"Sportswashing" as a National Security Concern: The Role of the Committee on Foreign Investment in the United States (CFIUS)

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ABSTRACT

Throughout United States history, foreign investment has played a key role in stimulating the national economy and supporting domestic businesses. But foreign investment can also imperil national security, such as by enabling an adversary to enhance its own 'hard power' capabilities at the expense of our own. The Committee on Foreign Investment in the United States (CFIUS) was created to combat such threats, flagging and preventing deleterious investment when it might pose a national security threat. Today, CFIUS operates pursuant to a flexible statutory scheme. And increasingly, in response to an evolving threat landscape, CFIUS has utilized that broad authority to combat 'soft power' threats posed by foreign investment, including influence threats enabled by data collection or false-front surveillance operations.

This Comment argues that foreign investment in domestic sporting institutions presents a novel, legitimate threat justifying executive attention. This Comment posits that sports are not simply a form of entertainment and instead cultivate a uniquely salient form of identity for the individuals and communities that comprise their fandoms. And rather than simply an innocuous economic enterprise, ownership of sporting institutions may present bad actors a powerful means of exerting control and malign influence over significant domestic populations. And when the sports investor is a foreign government or their proxy, such ownership may present a particularly potent threat to national security.

Incorporating these theoretical considerations, this Comment seeks to present an actionable analytical framework for CFIUS, reviewing courts, and policy makers to consider and evaluate the potential threats to national security posed by "sportswashing": foreign direct investment in domestic sporting institutions, through which foreign state or near-state actors leverage the popularity of sports and communities of sports fans to cultivate political and economic capital.

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I. INTRODUCTION

The creation of the Committee on Foreign Investment in the United States (CFIUS) by President Gerald Ford's 1975 Executive Order[1] broached a new frontier. CFIUS embodied an evolving conception of national security—one premised on the idea that foreign investment itself, even uncoupled from direct militaristic threats, could undermine the country's military infrastructure and production capabilities.[2]

Nearly fifty years later, a second CFIUS executive order would further encapsulate the country's broadened understanding of national security threats. In 2022, President Joe Biden's Executive Order acknowledged an "evolving national security landscape," with the shifting "nature of the investments that pose related risks to national security."[3] The pair of executive orders serves as a benchmark for an ever-evolving question: how might foreign investment undermine domestic national security?

Through this lens, CFIUS's evolution may be understood in terms of a transition in focus from solely militaristic "hard power" threats to one that increasingly includes influence-based "soft power" threats.[4] Threats posed by critical domestic defense sector investment,[5] for instance, are analytically distinct from those posed by investments in companies that amass large amounts of private data.[6] Under the right circumstances, either might imperil national security. But the latter is more fundamentally a concern about "foreign malign influence," a phrase defined by Congress to refer to hostile efforts undertaken by foreign countries to influence U.S. public opinion or political, military, or economic activity.[7] In the context of this expanded conception of

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[1] Exec. Order No. 11,858, 3 C.F.R. 159 (1976).

[2] *See* JAMES K. JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 1 (2020) ("Since its inception, CFIUS has operated at the nexus of shifting concepts of national security and major changes in technology . . . and a changing global economic order."); *see also id.* at 5 (describing the Committee's early focus on investment which "*might* have major implications for U.S. national interests") (emphasis added).

[3] Exec. Order No. 14,083, 87 Fed. Reg. 57,369 (Sept. 20, 2022).

[4] *See generally* JOSEPH S. NYE, JR., BOUND TO LEAD: THE CHANGING NATURE OF AMERICAN POWER 31 (1990) (discussing the relationship between hard "command" power and soft "co-optive" power).

[5] *See* EDWARD M. GRAHAM & DAVID M. MARCHICK, US NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 6–8 (2006) (describing historic national security concerns with foreign investment in the defense and chemical manufacturing sectors).

[6] *See* Exec. Order No. 14,083, 87 Fed. Reg. at 57,372 ("Data is an increasingly powerful tool for the surveillance, tracing, tracking, and targeting of individuals or groups of individuals, with potential adverse impacts on national security.").

[7] 50 U.S.C. § 3059(f)(2); *see also* Rachel Treisman, *The FBI Alleges TikTok Poses National Security Concerns*, NPR (Nov. 17, 2022, 12:37 PM), https://www.npr.org/2022/11/17/1137155540/fbi-tiktok-national-security-concerns-china [https://perma.cc/5HTG-79GV] (quoting FBI Director Christopher Wray, who expressed concern that Chinese data collection via the app

national security threats, CFIUS's broad statutory mandate has unique implications for foreign direct investment strategies outside of its historic purview.

"Sportswashing" is one such investment strategy. The term most commonly refers to a state or individual's leveraging of sporting institutions to launder their reputation on a global scale, such as by hosting the Olympics or the World Cup.[8] But as the recent LIV-PGA professional golf merger demonstrates,[9] state actors are increasingly pursuing sportswashing efforts through foreign direct investment in domestic institutions, whether in the United States or elsewhere.[10]

This Comment explores whether CFIUS has the authority to act against sportswashing. First, it examines how CFIUS's historical and modern scope informs the Committee's statutory authority. Specifically, it analyzes CFIUS's traditional focus on foreign investment in defense production and critical industries, and its more recent expansion to address a broader range of influence-driven national security threats. Second, this Comment describes how sportswashing—defined here as foreign direct investment in domestic sporting institutions, through which foreign state or near-state actors[11] leverage the popularity of sports and communities of sports fans to cultivate political and economic capital—may constitute foreign malign influence. Finally, it then articulates specific criteria that may be used to determine when a particular sportswashing investment constitutes a national security concern justifying CFIUS intervention.

TikTok "could be used for influence operations").

[8] *See Sportswashing*, OXFORD ENGLISH DICTIONARY (July 2023) (defining "sportswashing" as "[t]he use of sport or a sporting event to promote a positive public image for a sponsor or host (typically a government or commercial organization), and as a means of distracting attention from other activities considered controversial, unethical, or illegal."). For a critique of the phrase's uneven application, see Simon Chadwick & Paul Widdop, *Sport Washing and the Gulf Region*, *in* GEOPOLITICAL ECON. SPORT 148, 149–153 (2023) ("Gulf nations are often described as being sports washers, though countries such as Great Britain have historically avoided being associated with what is now often seen as being an insidious, deceitful practice."). Such criticisms are valid and well-taken. Thus, this Comment's proposed test for CFIUS intervention against sportswashing investment has been framed accordingly.

[9] *See, e.g.*, Sean Ingle, *'Gigantic Victory for Sportswashing': Old Truths Will Haunt Golf's New Dawn*, GUARDIAN (June 6, 2023, 4:51 PM), https://www.theguardian.com/sport/2023/jun/06/saudi-liv-pga-tour-divisions-within-golf [https://perma.cc/U23E-DHPP].

[10] For other recent examples of "sportswashing" foreign investment, *see, e.g.*, Joey D'Urso & James McNicholas, *Arsenal's Visit Rwanda Sponsorship: The Impact, Criticisms and What Fans Think*, ATHLETIC (June 26, 2022), https://www.nytimes.com/athletic/3382273/2022/06/27/arsenal-visit-rwanda-sponsorship/[https://perma.cc/K7WZ-DLYX] (describing Arsenal Football Club's sponsorship promoting Rwandan tourism); Emin Huseynov, *Baku's Grand Prix Is Being Used to 'Sportswash' Corruption*, GUARDIAN (June 18, 2016, 7:02 PM), https://www.theguardian.com/commentisfree/2016/jun/18/formula-1-azerbaijan-human-rights [https://perma.cc/E98V-VTD8] (critiquing the 2016 European Grand Prix hosted in Azerbaijan).

[11] For the purposes of this Comment, the phrase "near-state actors" refers to individuals or entities with discernible ties to a foreign government. See *infra* Part III.B.2, for a more detailed discussion.

II. CFIUS'S BACKGROUND AND MODERN SCOPE

A. Historical Background of CFIUS

CFIUS's development has been well-documented elsewhere.[12] This section will summarize that history as relevant here, with a particular emphasis on the Committee's long-standing focus on foreign government-controlled investment in the domestic economy.

While the U.S. economy's early development relied on foreign capital,[13] by the onset of World War I, such investments began to raise serious national security concerns.[14] Specifically, in 1915, a German spy's lost briefcase revealed a German scheme to invest in a U.S. projectile company for a very specific purpose: to keep the United States' leading munitions developers too busy to fulfill the British and French militaries' orders during the war.[15] The false-front company, Bridgeport Projectile, specifically "ordered five million pounds of gunpowder and two million shell cases with the intention of simply storing them."[16]

The plot demonstrated how foreign investment, even with facially commercial goals, might actually be designed to advance an adversarial state's more "sinister ends."[17] In response to the uncovered scheme, Congress passed the Trading with the Enemy Act (TWEA), which granted the President discretionary powers to block investments during times of war and national emergency.[18] In particular, the TWEA authorized the president to seize critical foreign assets in the chemical sector—an industry seen as particularly important for the war effort, and by extension, national security.[19]

In the decades following World War I, macroeconomic trends significantly reduced foreign investment in the United States, as global economies instead focused inwardly to recover from political and economic devastation.[20] But by the 1970s, the success of the Organization of the Petroleum Exporting Countries (OPEC) gave rise to new sources

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[12] *See, e.g.*, Heath P. Tarbert, *Modernizing CFIUS*, 88 GEO. WASH. L. REV. 1477, 1480–1503 (2020).

[13] *See id.* at 1480 (describing Alexander Hamilton's recognition of foreign investment as a "precious acquisition" necessary to grow the economy).

[14] *See* GRAHAM & MARCHICK, *supra* note 5, at 1.

[15] Ernest Wittenberg, *The Thrifty Spy on the Sixth Avenue El*, AM. HERITAGE (Dec. 1965), https://www.americanheritage.com/thrifty-spy-sixth-avenue-el [https://perma.cc/SAA5-J8YY].

[16] *Id.*

[17] GRAHAM & MARCHICK, *supra* note 5, at 4.

[18] Trading with the Enemy Act of 1917, Pub. L. No. 65-91, 40 Stat. 411, 411–426; *see also* GRAHAM & MARCHICK, *supra* note 5, at 4–5, 18–20 (describing the "very broad but rather ambiguous powers" that the TWEA granted the President).

[19] GRAHAM & MARCHICK, *supra* note 5, at 6–8.

[20] *Id.* at 18 (noting that many of the European nations, which otherwise would have been sources of investment, were economically fragile post-war).

of immense wealth, and thus, new sources of foreign investment.[21] In response to Congress' growing fervor over the threats posed by such investment, President Gerald Ford issued his 1975 Executive Order titled "Foreign Investment in the United States."[22] The order established the basic structure of CFIUS, with the inter-governmental agency chaired by the Secretary of the Treasury.[23]

CFIUS was initially envisioned as a monitoring agency tasked with examining trends in foreign investments and reviewing those that, in the Committee's judgement, might have major implications for the country's national interests.[24] Accordingly, the types of deals CFIUS analyzed in its early history largely corresponded with "hard power" threats directly implicating defense production sectors and critical infrastructure. For instance, in 1983, CFIUS reviewed a Japanese firm's attempt to acquire a domestic specialty steel producer, a deal that ultimately fell through after the Department of Defense classified the firm's produced metals as necessary for military aircraft production.[25] In another example, in 1990, President George H.W. Bush ordered the China National Aero-Technology Import and Export Corporation (CATIC) to divest from MAMCO Manufacturing, a U.S. developer of metal parts for civilian aircraft, after CFIUS flagged the transaction.[26]

But while CFIUS operated "at the nexus of shifting concepts of national security,"[27] the early Committee itself was largely ineffective.[28] Lacking the authority to actively combat foreign investment threats, CFIUS was underutilized as a watchdog and mostly inactive, meeting only ten times between 1975 and 1980.[29] In comparison, the modern

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[21] *Id.* at 20; *see also* Tarbert, *supra* note 12, at 1483 (noting that CFIUS was born out of concerns that "petrodollars might be used to acquire U.S. assets").

[22] Exec. Order No. 11,858, *supra* note 1.

[23] *Id.*

[24] *Id.*

[25] *See* Jackson, *supra* note 2, at 6; *see also* Stuart Auerbach, *U.S. May Halt Sale of Firm to Japanese*, WASH. POST (Nov. 8, 1986, 12:00 AM), https://www.washingtonpost.com/archive/politics/1986/11/08/us-may-halt-sale-of-firm-to-japanese/45eca569-b5a3-4940-b58c-2f0f4556a34b/ [https://perma.cc/XRG6-YC2J] (noting that, at the time, CFIUS lacked the "power to kill the sale of a company to foreign interests," but nonetheless played a role in flagging several Japanese acquisitions on national security grounds).

[26] *Foreign Acquisitions and National Security: Hearing before the Subcomm. On Com., Consumer Protect. & Competitiveness of the House Committee on Energy and Com.*, 101st Cong. 34–38 (1990) (statement of Allan I. Mendelowitz, Director, International Trade, Energy and Finance Issues) (testifying as to President Bush's decision to order CATIC's divestment of MAMCO).

[27] Jackson, *supra* note 2, at 1.

[28] *See* Tarbert, *supra* note 12, at 1484 ("[T]he initial iteration of CFIUS could do little more than monitor foreign acquisitions of American businesses.").

[29] Xingxing Li, *National Security Review in Foreign Investments: A Comparative and Critical Assessment on China and U.S. Laws and Practices*, 13 BERKELEY BUS. L.J. 255, 261 (2016) (arguing that the agency's infrequent meetings made it "unrealistic" that it could "respond to national security concerns of foreign direct investment in the United States").

United States Senate Committee on Armed Services is required by its own Rules of Procedure to meet once a month while Congress is in session.[30]

However, macroeconomic shifts in the 1980s led to a sharp rise in foreign investment, reaffirming the value of CFIUS's mandate, and highlighting the Committee's inability as then constituted to effectuate its mission. In 1988, Congress passed the Exon-Florio Amendment,[31] later described as broadening the "definition of national security beyond the traditional concept of military/defense."[32] Following President Ronald Reagan's delegation of congressional authority,[33] the Exon-Florio Amendment enabled CFIUS to recommend a transaction be suspended or blocked upon a finding of "credible evidence" that the "foreign interest exercising control might take action that threatens to impair national security."[34] Thus equipped, CFIUS's mission took on greater vigor, dramatically increasing the number of Committee investigations.[35]

Five years later with the Byrd Amendment of 1993, Congress further honed CFIUS's scope, emphasizing the unique threat posed by foreign government-controlled investment—situations when "an entity controlled by or acting on behalf of a foreign government" invests in domestic U.S. companies.[36] Specifically, the Byrd Amendment ostensibly mandated CFIUS review in:

> *any* instance in which an entity controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition, or takeover which *could* result in control of a person engaged in interstate commerce in the United States that *could* affect the national security of the United States.[37]

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[30] *Committee Rules*, U.S. SENATE COMM. ON ARMED SERVS., https://www.armed-services.senate.gov/about/committee-rules [https://perma.cc/92MS-J6BH].

[31] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425–26 (1988) (codified as amended at 50 U.S.C. § 4565 (2021)); *see also* GRAHAM & MARCHICK, *supra* note 5, at 34 (describing the Exon-Florio amendment's context).

[32] Jackson, *supra* note 2, at 7.

[33] GRAHAM & MARCHICK, *supra* note 5, at 34.

[34] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425–26 (1988).

[35] *See* GRAHAM & MARCHICK, *supra* note 5, at 57 (citing Department of Treasury data showing an increase from fourteen CFIUS notifications in 1988 to 204 notifications in 1989).

[36] National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2315, 2463–65 (1992) (codified as amended at 50 U.S.C. § 4565 (2021)); *see also* GRAHAM & MARCHICK, *supra* note 5, at 135–141 (describing Congressional concern that the Bush Administration had not extended review to a state-owned corporate acquisition of a maritime port operations company).

[37] National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2315, 2463–65 (codified as amended at 50 U.S.C. § 4565 (2021)) (emphasis added).

The Byrd Amendment's above-quoted language was notable for two primary reasons. First, it emphasized Congress's belief in the unique threat posed by foreign governments, or their direct proxies, investing in any domestic industry. Second, it conditioned review on whether the foreign government-controlled transaction "could" affect national security.[38] This set forth a distinctly broader requirement for mandatory review of foreign government-controlled transactions, compared to the "threatens to impair the national security of the United States" standard utilized for transactions unconnected with foreign governments.[39]

Following the September 11 terrorist attacks, Congress again began to scrutinize foreign direct investment.[40] In 2007, Congress passed the Foreign Investment and National Security Act (FINSA),[41] which further addressed congressional concern with foreign government-controlled entities acting as commercial economic actors in the domestic marketplace. Specifically, in response to ambiguity in the application of the Byrd Amendment, FINSA clarified that CFIUS lacked discretion to forego a formal, maximum forty-five-day investigation for foreign government-controlled transactions.[42] Otherwise stated, following FINSA, CFIUS *must* investigate foreign government-controlled transactions, whether or not the transaction facially implicates national security concerns.[43] Despite this renewed focus, some representatives continued to criticize CFIUS's deficiencies in reviewing foreign states' investments, particularly when funneled through sovereign wealth funds.[44]

In 2018, Congress passed the Foreign Investment Risk Review Modernization Act (FIRRMA),[45] the modern statutory basis for CFIUS

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[38] *Id.*

[39] 50 U.S.C. § 4565(b)(2)(B)(i)(I); *see also* Deborah M. Mostaghel, *Dubai Ports World Under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?*, 70 ALB. L. REV. 583, 601 (2007) (describing the linguistic shift in the Byrd Amendment's treatment of state-actors as opposed to other foreign entities).

[40] Jackson, *supra* note 2, at 4–5.

[41] Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (2007) (codified as amended at 50 U.S.C. § 4565 (2021)).

[42] H.R. REP. NO. 110-24, at 10 (2007) ("[A]ddressing what many in Congress view as a potential misreading of Congressional intent in the so-called 'Byrd amendment' to Exon-Florio, the [FINSA] bill ensures that transactions involving companies controlled by foreign governments will receive heightened scrutiny by CFIUS.").

[43] 50 U.S.C. § 4565(b)(1)(B) ("If the Committee determines that the covered transaction is a foreign government-controlled transaction, the Committee *shall* conduct an investigation of the transaction.") (emphasis added).

[44] *See, e.g.*, Tarbert, *supra* note 12, at 1494–96 (explaining that shifting conceptions of what drove foreign investment enhanced the complexity and scope of CFIUS review in the 2000s); *see also* Jackson, *supra* note 2, at 5 (detailing Congressional efforts to modify the scope of CFIUS review).

[45] John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636, 2174–2207 (codified at 50 U.S.C. § 4565).

authority. FIRRMA made several key changes to CFIUS.[46] First, it expanded the Committee's jurisdiction by subjecting additional covered transactions to mandatory review.[47] This included granting CFIUS the authority to review investments in real estate near sensitive locations, such as airports, maritime ports, and military installations.[48] Moreover, for the first time, FIRRMA also mandated certain filing requirements by parties involved in covered transactions, including when a foreign government maintains a "substantial interest" in the transaction, or when transactions involve critical technology businesses.[49] Thus, FIRRMA reaffirmed and further equipped CFIUS with the tools necessary to execute the Committee's national security mandate across an evolving swath of the economy.

Finally, in September 2022, President Joe Biden signed his Executive Order titled "Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States."[50] Executive Order 14,083 specifically noted the importance of ensuring that the "foreign investment review process remains responsive to an evolving national security landscape."[51] As a practical matter, the order expanded the factors that the Committee and the president should consider when evaluating the impact of national security issues, including the risks associated with investment patterns.[52] These factors are discussed in further detail below.

This history reveals a clear theme. Namely, that foreign government-controlled transactions have presented a unique point of emphasis for investment review, reflecting the latent national security risks posed by a foreign government operating ostensibly as an economic entity in the United States. Not only might such entities raise concerns for economic competition, but like the German Bridgeport Projectile scheme during World War I,[53] they may further conduct potentially adversarial initiatives under the ruse of financial motivations.

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[46] *See* Kristen E. Eichensehr & Cathy Hwang, *National Security Creep in Corporate Transactions*, 123 COLUM. L. REV. 549, 567–69 (2023) (describing FIRRMA's key modifications to CFIUS's authority).

[47] 50 U.S.C. § 4565(a)(4).

[48] *Id.* § 4565(a)(4)(B)(ii)(II)(aa–bb).

[49] *Id.* § 4565(b)(1)(C)(v)(IV)(bb).

[50] Exec. Order No. 14,083, 87 Fed. Reg. at 57,369.

[51] *Id.*

[52] *Id.*; *see also* Eichensehr & Hwang, *supra* note 46, at 570 (noting the administration's concern for "patterns of investment" rather than just "isolated transactions").

[53] See Wittenberg, *supra* note 15.

B. CFIUS Procedure

As noted, FIRRMA provides the modern statutory basis for CFIUS authority.[54] CFIUS operates pursuant to FIRRMA to "review certain transactions involving foreign investment in the United States and certain real estate transactions by foreign persons, in order to determine the effect of such transactions on the national security of the United States."[55] Notably, the statute leaves "national security" undefined, except to note that it should be construed as including "homeland security."[56] Indeed, the CFIUS statute is hardly unique in this way: across the more than 2,100 references to "national security" in the United States Code, Congress has defined the phrase only three times.[57] While such unbridled authority may cause apprehension for some, Congress may have seen the ambiguity as desirable, providing agencies with the necessary flexibility to respond to evolving threats.[58]

While CFIUS's authorizing statute fails to define national security, it does provide eleven factors to guide the Committee and the president's review of national security-implicating transactions. These factors include the transaction's potential national security-related effects on critical domestic infrastructure,[59] the transaction's potential impact on military goods sales,[60] whether the covered transaction is foreign government-controlled,[61] and the catch-all "such other factors" as deemed appropriate.[62]

CFIUS can review two broad categories of "covered transaction[s]"[63]: business transactions and real property transactions.[64] Regarding business transactions, the category directly relevant to this

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[54] 50 U.S.C. § 4565; *see also CFIUS Laws and Guidance*, U.S. DEPT. TREASURY, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-laws-and-guidance [https://perma.cc/P395-VDTM].

[55] *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEPT. TREASURY, https://cfius.gov [https://perma.cc/SW4L-NCSV].

[56] 50 U.S.C. § 4565(a)(1); *see also* Christopher M. Tipler, *Defining 'National Security': Resolving Ambiguity in the CFIUS Regulations*, 35 U. PA. J. INT'L L. 1223, 1223–24 (2014) (noting that none of the CFIUS-related executive orders, legislation, or regulations have defined national security).

[57] Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1193–97 (2018) (tallying references).

[58] *See, e.g.*, *Walker v. Yucht*, 352 F. Supp. 85, 92 (D. Del. 1972) ("To define is to limit the infinite; it implies determining now the exact meaning of a given term. But, a definition, although at present perhaps a guide, may tomorrow become a jailer.").

[59] 50 U.S.C. § 4565(f)(6).

[60] *Id.* § 4565(f)(4).

[61] *Id.* § 4565(f)(8).

[62] *Id.* § 4565(f)(11).

[63] *Id.* § 4565(a)(4).

[64] *Id.* § 4565(a)(4)(B).

Comment, CFIUS may review foreign investment in the form of a merger, acquisition, or takeover "that could result in foreign control of any United States business."[65] CFIUS can also investigate an investment into domestic critical infrastructure,[66] critical technologies,[67] or an industry that may yield sensitive personal data potentially "exploited in a manner that threatens national security."[68]

Under its enabling statute, CFIUS can examine covered transactions through two different levels of scrutiny. The first, preliminary level is a national security review, whereby the Committee seeks to "determine the [national security] effects of the transaction."[69] CFIUS can initiate a review of a covered transaction through unilateral action,[70] or it can initiate a review after receiving a "notice" or "declaration" of the transaction from involved parties.[71] National security reviews last a maximum of forty-five days,[72] and if CFIUS determines that the transaction poses no national security risks, or any revealed risks are sufficiently mitigated by the review, the deal is allowed to proceed.[73]

Under certain circumstances, however, CFIUS is instead required to launch an investigation, a subsequent, more searching review of the covered transaction.[74] For instance, CFIUS must investigate covered transactions where the "transaction threatens to impair" national security, and that risk has not been mitigated by the national security review.[75] And as relevant here, CFIUS must investigate all "foreign government-controlled transactions," foregoing the preliminary review.[76] As described in the prior section, this provision demonstrates congressional concern with the inherent risks posed by these types of transactions.

After conducting its investigation, CFIUS then refers the matter to the president, who must announce within fifteen days whether the

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[65] *Id.* § 4565(a)(4)(B)(i).

[66] *Id.* § 4565(a)(5) (defining "critical infrastructure" as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.").

[67] *Id.* § 4565(a)(6) (defining "critical technologies" to include defense articles or services, nuclear equipment, certain agents and toxins, and emerging and foundational technologies essential to national security).

[68] *Id.* § 4565(a)(4)(B)(iii)(III).

[69] *Id.* § 4565(b)(1)(A)(i).

[70] *Id.* § 4565(b)(1)(D).

[71] *Id.* § 4565(b)(1)(C)(i), (v).

[72] *Id.* § 4565(b)(1)(F).

[73] *Id.* § 4565(b)(2)(A) (limiting the circumstances under which CFIUS review proceeds beyond the review stage).

[74] *Id.* § 4565(b)(2).

[75] *Id.* § 4565(b)(2)(B)(i)(I).

[76] *Id.* § 4565(b)(2)(B)(i)(II).

transaction will be suspended or prohibited on national security grounds.[77] The president may intervene move to block the transaction if there is "credible evidence" that the acquisition might lead to action that threatens to impair domestic national security.[78] In making this determination, the president may take into account the same "factors to be considered" that govern CFIUS's national security reviews and investigations.[79] Notably, CFIUS's enabling statute specifically provides that the president's actions and findings with respect to covered transactions "shall not be subject to judicial review."[80] However, as demonstrated by the D.C. Circuit's approach in *Ralls v. Committee on Foreign Investment*,[81] a decision described in detail below, this bar to judicial intervention is not absolute.

C. The Changing Scope of CFIUS Review

As the history of CFIUS makes clear, legislators have long been concerned with the potentially malicious, ulterior motives behind foreign investment transactions, particularly those by foreign state or near-state actors.[82] But the types of transactions scrutinized through this national security lens have evolved since the Committee's initial establishment in 1975. There are two trends relating to CFIUS authority with direct bearing on this Comment's analysis. First, CFIUS's scope and volume of transactions has significantly expanded. And second, the judiciary has demonstrated a greater willingness to intervene in suits challenging CFIUS authority.

1. CFIUS's Broadening Horizons

President Biden's Executive Order 14,083 marks an important shift in the lens CFIUS employs to identify national security threats.[83] Specifically, it added several additional factors to the existing § 4565(f) criteria.[84] These additional factors fall into three primary categories: aggregate industry investment trends, cybersecurity risks, and

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[77] *Id.* § 4565(d)(2).

[78] *Id.* § 4565(d)(4)(A).

[79] *See id.* § 4565(f) (detailing the eleven statutory factors the president or their designee, CFIUS, may consider in analyzing a covered transaction's implications for national security).

[80] *Id.* § 4565(e).

[81] 758 F.3d 296 (D.C. Cir. 2014).

[82] *See, e,g.*, David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. TIMES (Mar. 10, 2006), https://www.nytimes.com/2006/03/10/politics/under-pressure-dubai-company-drops-port-deal.html [https://perma.cc/9ZL3-NUQC] (noting that DP World, a United Arab Emirates state-run business, dropped out of a deal to manage domestic ports after bipartisan backlash on national security grounds).

[83] Exec. Order No. 14,083, 87 Fed. Reg. 57,369, 57,369 (Sept. 20, 2022).

[84] *Id.* at 57,371–57,373.

sensitive data concerns.[85] Regarding the third category, Executive Order 14,083 specifically notes that "[d]ata is an increasingly powerful tool for the surveillance, tracing, tracking, and targeting of individuals or groups of individuals, with potential adverse impacts on national security."[86]

This distinct focus on data marks an important transition for CFIUS for two primary reasons. First, these new factors qualitatively broaden the analytical scope of CFIUS review, further cementing the agency's shifting lens from purely traditional militaristic threats to the decentralized, influence threats arising from data collection.[87] And this shift is consistent with the modern Intelligence Community's approaches, with its recent emphasis on the risks posed by foreign malign influence.[88] For instance, the Executive Order highlighted risks of "surveillance" and "targeting," techniques that may be used to facilitate military threats by identifying traditional security vulnerabilities in U.S. networks.[89] But those techniques may also be used to spur influence campaigns,[90] equipping foreign state actors with new data to leverage and use in propaganda or lobbying materials.[91]

Second, as a practical matter, the order's focus on data privacy implicates a far greater share of modern businesses. Because data collection is an essential component of many modern business plans, far more foreign businesses may be tagged and scrutinized by CFIUS as potential national security threats, even when their transactions may not have commanded any scrutiny even a decade ago.[92] In this way, President Biden's Executive Order formalized a shift that had already taken place under President Donald Trump's administration, when CFIUS

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[85] *Id.*

[86] *Id.* at 57,372.

[87] *Id.*

[88] *See generally* MICHAEL E. DEVINE, CONG. RSCH. SERV., IF12470, THE INTELLIGENCE COMMUNITY'S FOREIGN MALIGN INFLUENCE CENTER (FMIC) 1 (2023) (discussing foreign malign influence).

[89] *See, e,g.,* Alex Hern, *Fitness Tracking App Strava Gives Away Location of Secret US Army Bases*, GUARDIAN (Jan. 28, 2018, 4:51 PM), https://www.theguardian.com/world/2018/jan/28/fitness-tracking-app-gives-away-location-of-secret-us-army-bases [https://perma.cc/E8VB-TDTE].

[90] *See* DEVINE, *supra* note 88, at 1; *see also* Olivia Gazis, *U.S. Intelligence Community to Create Center to Address Foreign Malign Influence*, CBS NEWS (Apr. 26, 2021, 7:02 PM), https://www.cbsnews.com/news/intelligence-community-foreign-malign-influence/ [https://perma.cc/Z5N8-3KCY] (describing countering foreign influence operations as a "critical issue" that led to the creation of the Foreign Malign Influence Center).

[91] *See, e.g.*, Drew Harwell, *A Former TikTok Employee Tells Congress the App is Lying about Chinese Spying*, WASH. POST (Mar. 10, 2023, 11:33 AM), https://www.washingtonpost.com/technology/2023/03/10/tiktok-data-whistleblower-congress-investigators/ [https://perma.cc/R5NP-MB5R] (describing a former TikTok employee's concerns that data from the app could be distorted for propaganda or espionage purposes).

[92] *See* Eichensehr & Hwang, *supra* note 46, at 559 (arguing that CFIUS's expanded scope raises the question about "what exactly is beyond the reach of national security claims").

issued a 2019 order requiring Kunlun Tech, a Chinese company that owned 60% of the dating app Grindr, to unwind its acquisition.[93]

Evidence of CFIUS casting this wider net in its conception of national security concerns may be illustrated by the Committee's increasingly complex caseload. As argued by Dr. Heath Tarbert, former Chairman and Chief Executive of the Commodity Futures Trading Commission, the complexity of CFIUS's caseload may be circumstantially evidenced by the number of investigations—the more searching, resource intensive review detailed above—that CFIUS undertakes in a given year.[94] In 2007, CFIUS investigated only four percent of cases following an initial review,[95] whereas in 2022, the Committee investigated more than fifty-six percent following this initial review.[96] This added complexity may be partially attributable to investment trends by foreign government-controlled entities, which are now subject to mandatory investigation.[97] But the greater number and rate of investigations also provides some evidence that as the Committee has broadened its conception of national security, CFIUS's investigations in industries historically outside the national security review purview have increased the process's time and resource intensity.

2. The Judiciary Expressing Skepticism

In parallel to CFIUS's expanded scope, preliminary evidence indicates that courts have begun to move away from broad deference to CFIUS actions.[98] The D.C. Circuit Court of Appeals' 2014 decision in *Ralls Corp v. Comm. on Foreign Inv.*[99] marks this shift as the first and only published judicial opinion in a case where plaintiffs have challenged CFIUS authority.[100]

Namely, *Ralls* may be read for the proposition that CFIUS cannot expect carte blanche deference from courts, notwithstanding historic regard for the unique nature of national security issues. And because of that curtailed judicial deference, CFIUS must be willing and able to disclose a factual basis for its national security determination if the Committee halts any given transaction. This section introduces *Ralls*,

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[93] *Id.* at 550 (discussing the expansion of national security related review of foreign investment).

[94] Tarbert, *supra* note 12, at 1493–94.

[95] *Id.* at 1493.

[96] 2022 CFIUS ANN. REP. 21.

[97] *See* Tarbert, *supra* note 12, at 1494.

[98] Eichensehr & Hwang, *supra* note 46, at 591–94.

[99] 758 F.3d 296 (D.C. Cir. 2014).

[100] Eichensehr & Hwang, *supra* note 46, at 600–01.

and frames two primary takeaways from the decision that inform this shift.

i. Ralls background

In 2012, Ralls Corporation, a U.S.-incorporated company owned by two Chinese nationals, acquired several windfarm development companies located in Oregon, several of which operated near a restricted airspace and bombing zone operated by the U.S. Navy.[101] Ralls did not notify CFIUS of the acquisitions until after they were finalized, but CFIUS's subsequent review determined the acquisitions posed a national security threat.[102] President Barack Obama ultimately agreed with the Committee's assessment.[103] However, two weeks before he issued an order that Ralls divest itself of the acquired companies, Ralls sued CFIUS in federal court, seeking to invalidate the CFIUS action.[104]

ii. Takeaway: availability of judicial review

First, *Ralls* is important for the simple reason that it exists at all. Prior to the 2014 decision, there was no known or realized right for plaintiffs to sue CFIUS for harm resulting from its statutory actions. While some commentators have criticized the decision as introducing legal uncertainty,[105] the fact that the *Ralls* plaintiffs even had their case consideration on the merits affirms the basic notion that those impacted by the Committee's national security reviews of their transaction have standing to seek remedy through the courts.

The notion that courts retain judicial review authority was far from clear prior to the 2014 decision. Indeed, FIRRMA's amendments to the CFIUS enabling statute included a broadly worded bar to judicial review of the president's findings.[106] Yet on appeal, the D.C. Circuit concluded that while FIRRMA barred courts from reviewing the president's final actions to suspend or prohibit any covered transaction, it did *not* bar judicial review of suits challenging CFIUS's investigative process preceding such action.[107]

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[101] *Ralls Corp.*, 758 F.3d at 304.

[102] *Id.* at 305.

[103] *Id.* at 306.

[104] *Id.*

[105] *See, e.g.*, Henry K. Chen, *Applying Bright Lines to the "Black Box": Article II Powers as a Tool for Reducing Uncertainty in CFIUS Reviews*, 28 GEO. MASON L. REV. 1181, 1211–12 (2021) (arguing that the *Ralls* decision was problematic, in part, because it introduced excessive ambiguity into the application of the CFIUS process).

[106] *Ralls Corp.*, 758 F.3d at 311 (citing 50 U.S.C. app. § 2170(e) (now codified at 50 U.S.C. § 4565(e)(1))).

[107] *Id.* at 308.

The D.C. Circuit particularly distinguished between suits questioning the president's determination of "credible evidence" that the transaction threatened to impair national security, and constitutional claims "challenging the *process* preceding such presidential action.[108] The court reasoned that in the absence of clear and convincing evidence that Congress intended to bar judicial review of constitutional claims, CFIUS's enabling statute did not preclude Ralls' procedural due process arguments.[109] And despite the Government's argument to the contrary,[110] the court held that the most natural reading of the statutory language prohibited judicial review of only the president's final action to suspend or prohibit a covered transaction.[111]

In other words, because *Ralls* raised procedural due process concerns, the D.C. Circuit had authority to review the case, perhaps shy of questioning CFIUS's determination itself.[112]

iii. Takeaway: presentation of unclassified CFIUS rationale to impacted investors

The second key takeaway from the *Ralls* decision is the outcome for the plaintiffs in the case. Not only were their due process rights vindicated, with the court having determined they were deprived of their state property interests without due process of law,[113] but the court further ordered that they "be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence."[114] The *Ralls* Court reasoned that "a substantial interest in national security supports withholding only the classified information but does not excuse the failure to provide notice of, and access to, the unclassified information used to prohibit the transaction."[115]

That unclassified information may undoubtedly be valuable to potential repeat investors, enabling them to mitigate the risk of future CFIUS intervention. But perhaps more importantly, the D.C. Circuit's remedy presents a mechanism for accountability in courts. If CFIUS intervenes in a foreign investment transaction, the Committee must be

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[108] *Id.*

[109] *See id.* (citing a collection of Supreme Court cases supporting the proposition); *see also Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("[W]hen constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the extraordinary step of foreclosing jurisdiction unless Congress' intent to do so is manifested by clear and convincing evidence.") (internal quotation marks omitted).

[110] *Ralls Corp.*, 758 F.3d at 310.

[111] *Id.* at 311 ((citing 50 U.S.C. app. § 2170(e) (now codified at 50 U.S.C. § 4565(e)(1))).

[112] *Id.*

[113] *Id.* at 319.

[114] *Id.*

[115] *Id.* at 320.

prepared to provide the investors with its unclassified rationale behind its action. And given the Committee's statutory mandate,[116] it must necessarily be prepared to articulate why it is that any particular transaction threatened national security.

Viewed together, these two takeaways from *Ralls*—judicial review and investor access to the CFIUS's unclassified rationale—signify a trend away from carte-blanche national security deference to the Committee. And for CFIUS, each has the practical consequence of requiring the Committee to develop and produce justifications for its national security determinations to impacted investors. Thus, if and when CFIUS reviews transactions in a sector like sports, an area outside the Committee's historic focus, the Committee must be equipped with an analytical framework through which to evaluate such transactions on national security grounds. This Comment seeks to provide such a framework, both for the Committee itself, and for reviewing courts called on to analyze investor suits.

III. SPORTS INVESTMENT AND CFIUS: WHEN SPORTSWASHING IS AN ACTIONABLE NATIONAL SECURITY CONCERN

President Biden's Executive Order—and particularly its concern with the "surveillance, tracing, tracking and targeting of individuals or groups"—offers a unique glimpse into the administration's evolving understanding of novel threats to national security.[117] And on Capitol Hill, some legislators have sought to further push the outer bounds of CFIUS authority into a new economic sector: sports.

On June 6, 2023, the PGA Tour, the leading domestic organizer of professional golf competitions, announced that it would merge with LIV Golf, a rival golf organization developed and funded by Saudi Arabia's Public Investment Fund.[118] In a June 2023 letter to the Treasury Department, Representative Maxine Waters and Senator Sherrod Brown specifically called on CFIUS to examine the national security risks associated with the merger.[119] In a subsequent July 11, 2023 hearing on

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[116] 50 U.S.C. § 4565(b).

[117] Exec. Order No. 14,083, 87 Fed. Reg. 57,369 (2022).

[118] Rob Wile & David K. Li, *Here's Why the PGA Tour Just Merged with LIV Golf*, NBC NEWS (June 6, 2023, 5:38 PM), https://www.nbcnews.com/business/business-news/pga-tour-liv-merger-why-how-much-money-what-happens-next-rcna87972 [https://perma.cc/6QD7-YGR2]; *see also* Kate Kelly & Vivian Nereim, *All About the Deep-Pocketed Saudi Wealth Fund That Rocked Golf*, N.Y. TIMES (June 7, 2023), https://www.nytimes.com/2023/06/07/world/middleeast/saudi-arabia-sovereign-wealth-fund.html [https://perma.cc/XMH7-6WLM] (noting that analysts describe Saudi Arabia's Crown Prince Mohammed bin Salman as the "real power behind the purse strings" as the Public Investment Fund's board chair).

[119] Samantha Delouya, *LIV-PGA Tour Deal Probe Urged by Rep. Maxine Waters and Sen. Sherrod Brown*, CNN (June 16, 2023, 5:25 PM), https://www.cnn.com/2023/06/16/business/waters-and-brown-cfius-golf-deal/index.html [https://perma.cc/BEG3-5R5H].

the deal, Senator Richard Blumenthal criticized the transaction on the grounds that it would enable "a brutal, repressive regime [to] buy influence—indeed even take over—a cherished American institution simply to cleanse its public image."[120] And during a September 13, 2023 hearing before the Senate Permanent Subcommittee on Investigations, Quincy Institute Research Fellow Ben Freeman testified that the merger could "become a blueprint for how to garner influence in the U.S.[121]

To analyze whether CFIUS can indeed act against sportswashing investments, it is necessary to articulate a basis for considering sportswashing as a national security concern. And as a threshold matter, that endeavor requires a workable definition of sportswashing, a practice that remains "elusive," with its forms, mechanisms, and motivations highly varied and difficult to pin down.[122] For the purposes of this Comment, "sportswashing" refers to foreign direct investment in domestic sporting institutions, through which foreign state or near-state actors leverage the popularity of sports and communities of sports fans to cultivate political and economic capital.[123]

This section first articulates why sportswashing, so defined, rises to the level of a national security concern. It then defines the elements required for CFIUS to take action to prevent such investment on national security grounds.

A. Sportswashing Qualifies as a National Security Concern

Before analyzing how CFIUS should respond to instances of sportswashing, a threshold question must be answered: can sportswashing even be a national security concern? If not, CFIUS lacks the statutory authority to suspend or prevent the transaction.[124] But based on

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[120] Diane Bartz & Frank Pingue, *US Senate Panel Rips into Saudi Involvement in PGA Tour-LIV Golf Tie-Up*, REUTERS (July 11, 2023, 4:12 AM), https://www.reuters.com/sports/golf/pga-tour-official-defend-saudi-backed-liv-tie-up-before-us-senate-panel-2023-07-11/ [https://perma.cc/3A7E-PZHV].

[121] Ben Freeman, *QI's Ben Freeman's Testimony to the U.S. Senate on Saudi Sportswashing*, QUINCY INST. STATECRAFT (Sept. 13, 2023), https://quincyinst.org/2023/09/13/the-pga-tour-liv-deal-examining-the-saudi-arabias-public-investment-funds-investment-in-the-u-s/ [https://perma.cc/JH3P-765B].

[122] Chadwick & Widdop, *supra* note 8, at 148; *see also id.* at 153 (describing the need for a "more sophisticated understanding" of the "complex phenomenon").

[123] For additional attempts to define sportswashing, *see, e.g.,* Gulnara Akhundova, *Baku European Games 2015: A Fearsome PR Machine is Using Sport to Sweep Human Rights Under the Carpet*, INDEP., (June 12, 2015, 10:55 AM), https://www.independent.co.uk/voices/comment/baku-european-games-2015-a-fearsome-pr-machine-is-using-sport-to-sweep-human-rights-under-the-carpet-10314316.html [https://perma.cc/WS5N-XMG6] (providing the first known reference to sportswashing); Jules Boykoff, *Toward a Theory of Sportswashing: Mega-Events, Soft Power, and Political Conflict*, 39 SOCIO. SPORT J. 342, 342 (2022); Michael Skey, *Sportswashing: Media Headline or Analytic Concept?*, 58(5) INT'L REV. FOR SOCIO. SPORT 749, 749 (2023).

[124] 50 U.S.C. § 4565(l) (outlining CFIUS's options "to address national security risks").

sportswashing's characteristics and risk profile, CFIUS *can* consider the practice a national security concern, particularly given the Committee's broadening understanding of such threats. Furthermore, CFIUS *should* consider sportswashing a national security concern because of its capacity to be used for foreign malign influence and geopolitical leverage.

1. Based on its statutory flexibility and judicial deference, CFIUS can legally consider sportswashing an actionable national security threat.

Sportswashing fits within the modern intelligence community's conception of national security, which has broadened to include certain soft power exercises and influence campaigns. For instance, Federal Bureau of Investigation (FBI) Director Christopher Wray testified before the House Homeland Security Committee in November 2022 that he was concerned TikTok data "could be used for influence operations."[125] In a more recent example, Chairman of the Senate Select Committee on Intelligence, Senator Mark Warner, warned that the threat of foreign influence operations and disinformation campaigns may be "worse this year than four years ago."[126] Growing concerns about these types of campaigns further motivated the development of the Foreign Malign Influence Center, which is aimed at countering enduring "threats to democracy and U.S. national interests from foreign malign influence."[127]

Like the national intelligence community at large, CFIUS has similarly expanded its breadth of investigations beyond traditional militaristic threats involving the defense sector or critical industries. And the risks posed by sportswashing align with the "surveillance, tracing, tracking, and targeting"[128] threats that the Biden Administration has elsewhere identified as national security concerns in the foreign investment context. As discussed in further detail below, sportswashing enables foreign governments unique access to highly popular institutions and highly passionate fans, either or both of which present powerful points of leverage for influence campaigns.

Moreover, CFIUS can classify sportswashing as a national security concern because of generally expansive judicial deference to the

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[125] Treisman, *supra* note 7.

[126] Julian E. Barnes, *Americans Are More Vulnerable to Foreign Propaganda, Senator Warns*, N.Y. TIMES (Apr. 16, 2024), https://www.nytimes.com/2024/04/16/us/politics/election-interference-russia-warner.html [https://perma.cc/39K6-2YB8].

[127] *Organization*, OFF. DIR. NAT'L. INTEL., https://www.dni.gov/index.php/nctc-who-we-are/organization/340-about/organization/foreign-malign-influence-center [https://perma.cc/RK83-5PG6].

[128] Exec. Order No. 14,083, 87 Fed. Reg. at 57,372.

executive on matters of foreign policy and national security.[129] Any factual determination from CFIUS regarding national security threats raised by investment in domestic sporting institutions would likely command deference from the courts. This is particularly true given that Congress left "national security" undefined in § 4565, providing CFIUS with "tremendous flexibility for interpretation."[130] While *Ralls* made clear that judicial deference to national security decisions is not always absolute,[131] the general principle remains that highly changeable and context-dependent national security decisions are often improper areas for judicial intervention.[132] Of course, post-*Ralls*, CFIUS must be prepared to articulate its unclassified rationale behind its national security determinations. But CFIUS nonetheless "retains broad discretionary power,"[133] and any determination the Committee makes classifying a sportswashing investment as a national security threat would likely be respected by the courts.

2. Not only can CFIUS consider sportswashing an actionable national security concern, but the Committee also should make such a determination.

CFIUS should classify sportswashing as a national security threat because of its capacity for potent foreign malign influence.[134] As Professor Jules Boykoff notes, sportswashing investment enables foreign

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[129] The judicial deference contemplated here is grounded not in the fact that CFIUS may command deference as an agency, but rather because of the judiciary's historic deference to the executive on areas of foreign affairs and national security. *Compare* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842–43 (1984) (establishing judicial deference to an agency's interpretation of its own ambiguous statute) *with* Webster v. Doe, 486 U.S. 592, 600–01 (1988) (deferring to an intelligence agency's statutory interpretation, in part, because of the agency's essential national security mandate). Indeed, the Supreme Court did not cite *Chevron* in its *Webster* decision. Thus, this Comment does not anticipate that *Loper Bright*'s elimination of *Chevron* deference will bear greatly on the nature of judicial review of CFIUS's national security determinations. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024); *see also* Curtis Bradley & Jack Goldsmith, *Foreign Affairs, Nondelegation, and the Major Questions Doctrine*, 172 U. PA. L. REV. 1743, 1795 n.265 (2024) (noting that "overturning [*Chevron*] would potentially leave in place similar deference doctrines that apply to presidential action in foreign affairs").

[130] Eichensehr & Hwang, *supra* note 46, at 586 (referencing 50 U.S.C. § 4565(a)).

[131] *Ralls Corp.*, 758 F.3d at 313.

[132] *See e.g.*, *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (observing that the courts lack comparative institutional competence to question national security determinations).

[133] Sanjay Patnaik et al., *The National Security Grounds for Investigating Musk's Twitter Acquisition*, BROOKINGS (Nov. 4, 2022), https://www.brookings.edu/articles/the-national-security-grounds-for-investigating-musks-twitter-acquisition/ [https://perma.cc/V92T-GU7W].

[134] *See* DEVINE, *supra* note 88, at 1 (discussing foreign malign influence).

government investors to take advantage of "established regimes of fandom"[135]— an invaluable leverage point for several reasons.

First, scholars have long argued that individuals and communities often define themselves in relation to sporting institutions.[136] Understanding sports teams and leagues as cultural touchstones fundamental to identity is critical to appreciate their ownerships' potential for foreign malign influence. If a foreign state owns an institution with which fans self-identify, the foreign state, by definition, can exercise control through that institution to redefine fans' identities. This can be done in passive ways, such as changing the colors of the team's uniforms to echo the foreign state's own imagery. Indeed, after Saudi Arabia's Public Investment Fund acquired Newcastle United, a football club in the English Premier League, the owners did precisely that, announcing new green and white uniforms understood by many as evocative of Saudi Arabia's flag.[137]

Or it can be accomplished in more active ways, leveraging a quasi-principal and agent dynamic where fans may explicitly or implicitly become spokespersons for the state's messaging. For instance, in what was decried as an example of sportswashing's influence, fans of Chelsea Football Club in the English Premier League chanted the name of Chelsea's then-owner—Russian oligarch Roman Abramovich—during a game shortly after Russia's invasion of Ukraine in 2022.[138] One commentator noted in response that "when the club does well, the sportswasher will be well-regarded—the fans will defend the sportswasher, just as they defend a beloved manager or player."[139] Thus, whether subliminal or in more overt ways, sportswashing provides a unique leverage point for foreign state actors to garner political capital.

Considered in this context, rather than simply a form of entertainment, sports cultivate a highly salient sub-group identity that may be directly targeted. And the more salient an individual's fandom is to their social identity, the more susceptible they are to influence

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[135] Boykoff, *supra* note 123, at 348.

[136] *See, e.g.*, Bob Heere & Jefferey D. James, *Sports Teams and Their Communities: Examining the Influence of External Group Identities on Team Identity*, 21 J. SPORT MGMT. 319, 319 (2007) (recognizing sport as an instrument of community identity (citing D.F. Anderson & G.P. Stone, *Sport: A Search for Community*, *in* SOCIO. OF SPORT: DIVERSE PERSPS. 164, 164–72 (1981))).

[137] Chris Waugh, *Newcastle Release Third Kit in Same Colours as Saudi Arabia*, ATHLETIC (June 28, 2022), https://www.nytimes.com/athletic/4170071/2022/06/28/newcastle-release-third-kit-in-same-colours-as-saudi-arabia/ [https://perma.cc/H4N6-GS8N].

[138] Jonathan Wilson, *Sportswashing and Global Football's Immense Power*, SPORTS ILLUSTRATED (Mar. 11, 2022), https://www.si.com/soccer/2022/03/11/sportswashing-chelsea-abramovich-russia-qatar-abu-dhabi-saudi-arabia [https://perma.cc/82ZT-LAN3].

[139] *See*, *e.g.*, Kyle Fruh et. al., *Sportswashing: Complicity and Corruption*, 17 SPORT, ETHICS & PHIL. 101, 109 (2022).

targeting that fandom.[140] As demonstrated by the previous anecdotes, sportswashing may directly capitalize on such vulnerabilities through "community infiltration," where the investor can "acquire acceptance and status as a (prominent, beneficent) member of a given sporting community."[141] Once achieved, the investor can exert influence as a form of "induced tribalism, whereby they would be variously defended, excused, and justified by a sporting community as one of their own, especially against the criticisms of perceived outsiders."[142] For a foreign government, targeting and cultivating masses of such vigorous defenders would be immensely attractive, helping to facilitate the state's own geopolitical endeavors, or to undermine unfavorable policies and media coverage directed towards that government in the United States.

Second, and relatedly, sportswashing gives the investing state novel access points for lobbying efforts potentially detrimental to the hosting state.[143] This is because sports team or league ownership often grants owners new access to policy makers. In a domestic example, the National Football League's team owner-chaired political action committee, the Gridiron PAC, conducts lobbying efforts on behalf of the league's owners.[144] Whether or not U.S. sports team owners lobbying Congress is viewed favorably, were a foreign government or near-state actor to own a domestic sports team instead, such lobbying efforts may take on a different tone.

Internationally, sportswashing *has* enabled such access for foreign ownership groups. For instance, in 2008, English Premier League team Manchester City Football Club were "taken over by [United Arab Emirates] Sheikh Mansour bin Zayed Al Nahyan's Abu Dhabi United Group (ADUG)." [145] After the acquisition, the group's ownership was invited to "develop working relationships with the [local] council" controlled by the Labour Party.[146] Otherwise stated, ownership of a sports team

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[140] *See* Debra A. Laverie & Dennis B. Arnett, *Factors Affecting Fan Attendance: The Influence of Identity Salience and Satisfaction*, 32 J. LEISURE RSCH. 225, 228–29 (2000) (describing how different levels of identity salience affect corresponding identity related behavior).

[141] Fruh, *supra* note 139, at 104.

[142] *Id.*

[143] *See* Ben Freeman, *Sports: The Next Frontier of Foreign Influence in America*, SPORTS BUS. J. (Aug. 3, 2023), https://www.sportsbusinessjournal.com/Articles/2023/08/03/oped-03-freeman [https://perma.cc/M2RE-SRFJ] (arguing sportswashing may enable the foreign state to not only silence dissent, but also buy off lobbyists, former members of Congress, and thought leaders).

[144] Michael Rothstein, *Election 2020: How the NFL's Gridiron PAC uses influence in Washington*, ESPN (Oct. 29, 2020, 7:10 AM), https://www.espn.com/nfl/story/_/id/30198564/election-2020-how-nfl-gridiron-pac-uses-influence-washington [https://perma.cc/SK3T-3E3U].

[145] Rob Pollard, *The Remarkable Story of Manchester City's Rise Under Sheikh Mansour*, BLEACHER REP. (Oct. 18, 2016), https://bleacherreport.com/articles/2670212-the-remarkable-story-of-manchester-citys-rise-under-sheikh-mansour [https://perma.cc/6CVT-8MZS].

[146] Jonathan Silver, *Newcastle's Saudi Takeover is Just the Latest Chapter in Football Capitalism*, TRIBUNE (Oct. 7, 2021), https://tribunemag.co.uk/2021/10/newcastles-saudi-takeover-is-

granted a foreign government new direct connections and lobbying opportunities with one of the United Kingdom's major political parties, access which may have otherwise been unavailable. In another recent example from the United Kingdom, Putin-linked Russian oligarch Roman Abramovich was "afford[ed] . . . considerable influence and access to Britain's professional and ruling classes" during his ill-fated ownership of Chelsea Football Club.[147] Such access may be leveraged by foreign states to undermine national security or extract valuable concessions implicating global engagement.

Considered in the abstract, CFIUS therefore can and should consider sportswashing as a potential national security threat.

B. CFIUS Intervention Criteria

Having argued that sportswashing can implicate national security concerns, this Comment next proposes specific criteria for when a particular sportswashing investment justifies CFIUS intervention.

First, as defined here, sportswashing must occur via foreign investment in the United States. Second, aligned with historically rooted concerns, the investment source must be a foreign state or near-state actor, as opposed to simply investment by a non-American individual or company. And third, the investment must be plausibly motivated by an effort to exert foreign malign influence through the sporting institution.

Where these elements are satisfied by a proposed sportswashing transaction, CFIUS should either suspend the transaction under its § 4565(l)(1) authority,[148] or impose conditions under its § 4565(l)(3) authority[149] to mitigate the unique risks posed by these types of sportswashing transactions. And should investors challenge such determinations under *Ralls*,[150] a presiding court should consult the presence of these elements in reviewing such claims, as intelligence classification permits.

1. Domestic Investment Element

Perhaps obviously, in order to be actionable by CFIUS, the sports investment must occur within the United States. Under § 4565(4)(B)(i)'s generally applicable definition, a covered transaction

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just-the-latest-chapter-in-football-capitalism [https://perma.cc/7BWF-MQPV].

[147] Luke Harding & Rob Davies, *Moscow-on-Thames: Soviet-Born Billionaires and Their Ties to UK's Political Elite*, GUARDIAN (July 25, 2020, 1:00 AM), https://www.theguardian.com/uk-news/2020/jul/25/moscow-on-thames-russia-billionaires-soviet-donors-conservatives [https://perma.cc/8F7C-M83Y].

[148] 50 U.S.C. § 4565(l)(1).

[149] *Id.* § 4565(l)(3).

[150] Ralls Corp. v. Comm. on Foreign Inv., 758 F.3d 296 (D.C. Cir. 2014).

constitutes "[a]ny merger, acquisition, or takeover . . . by or with any foreign person that could result in foreign control of any United States business."[151] Thus, a foreign investor assuming ownership of the New York Yankees would constitute a covered transaction, and therefore could be reviewed for its impacts on national security.[152] But an American investor assuming ownership of Zenit Saint Petersburg, a professional football team based in Russia, would not be actionable by CFIUS. Nor could CFIUS review a deal wherein the Shanghai Sharks, a Chinese Basketball Association team, offered LeBron James $200 million a year to play professionally in China.[153] While the latter two examples could conceivably enable foreign malign influence efforts as well, only foreign investment within the United States implicates CFIUS review.

2. State Proximity Element

CFIUS should limit its action against sportswashing to foreign government-controlled transactions, which include investment by near-state actors.

This comment defines the phrase "near-state actors" as those individuals or entities with discernable ties to the apparatus of a foreign government. Rather than utilize the traditional "state actors" versus "non-state actors" framework, a dichotomy criticized as overly simplistic by some international relations scholars,[154] the phrase "near-state actors" attempts to capture the subset of "non-state actors" who may wield influence and control on behalf of a foreign government, enabling said government to develop and exert foreign malign influence. Otherwise stated, "near-state actors" are individuals or entities that, because of their ties to foreign governments, can cultivate foreign malign influence at the behest of said governments through their investment in domestic sporting institutions.

Determining whether an individual or entity investor is a near-state actor will necessarily be a fact intensive inquiry. Certain

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[151] 50 U.S.C. § 4565(a)(4)(B)(i).

[152] *Id.* § 4565(b).

[153] This example is not as outlandish as it might seem. Cristiano Ronaldo, one of the world's most notable football players, currently earns approximately $220M annually after transferring to play for AL Nassr, a Saudi Pro League football club in Saudi Arabia. *Ronaldo Becomes World's Best-Paid Athlete After Saudi Move*, AL JAZEERA (May 3, 2023), https://www.aljazeera.com/sports/2023/5/3/ronaldo-becomes-worlds-best-paid-athlete-after-saudi-move [https://perma.cc/DA6R-23NQ]. That being said, the domestic league or team itself might intervene to prevent such a transfer. *See* Tom Bogert, *MLS Nixed $13 Million Jesus Ferreira Transfer Talks with Spartak Moscow: Sources*, ATHLETIC (Jan. 24, 2024), https://www.nytimes.com/athletic/5225232/2024/01/24/jesus-ferreira-spartak-moskow-fc-dallas-mls/ [https://perma.cc/8WUG-BZ2P].

[154] *See*, *e.g.*, Peter Wijninga et al., *State and Non-State Actors: Beyond the Dichotomy*, *in* STRATEGIC MONITOR 2014, at 141 (2014) (problematizing the definition of "non-state actor," described as a "negatively posited catchall term that has no obvious delimitations ").

scenarios, such as a sovereign wealth fund or a former head of state, will be easy cases. But for the more-borderline cases, CFIUS and reviewing courts might consider such factors as whether the investor was formerly a member of the foreign government, whether the investor has close family ties to current or former foreign government leadership, whether the investor's business operations are dictated by the foreign government, whether the investor is susceptible to direct takeover and nationalization by the foreign government, and the frequency in which the investor engages in formal or informal meetings with the foreign government.

Incorporating this definition of near-state actors, this comment argues that CFIUS should limit its action against sportswashing to investment by state or near-state actors for three primary reasons. First, this limit is consistent with historic practice. Second, this limit will prevent retaliation on reciprocity grounds. And third, this limit would mitigate the risk of chilling foreign investment otherwise deemed beneficial.

i. Historic policy concerns

From CFIUS's inception, the Committee has dedicated specific attention to investment from foreign state and near-state actors. Whether German investment in weapons manufacturing during World War I[155] or the Dubai Port World controversy involving a foreign government-owned entity's acquisition of domestic ports,[156] foreign investment as sovereign action has historically and justifiably triggered greater scrutiny than simply investment from a private foreign source.[157] Put another way, the closer an investment's source may be traced to a foreign state itself, the more likely such investment is primarily grounded in foreign policy goals implicating domestic national security concerns. And even if such investment is ostensibly driven by economic considerations, CFIUS's history and statutory authorization each demonstrate that the latent national security risks posed by foreign government-controlled entities normatively exceed those posed by private foreign actors.

Modern CFIUS statutory authority retains this emphasis, providing more stringent review procedures when a covered transaction is "foreign government-controlled," meaning that it could "result in the

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[155] Wittenberg, *supra* note 15.

[156] Sanger, *supra* note 82.

[157] Even CFIUS's modern authorizing statute treats foreign government-controlled transactions more cautiously than other foreign investment sources. *See* § 4565(b)(2)(B)(i)(II) (mandating a national security investigation if "the transaction is a foreign government-controlled transaction").

control of any United States business by a foreign government or an entity controlled by or acting on behalf of a foreign government."[158] Given the emergence of sportswashing through foreign direct investment as a novel threat, this requirement both meaningfully balances CFIUS's traditional focus and provides a check on the agency's otherwise unbridled discretion. Such discretion could otherwise be utilized for more protectionist ends in an economic sector already outside the conventional national security lens.[159]

ii. Reciprocity concerns

Americans frequently invest in foreign sports leagues and teams. For instance, in the 2023–24 season of the United Kingdom's top-flight football league, the English Premier League, American individuals or companies owned partial stakes in forty percent of the clubs.[160] Were CFIUS to amend its policy to prevent all foreign owners of domestic sports teams, even those without any discernable connection to their home country's government that might facilitate a foreign malign influence campaign, reciprocal revocations of American ownership rights might reasonably follow. Therefore, given the otherwise-likely ramifications for private American investment abroad, the state proximity element properly and justifiably grounds sportswashing in its base concern—malicious influence wielded by foreign state governments or their proxies.

iii. Chilling investment concerns

Moreover, if CFIUS took the blanket position of no foreign investment in domestic sporting institutions, there may be risk in chilling foreign investment more broadly. CFIUS is not an economic protectionist agency, and indeed, may not justify its national security analysis on such grounds.[161] This is in part because foreign investment is critical to the domestic economy. For instance, in January 2024, the United States Department of Commerce reported that it had facilitated more than

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[158] 50 U.S.C. § 4565(a)(7).

[159] *See* Qingxiu Bu, Ralls *Implications for the National Security Review*, 7 GEO. MASON J. INT'L COM. L. 115, 136–37 (2016) (noting that "an overly intrusive CFIUS would be an unintended protectionist barrier and risk undermining the U.S.'s goal of greater investment").

[160] Prakhar Sachdeo, *Owners of Premier League Clubs*, CNBC, https://www.cnbctv18.com/webstories/sports/owners-of-all-20-premier-league-football-clubs-12191.htm [https://perma.cc/QKC5-E4KA].

[161] *See* Bu, *supra* note 159, at 136–37 ("[T]he CFIUS regulations specifically disavow economic protectionism."); *see also* Cathleen Hamel Hartge, *China's National Security Review: Motivations and the Implications for Investors*, 49 STAN. J INT'L L. 239, 262 (2013) (emphasizing that, in contrast with China, the "United States [and CFIUS] ha[ve] specifically rejected [economic protectionism] considerations" in national security reviews of foreign investment).

$200 billion in foreign direct investment through the SelectUSA program, supporting more than 200,000 jobs throughout the United States and its territories.[162] CFIUS's action should be narrowly tailored to avoid imperiling such investment. And by limiting sportswashing concerns to foreign government-controlled transactions, including investment from individuals or entities with discernably close ties to a foreign government, CFIUS would exercise a manageable and justifiable standard.[163]

Recognizing investment in domestic sporting institutions as an actionable national security concern requires an inferential leap—that because the investor is non-American, either their investment's effects will imperil national security, their motivations with the investment are sufficiently pernicious to warrant blocking the transaction, or both. When the investor is a state actor, both the likely effect and the likely motivation warrant greater national security concerns than simply a non-American individual without any ties to a foreign government. Thus, Japanese national Hiroshi Yamauchi—the former president of Nintendo and a one-time owner of the Seattle Mariners baseball team[164]—would fall outside of the actionable sportswashing definition because he was not a near-state foreign investor. However, Russian national Mikhail Prokhorov, a former owner of the Brooklyn/New Jersey Nets basketball team, would have met the state proximity element due to his own political career and ties to the Kremlin.[165]

In weighing these specific concerns, the state proximity requirement constitutes a meaningful compromise. The United States seeks to strike a balance with its CFIUS policy: "welcom[ing] and support[ing] foreign investment, consistent with the protection of national security."[166] That balance requires a compromise between protectionist tendencies, such as insulating the domestic economy from national

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[162] *U.S. Commerce Department Announces $200 Billion Milestone in Foreign Direct Investment*, U.S. DEP'T COM., https://www.commerce.gov/news/press-releases/2024/01/us-commerce-department-announces-200-billion-milestone-foreign-direct [https://perma.cc/9WFJ-SL5J].

[163] While foreign government-controlled transactions may be more likely in the context of autocracies, sovereign wealth funds exist across government structures. For instance, Norway's Government Pension Fund Global ranks first amongst sovereign wealth funds by total assets. *See Top 100 Largest Sovereign Wealth Fund Rankings by Total Assets*, SOVEREIGN WEALTH FUND INST., https://www.swfinstitute.org/fund-rankings/sovereign-wealth-fund [https://perma.cc/F6X6-UEES].

[164] *See* Steve Friedman, *Seattle Mariners Team Ownership History*, SOC'Y FOR AM. BASEBALL RSCH., https://sabr.org/bioproj/topic/seattle-mariners-team-ownership-history/ [https://perma.cc/7EPA-NDUB].

[165] *See* Julia Ioffe, *The Master and Mikhail*, NEW YORKER (Feb. 19, 2012), https://www.newyorker.com/magazine/2012/02/27/the-master-and-mikhail [https://perma.cc/4DU4-MJ2P] (describing Prokhorov's political campaigning in Russia and alleged ties to Vladimir Putin).

[166] Exec. Order No. 14,083, 87 Fed. Reg. at 57,369.

security risks by foreclosing foreign investment entirely, and the recognition of genuine economic advancement that foreign investment spurs. This element seeks to strike a similar balance, ensuring that CFIUS's congressional mandate to focus on national security concerns will not be co-opted to prevent foreign ownership on economic protectionist, cultural gatekeeping, or xenophobic grounds.

3. Foreign Malign Influence Element

The final element operates essentially as a *mens rea* component. The sportswashing investment must be plausibly motivated by an effort to exert foreign malign influence through the sporting institution.[167] To be sure, CFIUS could presume this criterion's satisfaction simply by the fact that the investment is foreign government controlled. However, the agency does not do so for other types of investments, instead subjecting foreign government-controlled transactions to greater scrutiny, but not categorically prohibiting them.[168] Thus, a per se rule would be inappropriate in the sportswashing context. However, this Comment does contemplate a direct relationship between the latter two elements: the stronger the nexus between an individual or entity investor to the apparatus of foreign government, the stronger the presumption that the foreign malign influence element will be met.

In analyzing this element, CFIUS should rely on the expertise of the Director of National Intelligence, an ex officio member of the Committee,[169] and the Director of National Intelligence's statutorily-mandated analysis of "any threat to the national security of the United States posed by any covered transaction."[170] This analysis would be critical to reveal malicious intentions pursued through the investment, or a sufficient risk of resultant malicious influence, thus satisfying this element.

President Biden's "Ensuring Robust Consideration" Executive Order further highlighted the importance of an investor's intentions through their transaction. Specifically, the Executive Order provided that foreign investment that might "otherwise appear to be an economic transaction undertaken for commercial purposes may actually present an unacceptable risk to United States national security due to the legal environment, *intentions*, or capabilities of the foreign person, including

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[167] *See* DEVINE, *supra* note 88, at 1 (describing foreign malign influence).

[168] 50 U.S.C. § 4565(b)(1)(B)(II) (subjecting foreign government-controlled transactions to an automatic national security investigation, bypassing the preliminary national security review stage other transactions are generally subjected to before an investigation is launched).

[169] *Id.* § 4565(k)(2)(I).

[170] *Id.* § 4565(b)(4)(A)(i).

foreign governments, involved in the transaction."[171] Moreover, the statutory definition of "foreign malign influence" includes an analogous *mens rea* component: "any hostile effort undertaken by, at the direction of, or on behalf of or with the substantial support of, the government of a covered foreign country *with the objective of influencing* . . .".[172] Thus, ascertaining whether sportswashing is plausibly motivated by an intent to influence is grounded in existing-intelligence infrastructure and practices. There is little reason why CFIUS would be incapable of making such discretionary judgments in the sportswashing context.

This element will therefore ensure CFIUS's actions are properly grounded in mitigating the legitimate national security risks stemming from sportswashing. Given that CFIUS's confidential national security review process,[173] as well as the legitimacy that comes from the Committee's inter-governmental makeup,[174] courts remain likely to yield to the Committee's national security determinations in practice. This is true despite the D.C. Circuit's approach in *Ralls*,[175] and even despite the Supreme Court's elimination of *Chevron* deference to agency decisions,[176] because of the judiciary's historic apprehension to intervene in matters of national security. But in light of the shifting perceptions of deference accorded to agencies, as epitomized by the *Loper Bright* decision, it is all the more essential that the factual and analytical underpinnings of CFIUS determinations can withstand logical—and judicial—scrutiny. Because even if *Ralls* does not stand for the proposition that every CFIUS decision will be subject to intense judicial inquiry, as that trend has not manifested in the decade since the decision, *Ralls* should at least be understood as dispelling any misconceptions about CFIUS having entirely carte blanche discretion. So, recognizing that the Committee cannot command limitless deference in its decisions, this Comment has sought to provide a roadmap to evaluate those national security determinations within the sportswashing context, both for the Committee itself ex ante, and for the courts' review ex post.

IV. CONCLUSION

In a hearing regarding the PGA Tour-LIV Golf merger, Senator Richard Blumenthal proclaimed that the hearing was about how "a brutal, repressive regime can buy influence—indeed even take over—a

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[171] Exec. Order No. 14,083, 87 Fed. Reg. at 57,369 (emphasis added).

[172] 50 U.S.C. § 3059(f)(2) (emphasis added).

[173] Eichensehr & Hwang, *supra* note 46, at 600.

[174] 50 U.S.C. § 4565(k)(2) (outlining CFIUS membership, which includes the Secretary of Homeland Security, Secretary of Defense, and the Secretary of State).

[175] *Ralls Corp.*, 758 F.3d 296 (D.C. Cir. 2014).

[176] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

cherished American institution simply to cleanse its public image."[177] Senator Blumenthal is quite right that the regime may utilize sportswashing to "cleanse its public image," though that may amount only to a moral concern. But sportswashing does not operate "simply" to launder the investor's reputation. It also grants the investor an entryway to "existing regimes of fandom,"[178] access that may facilitate a foreign malign influence campaign that directly implicates a legal concern, and indeed, a national security threat. As a general practice, sportswashing—defined here as foreign direct investment in domestic sporting institutions, through which foreign state or near-state actors leverage the popularity of sports and communities of sports fans to cultivate political and economic capital—does raise national security concerns. And when the above-described elements are met, CFIUS both can and should intervene to review, block, or restructure the transaction under its statutory authority.

[177] Bartz & Pingue, *supra* note 120.

[178] Boykoff, *supra* note 123, at 348.