021), <https://perma.cc/QL7Y-7R9X> (finding an average of 64 percent of respondents across 53 countries view inequality as the largest threat, outpacing foreign interference and “big tech”). Compare with then-candidate Biden’s 2019 statement: “When you have income inequality as large as we have in the United States today, it brews and ferments political discord and basic revolution. It allows demagogues to step in.” Quoted in Eric Levitz, *Biden 2020: Change That Wall Street Liberals Can Believe In?*, N.Y. MAG: INTELLIGENCER (Sept. 8, 2020), <https://perma.cc/FY3W-KAJN>.

125. Thomas Wright, *The Quiet Reformation of Biden's Foreign Policy*, THE ATLANTIC (Mar. 19, 2020), <https://perma.cc/D4XC-J8HN>.

126. *Id.*

Writing in 2020, Jake Sullivan and Jennifer Harris (now National Security Advisor to President Biden and National Security Council (NSC) Senior Director for International Economics and Labor, respectively) rejected the “view that economics and foreign policy ought to be kept distinct, as if mixing the two would taint economics,” seeing engagement on economic matters as “determin[ing] the United States’ success or failure in geopolitics.”¹²⁷ Similarly, 2020 marked the culmination of a multi-year research effort at the Carnegie Endowment for International Peace, launching a report notably titled *Making U.S. Foreign Policy Work Better for the Middle Class*.¹²⁸ Led by now-Director of State Department Policy Planning Salman Ahmed,¹²⁹ the task force report argued that the United States must advance “national security interests and middle class economic interests concurrently,” including at times deploying “defensive economic tools” like CFIUS.¹³⁰ Nor did only policy wonks support that perspective. Writing in March 2020, then-presidential candidate Biden devoted half of an article in *Foreign Affairs* to concerns more focused on shoring up domestic democratic foundations than outward facing foreign policy – including a section specifically calling for a “foreign policy for the middle class.”¹³¹

Since assuming office, the Biden administration appears to have doubled down on this outlook. At a February 2021 press conference, Sullivan reinforced that the “Build Back Better [agenda] isn’t just about economics, it’s about national security as well.”¹³² Early days suggest that no one believes in this position more than Biden himself. He has emphasized that the world is “in the midst of a fundamental debate about the future,” an “inflection point between” democracy and autocracy.¹³³ Viewing defense of democracy as, in the words of a senior White House aide, a “central organizing principle” for his presidency, Biden considers whether Americans feel democracy can provide for them as the key litmus test.¹³⁴ Thus,

127. Sullivan & Harris, *supra* note 9.

128. MAKING U.S. FOREIGN POLICY WORK BETTER FOR THE MIDDLE CLASS (Salman Ahmed & Rozlyn Engel eds., 2020). The report argues that “the prime directive of everyone in the foreign policy community – not just those responsible for international economics and trade – should include developing and advancing a wide range of policies abroad that contribute to economic and societal renewal at home.” *Id.* at 11.

129. The report’s authors also included Sullivan and Harris.

130. *Id.* at 22, 67.

131. Joseph R. Biden, Jr., *Why America Must Lead Again: Rescuing U.S. Foreign Policy After Trump*, FOREIGN AFF., Mar.-Apr. 2020, at 64.

132. Jake Sullivan, Assistant to the President for Nat’l Sec. Aff., Press Briefing by Press Secretary Jen Psaki and National Security Advisor Jake Sullivan (Feb. 4, 2021), <https://perma.cc/2KSG-BSQE>.

133. Joseph R. Biden, Jr., President of the United States, Speech at the Munich Security Conference: Remarks on America’s Place in the World (Feb. 16, 2021), <https://perma.cc/B4CS-8VJS>; American Jobs Plan Remarks, *supra* note 71 (“I truly believe we’re in a moment where history is going to look back on this time as a fundamental choice that had to be made between democracies and autocracies.”).

134. Jeremy Diamond, *Joe Biden Can’t Stop Thinking About China and the Future of American Democracy*, CNN (Apr. 29, 2021), <https://perma.cc/TFB5-R7L9> (quoting senior White House aides on-background). Diamond further reports that just “as Roosevelt led the [United States] through a pivotal decade in which democracy was threatened, Biden told his aides he believed the [United States] was at a similar inflection point. With autocracies like China on the rise, the [United States] – and by extension his presidency – would be judged, at least in part, on the ability to answer a fundamental question: Can the [United States] demonstrate that democracy works?” *Id.*

Senior Advisor to the President Mike Donilon describes a “two-part puzzle” where “the country needs to see again that democracy can deliver tangible results in their lives,” which would then serve as “a proof point to the rest of the world that the future will be won by democracies, not by autocracies.”¹³⁵

That interconnection explains the Biden administration’s efforts to weave the narrative of competition with China into signature domestic initiatives.¹³⁶ Speaking to a joint session of Congress in April 2021, Biden framed proposed investments as responding to authoritarians who “think that democracy can’t compete in the [twenty-first] century.”¹³⁷ Consequently, the Biden administration appears to have embraced a Rooseveltian conception of national security. Meeting threats to democracy requires not only the force of arms on foreign fields, but even more fundamentally, in the words of now-NSC Senior Director for Technology Tarun Chhabra, seeking to “restore public faith in democratic capitalism.”¹³⁸

IV. FIRRMA FIT?

Given the Biden administration’s Rooseveltian understanding of national security, the subsequent question is whether CFIUS has authority to act on that interpretation. Widening the aperture of FDI review to ward against potential malign investment intended to threaten employment levels or employment quality would result in CFIUS conducting some analysis that is traditionally the purview of a “net benefit test” for FDI.¹³⁹ That authority under FIRRMA is dubious. Congress did not intend that FIRRMA be interpreted in such an expansive manner. Both statutory text and legislative history speak to an explicit rejection of CFIUS

135. *Id.*

136. The Ezra Klein Show, *The Best Explanation of Biden’s Thinking I’ve Heard*, N.Y. TIMES (Apr. 9, 2021), <https://perma.cc/S3EQ-GT88> (interviewing Brian Deese, director of the White House Economic Council, in which Deese describes the administration’s strategy for domestic investments as interwoven with responding to China strategically, economically, and to answer the question of “can the United States deliver for its own citizens.”); Ella Nilsen & Alex Ward, *Biden is Using His Economic Plan to Challenge China*, VOX (Apr. 26, 2021), <https://perma.cc/C5C7-5MJ9> (“Biden’s signature domestic economic policy plan is also a critical element of a broader foreign policy strategy to thwart China’s growing power and global influence.”).

137. Joseph R. Biden, Jr., President of the United States, Remarks in Address to a Joint Session of Congress (Apr. 28, 2021), <https://perma.cc/N6H3-SS69> (invoking Roosevelt’s time as “another era when our democracy was tested”).

138. TARUN CHHABRA, *THE CHINA CHALLENGE, DEMOCRACY, AND U.S. GRAND STRATEGY* 9 (Brookings Inst. 2019).

139. A “net benefit test” looks beyond core security-related factors to consider whether the investment under review provides aggregate benefit to a country. Canada’s Investment Canada Act (ICA) provides an example. Investment Canada Act [ICA], R.S.C., 1985, c. 28 (1st Suppl.). Under the ICA, considerations for review include, but are not limited to: “the effect of the investment on the level and nature of economic activity,” including “effect on employment”; “the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada”; “the effect of the investment on competition within any industry or industries in Canada”; and “the contribution of the investment to Canada’s ability to compete in world markets.” *Id.* § 20. See generally MATHIEU FRIGON, *THE FOREIGN INVESTMENT REVIEW PROCESS IN CANADA* (Library of Parliament 2011).

review for inbound investment under a net benefit framework.¹⁴⁰ However, FIRRMA's text provides the president and CFIUS a set of highly flexible factors. That elastic mandate, coupled with the practical structure of the review process, offers leeway for nudging the scope toward broader investment review. That reading would clearly contradict congressional intent expressed in FIRRMA's precatory language and the legislation's history. Nonetheless, space remains, with only Congressional action likely capable of reining in a president in such circumstances.

A. *FIRRMA-ly No*

Both FIRRMA's text and its legislative history illustrate that it does not expand CFIUS's mandate to a full net benefit test. Almost immediately, the "sense of Congress" provision highlights the importance of a reading that hews more closely to traditional national security. Recognizing that FDI "provides substantial benefit to the United States," the section warns against overreach.¹⁴¹ Most directly, the provision admonishes that CFIUS should "review transactions for the purpose of protecting national security and should not consider issues of national interest absent a national security nexus."¹⁴² This warning against consideration of "issues of national interest" takes on particular meaning in light of the text and history of the Exon-Florio Amendment. Not only did the final text of the Exon-Florio Amendment eliminate language of "essential commerce" and "economic welfare," it also shifted CFIUS away from its original Ford-era mandate that charged the Committee with "review[ing] investment which . . . might have major implications for U.S. national interests."¹⁴³ Thus, specifically warning against considering a broader "national interest" demonstrates Congress's continued intention of a narrower remit.

While traditionally such "sense of Congress" provisions would be only persuasive, that standard leaves a textual conundrum in the context of FIRRMA.¹⁴⁴ If such provisions are only precatory,¹⁴⁵ it is odd that the six new factors guiding CFIUS, which also come as a "sense of Congress" provision, have been viewed as full factors for CFIUS consideration.¹⁴⁶ Such a quandary supports turning to additional modes of analysis for clarification, particularly legislative history.

140. See FIRRMA § 1702(b)(1); GRAHAM & MARCHICK, *supra* note 11, at 42.

141. FIRRMA § 1702(b)(1).

142. *Id.* § 1702(b)(9).

143. See JACKSON, *supra* note 27, at 5-8 (citing Executive Order No. 11858(b), 40 Fed. Reg. 20263 (May 7, 1975)); GRAHAM & MARCHICK, *supra* note 11, at 42.

144. See, e.g., CONG. RSCH. SERV., R46484, UNDERSTANDING FEDERAL LEGISLATION: A SECTION-BY-SECTION GUIDE TO KEY LEGAL CONSIDERATIONS 27 (2020) ("Courts generally regard these [sense of Congress] provisions as 'precatory' and 'not amounting to positive, enforceable law'") (citing *Chong Yia Yang v. Cal. Dep't of Soc. Servs.*, 183 F.3d 953, 955, 958-61 (9th Cir. 1999)).

145. *Id.* at 27-28 (noting "language, by itself, does not compel the President to follow a particular course of action").

146. See MORTLOCK ET AL., *supra* note 94.

That legislative history is quite clear. In FIRRMA, Congress selected a bill that, in the words of its sponsor, was “laser-focused on national security concerns.”¹⁴⁷

Congress passed FIRRMA over two alternative pieces of legislation, the U.S. Foreign Investment Review Act of 2017 (USFIRA) and the Foreign Investment and Economic Security Act of 2017 (FIESA), which both took a broader scope.¹⁴⁸ Each bill would have established the authority for the executive branch to review FDI for wider economic impacts. USFIRA would have supplemented CFIUS via a parallel committee reviewing investments’ broader economic effects.¹⁴⁹ FIESA would have augmented the existing CFIUS framework, charging the Committee to review whether a “transaction is of net benefit.”¹⁵⁰ Those two bills were unmistakably different from FIRRMA to Congress. Speaking in 2018 at a hearing on FIRRMA, Senator Sherrod Brown, co-sponsor of USFIRA, unambiguously contrasted his proposal with the one before the committee, stating he had introduced legislation that would require review of foreign investments “to make sure they are in the long-term, strategic interests, economic and otherwise, of the United States.”¹⁵¹ Similarly, in FIESA, Representative Rosa DeLauro sought to address strategic threats “beyond simple national security risks, requir[ing] a holistic approach to foreign investment reviews at CFIUS.”¹⁵² In selecting FIRRMA, Congress chose from a full slate of options. The elected path rejected expanding CFIUS’s scope to a net benefit test.

B. Intention vs. Execution: FIRRMA’s Flexibility in Practice

Despite Congress’s intentions, FIRRMA provides a malleable framework for executive action. Textually, the FIRRMA-amended Defense Production Act leaves considerable space for discretion in implementation – including an elastic catchall provision.¹⁵³ Furthermore, the structure of the investment review process augments that discretion by providing multiple opportunities for the Committee to intervene with limited checks on the rationale behind its position.¹⁵⁴ Consequently, a president would have some ability (even if questionable) to shape CFIUS’s scope to review prospective transactions for broader economic

147. Cornyn CFIUS Testimony, *supra* note 13, at 35. In the same testimony, Senator Cornyn stated that FIRRMA “takes a targeted approach at addressing specific national security problems while aiming not to unnecessarily chill foreign investment.” *Id.* at 1.

148. United States Foreign Investment Review Act, S. 1983, 115th Cong. (2017) (introduced by Senator Chuck Grassley (R-IA) and Sherrod Brown (D-OH)) [Hereinafter USFIRA]. Foreign Investment and Economic Security Act, H.R. 2932, 115th Cong. (2017) (introduced by Representative Rosa DeLauro (D-CT)) [Hereinafter FIESA].

149. USFIRA § 1002(b) (Proposing a second committee chaired by the Commerce Secretary, rather than the Treasury Secretary).

150. FIESA § 3(a)(1)(B)(ii).

151. *CFIUS Reform: Examining the Essential Elements: Hearing Before S. Comm. on Banking, Housing, and Urban Aff.* 6-7, 115th Cong. (2018) (statement of Senator Sherrod Brown (D-OH)).

152. Press Release, Office of Representative Rosa DeLauro, DeLauro Reintroduces the Foreign Investment and Economic Security Act (June 15, 2017), <https://perma.cc/UHW5-5QEQ>.

153. See *infra* note 156 and accompanying text.

154. See *infra* notes 158-161 and accompanying text. For an overview of the bureaucratic stages of the CFIUS review process, see JACKSON, *supra* note 27, at 15-22.

considerations in service of national security despite the Congressional mandate to the contrary.

The pliable framework offers space for a degree of discretion in presidential action. In addition to more specific factors for consideration, the statutory language includes a catchall provision of “other factors as the President or the Committee may determine to be appropriate.”¹⁵⁵ A president operating under a Rooseveltian understanding of national security, might instruct CFIUS to consider a prospective transaction’s impact on domestic employment conditions as an element affecting public faith in the democratic model, and therefore the nation’s security as a democracy. Such a move would aim to smuggle some of the broader economic considerations into the national security tent, rather than overtly seek to expand the Committee’s reach to new, questionable terrain.

Should that approach seem politically too frontal an attack on the statutory injunction against the Committee considering broader economic factors, the current CFIUS framework lends itself to drawing a nexus between the transaction under review and more traditional national security concerns. FIRRMA’s mandate to consider “control of [U.S.] industries and commercial activity” as it impacts the ability to “meet the requirements of national security, including the availability of human resources, products, technology, materials, and other supplies and services” offers considerable discretion.¹⁵⁶ As an extreme example, could a company teaching coding be linked to national security because coding skills would constitute a human resource essential to a wartime scenario in the digital age? Perhaps less extreme would be considering the need for national security protections on the coding school in light of data held on its clients. Under FIRRMA’s directive to protect American citizens’ sensitive data from foreign actors when there are national security implications,¹⁵⁷ there would appear a more direct nexus. Consequently, by tying issues of economic security to explicit FIRRMA-approved national security factors, a president could integrate economic security matters under the national security umbrella while remaining – technically – within the statutory framework’s bounds.

Limited judicial review of presidential decisions strengthens the president’s hand in this space, and places the onus on Congress to check any perceived misuse of authorities. The statutory language expressly precludes judicial review of the president’s actions in suspending or prohibiting a covered transaction and his/her findings to support that decision.¹⁵⁸ In *Ralls Corporation v. Committee on Foreign Investment in the United States*, the leading case on CFIUS, the D.C. Circuit opined the statute’s most natural reading would bar courts from reviewing

155. 50 U.S.C.A. § 4565(f)(11) (West).

156. FIRRMA § 1702(c)(4).

157. *Id.* § 1702(c).

158. 50 U.S.C.A. § 4565(e)(1) (West) (“The actions of the President under paragraph (1) of subsection (d) and the findings of the President under paragraph (4) of subsection (d) shall not be subject to judicial review”). The statute’s clear language provides “persuasive reason to believe that such [explicit preclusion] was the purpose of Congress.” *Abbott Lab’y v. Gardner*, 387 U.S. 136, 140 (1967).

the merits of a final presidential action.¹⁵⁹ Tellingly, the D.C. Circuit specifically cabined its review to a due process challenge, skirting review of the decision's merits, to avoid the political question doctrine,¹⁶⁰ suggesting other courts would be unlikely to probe a presidential decision's merits.¹⁶¹

Additionally, the review process's case-by-case nature affords CFIUS the opportunity to proactively shape the space in its engagement with parties prior to reaching a final decision. Particularly important is a period of informal consultation where parties to a potentially covered transaction may solicit the Committee staff's input prior to formally filing, when Committee staff might flag prospective transactions it believes would run afoul during review.¹⁶² Given the lack of review available for such informal consultations,¹⁶³ this pre-review stage offers latitude for an administration to take action to implement its vision of national security without significant judicial countercheck.

Nor is this level of executive discretion confined to the informal consultations period. Once before the Committee, the parties are subject to CFIUS's considerable powers of persuasion, given its ability to recommend the president block the transaction entirely. Those powers could be put to suggesting mitigation actions more in line with a net benefit framework.¹⁶⁴ Should those efforts fail to reach an acceptable resolution, CFIUS may refer the transaction to the president, who, per the FIRRMA-amended Defense Production Act, would be authorized to "take such action . . . appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States."¹⁶⁵ While the president must find "credible evidence . . . that a foreign person that would acquire an interest in a United States business or its assets as a result of the covered transaction might take

159. *Ralls Corp. v. Comm. on Foreign Invest. in the United States*, 758 F.3d 296, 311 (D.C. Cir., 2014).

160. *Id.* at 314.

161. Courts' reluctance to interfere in presidential decisions on foreign policy or national security grounds is relatively high. See *Holder v. Humanitarian L. Project*, 561 U.S. 1, 33 (2010) (finding the executive branch's evaluation of the facts is "entitled to deference" when it involves "sensitive and weighty interests of national security"); *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring) (pertaining particularly to the political question doctrine and finding "justifications for concluding that the question here is political in nature are even more compelling . . . because it involves foreign relations").

162. JACKSON, *supra* note 27, at 15-16.

163. Such informal consultations are far from the "'consummation' of the agency's decision-making process" looked for in finding finality in an agency action for judicial review. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citation omitted).

164. In terms of judicial review, a non-presidential action would be more open to challenge. Some interpreting *Ralls* view CFIUS orders, such as a mitigation agreement or other order that does not rise to presidential level, as "subject to judicial review regardless of whether there is subsequent presidential review." TIMOTHY KEELER, SIMON KRIESBERG, MARGARET-ROSE SALES KELSEY RULE, U.S. APPELLATE COURT CLARIFIES DUE PROCESS RIGHTS FOR PARTIES SUBJECT TO CFIUS REVIEW OF FOREIGN INVESTMENTS 3 (Mayer Brown 2014). CFIUS is "subject to the [Administrative Procedure Act]," under which parties may bring "a wider range of legal claims" against the Committee. *Id.* While at first glance that greater possibility of challenge might seem to chill flexibility, the reality remains that if the Committee believed parties were consistently challenging those orders to evade constraints then it would have reason to believe mitigation was failing and to recommend sterner action to the president.

165. 50 U.S.C.A. § 4565(d)(1) (West).

action that threatens to impair the national security,”¹⁶⁶ FIRRMA’s flexible factors guide that assessment.

Therefore, despite clearly contradictory legislative history, the statutory language of FIRRMA and real-world process of investment review afford a measure of latitude for a president to embrace and implement an expansive definition of national security aligned with a Rooseveltian outlook. That capability undoubtedly rests on dubious foundations, and may well provoke legislative repercussions. A perturbed Congress could step in.¹⁶⁷ Nevertheless, the current reality allows the president considerable leeway in deploying CFIUS.

V. THE RIGHT TOOL FOR THE RIGHT PROBLEM

However, in addressing a problem policy makers should select the right tool, not any available one. Employing current authorities to enact a *de facto* net benefit test in pursuit of a Rooseveltian notion of security would be effective only if it furthered the economic security of American workers. Yet, a more cumbersome and expansive form of investment review is likely to harm more than help the Biden administration’s Foreign Policy for the Middle Class agenda. FDI remains an important economic asset for the nation – including for robust middle class jobs. Properly monitored, as FIRRMA enables CFIUS to do, foreign investment helps create and sustain U.S.-based jobs. Responding to China’s economic challenge requires changes to American economic policy; however, the focus should be on adjustments based on actual threats, not phantom ones. Rather than manipulate CFIUS to bring it directly to bear on issues of employment levels and job quality, the Biden administration should embrace the Committee’s current remit under FIRRMA as indirectly contributing to the economic security objective in its efforts to protect advanced technological competitiveness, which in turn drives employment and opportunity.

A. *Too Much Cost for Too Little Threat Reduction*

In a climate where threats are prompting the revisiting of many assumptions, overcorrection beckons.¹⁶⁸ Undoubtedly, several Chinese economic practices have proven inimical to the U.S. economy.¹⁶⁹ While the United States should

166. *Id.* § 4565(d)(4)(A). The president also would have to find that “provisions of law, other than this section and the International Emergency Economic Powers Act, do not . . . provide adequate and appropriate authority for the President to protect the national security in the matter before the President.” *Id.* § 4565(d)(4)(B).

167. Perceived abuse of national security authorities can lead to congressional pushback. See Eric Martin, *Senators Plan Bipartisan Revamp of National Security Tariffs*, BLOOMBERG (Mar. 15, 2021), <https://perma.cc/MPU7-HZR8> (detailing a bipartisan group seeking “to better align the [Trade Expansion Act of 1962] with its original intent as a trade-remedy tool for the president and Congress to respond to genuine threats to national security”).

168. Ryan Hass, *China is Not Ten Feet Tall*, FOREIGN AFF. (Mar. 3, 2021), <https://perma.cc/J7ZB-8HVQ> (“Insecurity leads to overreaction, and overreaction produces bad decisions that undermine . . . [U.S.] . . . competitiveness.”).

169. See *supra* notes 76-78 (referencing multiple inimical Chinese economic practices). See also Mark Muro & Yang You, *To Counter China’s Economic Influence, Rebuild the American Heartland*, BROOKINGS (Apr. 1, 2021), <https://perma.cc/Z28C-3AS3>; CLARA HENDRICKSON, MARK MURO, & WILLIAM GALSTON, COUNTERING THE GEOGRAPHY OF DISCONTENT: STRATEGIES FOR LEFT-BEHIND PLACES, 11 (Brookings Inst. 2018) (expanding on the work of Autor, Dorn, and Hanson to conclude “the

respond to harmful practices, in this context FDI is not one of them. Early concerns that Chinese investment might serve as an instrument for acquiring overseas assets and taking them, along with those jobs, back to China have not borne out.¹⁷⁰ Rather, by 2012, Chinese FDI supported approximately 27,000 jobs in the United States.¹⁷¹ That figure is net positive and a miniscule portion of the 12 million jobs estimated, as of 2016, stemming from direct employment by foreign businesses, indirect or induced employment, or productivity spillovers all attributable to FDI.¹⁷² Additionally, those benefits are not just quantitative but qualitative as some studies have found U.S. affiliates of foreign businesses compensate workers at higher rates than the U.S. average.¹⁷³ Nor do these investments support only advanced technology jobs. In 2016, FDI supported almost 2.5 million American manufacturing jobs, a staggering “20 percent of *all* U.S. manufacturing employment that year.”¹⁷⁴ Therefore, as Chinese investment in the United States has fallen since 2016,¹⁷⁵ lessening reason for concern over its impact on employment levels, the United States would be ill advised to lose sight of the gains obtained by maintaining an open door to friendly FDI.¹⁷⁶

A wider scoped CFIUS would complicate the broader investment space, potentially chilling investment when the global FDI market is tightening.¹⁷⁷ FDI has fallen in the United States since 2016, while China emerged as the

greatest negative trade impacts during the initial period of Chinese import penetration” hit “clusters of vulnerable, lower-productivity manufacturing industries”).

170. Thilo Hanemann, *The Employment Impacts of Chinese Investment in the United States*, RHODIUM GROUP (Sept. 27, 2012), <https://perma.cc/7HJT-NGSK> (2012 research finding no evidence of China using investment in U.S. jobs as a method of removing jobs from the United States).

171. *Id.*

172. JULIAN RICHARDS & ELIZABETH SCHAEFER, JOBS ATTRIBUTABLE TO FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 13 (Int'l Trade Admin. 2016). This study is of specific relevance as it was cited in FIRRMA as evidence of the benefits of FDI. FIRRMA § 1702(a)(1).

173. DEP'T OF COM. & EXEC. OFF. OF THE PRESIDENT, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 8 (2013) (finding 2011 data illustrating that, on average, foreign affiliates compensated U.S. employees at a rate of \$77,000 compared to \$58,000).

174. Int'l Trade Admin., *The Intersection of Manufacturing & FDI: Job Creation*, TRADEOLOGY (Oct. 4, 2019), <https://perma.cc/7DF2-9NQF>. In 2016, four U.S. allies (Japan, Germany, the United Kingdom, and France) alone were the source for FDI supporting over 1.2 million manufacturing jobs in the United States. *Id.*

175. DEREK SCISSORS, PARTIAL DECOUPLING FROM CHINA: A BRIEF GUIDE 6 (Am. Enter. Inst. 2020).

176. U.S. allies and partners are the principal sources of FDI. In 2019, the top five sources of FDI were Japan (14.5%), Canada (13%), Germany (11.7%), the United Kingdom (10.0%), and Ireland (7.0%). Dep't of Com., *Foreign Direct Investment (FDI): United States*, SELECTUSA, <https://perma.cc/87B9-MF64>.

177. Increased global competition for FDI was a chief concern during FIRRMA's consideration. See *CFIUS Reform: Examining the Essential Elements: Hearing Before S. Comm. on Banking, Housing, and Urban Aff.* 14, 115th Cong. (2018) (testimony of Scott Kuper, National Venture Capital Association) (expressing concern that “the global share of U.S. venture technology, venture capital has fallen, there are a lot more dollars competing for those deals from other geographies”). See also Paul Hannon & Eun-Young Jeong, *China Overtakes U.S. as World's Leading Destination for Foreign Direct Investment*, WALL ST. J. (Jan 24, 2021, 7:40 PM), <https://perma.cc/8UC8-DPUR>.

world leader in FDI in 2020.¹⁷⁸ Canada, following four decades of using a net benefit test, has shifted toward a national security-focused review process amid criticisms that the net benefit test causes uncertainty that drives away investors.¹⁷⁹ Likewise, “in the competition for global capital, the United States is well served by regulatory processes that are transparent, predictable, and efficient.”¹⁸⁰ An expanded scope for review could yield significant drag on the U.S. economy for minimal reason, an outcome counter to the Biden administration’s aim of supporting well-paying jobs for American workers in service of demonstrating that democracy can economically deliver in the 21st century.

B. Sometimes the Indirect Route is Best

In deploying the right tool for the right problem, the Biden administration should eschew press ganging CFIUS into direct service of economic security. Instead, it should focus on how CFIUS is currently situated to indirectly support that objective. As some Chinese practices continue to threaten quality American jobs,¹⁸¹ the United States must employ the range of tools at its disposal to address those concerns. From strategic domestic investment to multilateral engagement with partners to establish rules for the 21st century digital economy, those tools exist and can be wielded.¹⁸² CFIUS, meanwhile, is most effective indirectly contributing by fulfilling its mandate concerning advanced technologies and U.S. persons’ data. CFIUS thus serves as an implicit player in defending future quality jobs. Even under the outlined statutory limitations, CFIUS’s practical reach is quite long given the lack of a “clear dividing line” between new civilian

178. Hannon & Jeong, *supra* note 177.

179. Sandy Walker, *Trends in Foreign Investment Review: Expanding Role for National Security in Canada’s Foreign Investment Review*, JD SUPRA (Feb. 19, 2021), <https://perma.cc/7TPT-M4GL> (“In 2021, that [investment] scrutiny is increasingly likely to be in the form of review under the ICA’s national security review process rather than its ‘net benefit to Canada’ review process.”); Denise Deveau, *Does the “Net Benefit” Test Make the Grade?* FIN. POST (Alberta) (June 23, 2020), <https://perma.cc/QP58-8PXC> (identifying the “common complaint” that the net benefit test is “not that transparent and the conditions imposed too subjective and restrictive”).

180. *Evaluating CFIUS: Challenges Posed by a Changing Global Economy: Hearing Before Sub. Comm. on Monetary Pol’y and Trade of the H. Comm. on Fin. Serv.*, 115th Cong. (2018) (testimony of Theodore Kassinger, former Deputy Secretary of Commerce).

181. Scissors, *supra* note 175, at 12–13 (warning that as China “tries to move up the value chain, it brings subsidies and regulatory intervention to new industries,” likely to result in the potential “targeting [of] mainstay U.S. manufacturing sectors . . . costing [the United States] hundreds of billions in sales and several million jobs”).

182. Jennifer Harris, *Chinese Investment in the United States: Time for New Rules?* LAWFARE (April 11, 2017, 9:00 AM), <https://perma.cc/L5NU-B32P> (opposing “introducing economic security considerations into the CFIUS process” as “Washington should address them squarely and in their own right – not smuggle them into a pre-existing, ill-fitting framework for national security concerns”). On domestic investment, see Sullivan and Harris, *supra* note 9; Bernstein, *supra* note 9; Marco Rubio, Senator, American Industrial Policy and the Rise of China (Dec. 10, 2019) <https://perma.cc/6BK5-PDNJ>. On multilateral engagement with like-minded partners, see WILLIAM REINSCH & JACK CAPORAL, TOWARD A NEW GLOBAL TRADE FRAMEWORK 20-23 (Matthew P. Goodman & Scott Miller, eds. 2021).

technologies and traditional defense purposes,¹⁸³ as well as its mandate to protect “personally identifiable information, genetic information, or other sensitive data.”¹⁸⁴

Maintaining U.S. competitiveness in cutting edge industries will be essential to broader economic vitality that supports employment. This approach does not assume *all* Americans will work in advanced technologies or that an economy thriving at the macro-level because of a flourishing technology sector is an economically inclusive one. That mistake has been made before. Rather, it reflects the reality that occupations are becoming increasingly digitalized.¹⁸⁵ Data collection and analysis increasingly pervades American life, making work from health-care to insurance potentially interwoven with CFIUS’s jurisdiction as the Committee works to protect against personal data transforming into counterintelligence liabilities, and therefore national security concerns. Simultaneously, “advanced industries,” the likely producers of the critical technologies under CFIUS’s purview, possess an “inordinate role in generating prosperity” in the broader U.S. economy.¹⁸⁶ Not only are those jobs well-paying positions in and of themselves, but they provide a “substantial ‘multiplier effect’” in which each new advanced industry position yields 2.2 additional domestic jobs.¹⁸⁷ Consequently within its narrower scope, CFIUS serves to protect critical engines of the economy on which numerous other jobs depend.

CONCLUSION

The United States confronts a transformational moment in world politics and its own national security outlook. While the contours of agreement are still taking shape, a rough consensus has emerged that authoritarian regimes, particularly China, are long-term strategic competitors to the democratic model. At such moments of reorienting the ship of state, policy makers cannot be overly bound by old assumptions. The Biden administration’s path toward adopting a Rooseveltian conception of national security that embraces economic security is a wise step to defend democracy. Recent history has demonstrated globalization’s rising tide has not raised all boats, with results contributing to an ongoing assault on American democracy.

Confronting that reality does not necessarily entail pressing every tool into service in every instance. In national security policy, as in children’s soccer, success comes when individuals (or here institutions) play their positions, not chase the ball. FIRRMA’s reforms provided a necessary update to the CFIUS framework, allowing the Committee to play a more substantial role in helping protect

183. Williams, *supra* note 93.

184. FIRRMA § 1702(c)(5).

185. See MARK MURO, SIFAN LIU, JACOB WHITON & SIDDHARTH KULKARNI, DIGITALIZATION AND THE AMERICAN WORKFORCE 4 (Brookings Inst. 2017).

186. MARK MURO, SIDDHARTH KULKARNI & DAVID, M. HART, AMERICA’S ADVANCED INDUSTRIES: NEW TRENDS (Brookings Inst. 2016).

187. *Id.* (as of 2016, that “sector support[ed] . . . one quarter of all private employment”).

advanced industries from being coopted for authoritarian ends. That position allows CFIUS to not only better protect traditional national security equities in the defense domain, but also new ones – helping ward against digital authoritarianism. However, it also allows CFIUS to play an indirect role advancing economic security by guarding the advanced industries that will serve as engines for growth. In that way, rather than by twisting the Committee to extend its reach, CFIUS is situated to play a robust supporting role in furthering a Foreign Policy for the Middle Class.