

COMMENTS

JUDGE, JURY, AND EXECUTIONER: WHY PRIVATE PARTIES HAVE STANDING TO CHALLENGE AN EXECUTIVE ORDER THAT PROHIBITS ICTS TRANSACTIONS WITH FOREIGN ADVERSARIES

ARI K. BENTAL*

ABSTRACT

On May 15, 2019, President Donald Trump, invoking his constitutional executive and statutory emergency powers, signed Executive Order 13,873, which prohibits U.S. persons from conducting information and communications technology and services (ICTS) transactions with foreign adversaries. Though the executive branch has refrained from publicly identifying countries or entities as foreign adversaries under the Executive Order, observers agree that the Executive Order's main targets are China and telecommunications companies, namely Huawei, that threaten American national security and competitiveness in the race to provide the lion's share of critical infrastructure to support the world's growing 5G network.

Executive Order 13,873 raises several concerns—both broad and specifically related to the Trump Administration. In general, courts have struggled to clearly

* Note & Comment Editor, *American University Law Review*, Volume 70; J.D. Candidate, May 2021, *American University Washington College of Law*, B.A., International Affairs, 2016, *The George Washington University*. I would like to thank Erin Downey, whose friendship and guidance were essential to the publication of this Comment. Additionally, I am grateful to Maddie Dolan for providing extensive, invaluable feedback that sharpened the piece during the editorial process. I would also like to thank all of the other *Law Review* editors and staff who worked on this Comment. Finally, I would like to thank my mother, Tuffy Kriegel, for her boundless love and encouragement.

define the legal status of executive orders or the courts' ability to review executive orders. The quasi-legislative nature of executive orders creates tension with the separation of powers principle and contributes to courts' challenges in addressing concerns that they raise. The Trump Administration has continued a concerning trend of pursuing policy objectives through executive orders rather than through Congress in the current era of legislative gridlock. This Administration has also weaponized trade policy to accomplish national security objectives and implement a protectionist strategy that threatens the U.S.'s position as the world's leading economy.

*This Comment argues that affected parties have standing to challenge the government's enforcement of this Executive Order against them in Article III courts in defense of their due process rights, despite language in the Order that may suggest it is exempt from judicial review. By analogizing the new interagency committee tasked with implementing Executive Order 13,873 to the Committee on Foreign Investment in the United States, this Comment uses the precedent the D.C. Circuit established in *Ralls Corp. v. CFIUS* to demonstrate that hypothetical U.S. person plaintiffs, who may be involved in ICTS transactions with foreign adversaries, have a due process right to notice of, access to, and the opportunity to rebut the unclassified information the government uses to justify enforcement action against them under Executive Order 13,873. This Comment concludes by synthesizing the arguments of important stakeholders who have submitted public comments on the proposed rule for enforcing the Executive Order and providing policy recommendations to improve the efficacy and fairness of the implementing regulations.*

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INTRODUCTION

“The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his

image.”¹ Throughout the history of the United States, Presidents have used executive orders to fill gaps in the Constitution’s allocation of power and respond to pressing challenges that require greater agility than the legislative process can achieve.² As Justice Jackson noted above, however, the Framers of the Constitution sought to avoid creating an omnipotent executive—a desire embodied in the separation of powers principle, which the Framers codified in 1789 when the Constitution became the blueprint of the U.S. government.³ The Framers rejected a form of government based on arbitrary, unchecked power consolidated in the hands of the few and applied against the many.⁴ Executive orders often contradict that ideal by empowering the President with legislative, enforcement, and judicial authority to address or resolve pertinent issues; thus, executive orders are particularly prevalent and useful in times of legislative gridlock.⁵

On May 15, 2019, President Trump signed Executive Order 13,873—“Securing the Information and Communications Technology and Services Supply Chain”—in which he directed an interagency committee, led by the Department of Commerce, to create a new framework to assess United States persons’ or entities’ information and communications technology and services (ICTS) transactions and prohibit such transactions with foreign adversaries.⁶ Many key terms in the Executive Order are defined ambiguously, and the Order lacks guidance on the framework’s implementing regulations or the relevant

1. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

2. See Erica Newland, Note, *Executive Orders in Court*, 124 YALE L.J. 2026, 2031–32 (2015) (highlighting executive orders’ freedom from the constraints of some legislative requirements).

3. U.S. CONST. arts. I–III; *Youngstown Sheet & Tube Co.*, 343 U.S. at 641 (Jackson, J., concurring).

4. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“Governments are instituted among Men, deriving their just powers from the consent of the governed . . .”).

5. Cf. Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 552–53 (2005) (“[Executive orders] rid the president of the need to assemble majorities in both houses of Congress, or to wait through administrative processes . . . to initiate policy.”).

6. Exec. Order No. 13,873 § 1(a), 84 Fed. Reg. 22,689, 22,689–90 (May 15, 2019). The other members of the committee are the Secretaries of State, Defense, Homeland Security, and the Treasury, as well as the Attorney General, the U.S. Trade Representative, the Director of National Intelligence, the Administrator of General Services, and the Chairman of the Federal Communications Commission. *Id.* at 22,689.

agencies' roles in enforcement.⁷ The ambiguity of the Executive Order creates the potential for arbitrary enforcement because it currently does not feature procedural safeguards to stop any President, let alone one as mercurial as President Trump, from labeling countries, organizations, or individuals as “foreign adversaries” merely due to a personal rift.

Data security breach liability is one nontraditional focus of national security policy that Executive Order 13,873 may impact due to the prevalence of third-party code, which media and e-commerce companies use to control how they store data, interact with customers, and run their websites and mobile applications.⁸ Companies worry that the Executive Order's application to third-party code may trigger the war exclusion of their cyber insurance policies—which typically do not cover loss or damage resulting from a state's (or its agent's) “hostile or warlike action in time of peace or war,” regardless of its cause—and, thus, result in a forfeiture of their coverage if cyberattacks on their

7. See *id.* § 2(c), 84 Fed. Reg. at 22,690; Megan L. Brown et al., *President Moves to Restrict Foreign Telecom Deals Under Sweeping Order on Network Supply Chain Security; Congress Poised to Follow*, WILEY REIN LLP (May 16, 2019), <https://www.wileyrein.com/newsroom-articles-President-Moves-to-Restrict-Foreign-Telecom-Sales-Under-Sweeping-Order-on-Network-Supply-Chain-Security-Congress-Poised-to-Follow.html> [<https://perma.cc/S68H-F26X>] (“This is a new area of regulation, separate from existing government review of transactions by the Committee on Foreign Investment in the United States, and there is uncertainty about how the order will affect business until the agency makes rules as directed.”). At the time this Comment was printed, the executive branch had yet to issue a final rule regarding the implementing regulations for the Executive Order in light of public comments. Exec. Order No. 13,873 § 2(b), 84 Fed. Reg. 22,690.

8. See, e.g., Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1585 (2011) (quoting THE FEDERALIST NO. 23, at 115 (Alexander Hamilton) (Ian Shapiro ed. 2009)) (noting that, although establishing and operating the armed forces are the primary concerns of national security policy, threats have emerged and will continue to emerge from a variety of unforeseen sources); see also Daniel Garrie, *Executive Order 13873 Could Expand the Reach of War Exclusions in Cyber Policies*, FORBES TECH. COUNCIL (July 16, 2019), <https://www.forbes.com/sites/forbestechcouncil/2019/07/16/executive-order-13873-could-expand-the-reach-of-war-exclusions-in-cyber-policies/#321ae70575b3> [<https://perma.cc/HEQ6-TBT2>] (detailing Executive Order 13,873's implications for cyber insurance litigation); *New Executive Order Applies to Foreign Third-Party Code*, MEDIA TR. (Sept. 22, 2019), <https://mediatrust.com/blog/new-executive-order-applies-foreign-third-party-code> [<https://perma.cc/F43N-P33V>] (estimating that third-party code accounts for 80–95% of the code running on leading media and e-commerce domains).

systems occur.⁹ As foreign third-party coders account for many of the increasingly prevalent malware attacks on U.S. digital infrastructure, the Trump Administration will likely designate many third-party coders, if not their host countries at large, as foreign adversaries.¹⁰ Thus, the new committee may enforce the Executive Order against U.S. entities that use third-party coders' services, despite the limited oversight capabilities that U.S. entities possess over the third-party coders with whom they work.¹¹ The apparent breadth of the scope of the term "foreign adversaries" in the Executive Order suggests that insurance companies could deny coverage to U.S. companies that sustain cyberattacks and receive third-party coding services from private entities operating within the jurisdiction of foreign adversaries, even if the interagency committee has not designated the third-party coders themselves as foreign adversaries.¹²

This Comment argues that parties subject to Executive Order 13,873 have standing to bring as-applied challenges to the Executive Order in Article III courts to assert their due process rights and preserve the separation of powers principle the Constitution prescribes. Additionally, this Comment uncovers the due process concerns that the Executive Order poses for affected parties. While there is precedent for allowing deliberate vagueness in executive orders concerning national security and emergencies to provide the executive branch with sufficient

9. See Complaint at 4 ¶ 13, *Mondelez Int'l, Inc. v. Zurich Am. Ins. Co.*, No. 2018L011008, 2018 WL 4941760 (Ill. Cir. Ct. Oct. 10, 2018) (providing an excerpt of the insurance policy and war exclusion at issue in that case); Garrie, *supra* note 8; MEDIA TR., *supra* note 8.

10. Garrie, *supra* note 8; MEDIA TR., *supra* note 8.

11. Garrie, *supra* note 8.

12. See Exec. Order No. 13,873, 84 Fed. Reg. 22,689, 22,689 (May 15, 2019) (identifying any person merely "subject to the jurisdiction . . . of foreign adversaries" who acquires or uses ICTS in the United States as "an unusual and extraordinary threat" to the United States); see also *Securing the Information and Communications Technology and Services Supply Chain*, 84 Fed. Reg. 65,316, 65,317–18 (proposed Nov. 27, 2019) (to be codified at 15 C.F.R. pt. 7) ("The Department [of Commerce] invites comment on all aspects of the proposed regulation but notes that the determination of a 'foreign adversary' for purposes of implementing the Executive order is a matter of executive branch discretion and will be made by the Secretary in consultation with [the other heads of the interagency committee's constituent agencies]."); Garrie, *supra* note 8 (noting that the broad scope of "foreign adversary" in the Executive Order may provide persuasive authority to insurance companies, which will argue that they no longer have to prove direct involvement of a given state or its agent to invoke the war exclusion to deny coverage to victims of cyberattacks—a historically difficult task).

flexibility to respond to new threats as they emerge, Executive Order 13,873's language does not clearly indicate the people or entities subject to its enforcement.¹³ The Executive Order fails to confine the scope of ambiguously defined critical terms, which may allow the committee to deprive affected parties of their property interests without providing adequate notice of the evidence the committee uses to justify enforcement.¹⁴

Part I of this Comment provides an overview of the separation of powers principle; the history and legal status of executive orders; the Trump Administration's use of trade policy to serve national security ends, as well as the specifics of Executive Order 13,873; the constitutional and statutory authority on which President Trump substantiated this Executive Order; existing legislation, regulations, and agencies that operate at the intersection of national security and trade; and standing to sue in Article III courts. Part II of this Comment then analyzes standing in a hypothetical case of parties suffering a due process violation as a result of this Executive Order's enforcement and compares the hypothetical claim with landmark standing cases to establish that parties whom this Executive Order adversely affects have justiciable due process claims against the executive branch.¹⁵ Part II

13. See *supra* note 12 and accompanying text; see also Newland, *supra* note 2, at 2036–37 (acknowledging courts' tendency to defer to the President's interpretations of ambiguous provisions in executive orders).

14. See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) (explaining that a valid due process claim arises when (1) the government deprives one of a life, liberty, or property interest, and (2) in depriving that interest, the government violates the Due Process Clause of the Fifth Amendment).

15. *Infra* Section II.A. The hypothetical claim involves two plaintiffs that illustrate the wide variety of industries and actors that may fall within the Executive Order's scope: (1) a U.S.-based subsidiary of a foreign telecommunications provider, which a foreign adversary allegedly controls, that is seeking to build critical infrastructure on land the subsidiary recently purchased in the United States, and (2) a hospital that uses a new, unique, "smart" cancer treatment machine, produced by a manufacturer from a foreign adversary country, that identifies cancer cells in patients and recommends treatment regimens using a broadband connection to solicit the advice of leading oncologists around the world instantly. These plaintiffs argue that the government violates the Due Process Clause of the Fifth Amendment, which provides, in relevant part, "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V. The government infringes on the affected parties' due process rights when the government imposes mitigation measures or blocking orders that deprive the affected parties of their property interests without providing the affected parties with notice of, access to, and the opportunity to rebut unclassified evidence the committee used against them in deciding to restrict the ICTS

also advocates for lawful, fair, and effective enforcement of the Executive Order through policy recommendations for its implementing regulations. This Comment concludes that parties subject to Executive Order 13,873 have standing to challenge its enforcement in Article III courts on due process grounds, and that judicial review is a crucial check on the executive branch's power in support of transparency.

I. BACKGROUND

President Trump found statutory and constitutional authority for Executive Order 13,873 in the National Emergencies Act¹⁶ (NEA), International Emergency Economic Powers Act¹⁷ (IEEPA), 3 U.S.C. § 301,¹⁸ and Article II of the Constitution.¹⁹ To provide context to evaluate the underlying authority for this Executive Order, this Part first examines the separation of powers principle, the distinct authorities each federal government branch possesses that are relevant to this Executive Order, and how the branches share power during national emergencies through congressional delegation of authority by statute. Second, this Part discusses the history and legal status of executive orders, examples of executive orders that have exceeded the scope of the President's authority, and the language of Executive Order 13,873, specifically its insufficiently defined key terms. Third, this Part evaluates existing legislation and executive action at the intersection of national security and international trade and investment to highlight how the government currently regulates the space. Fourth, this Part explains the requirements for parties to achieve standing to bring a claim in Article III courts and provides cases that have developed the standing doctrine to frame the justiciability of this Executive Order.

transactions in question. *See* *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, 758 F.3d 296, 319 (D.C. Cir. 2014).

16. 50 U.S.C. §§ 1601–1651 (2012).

17. *Id.* §§ 1701–1707.

18. 3 U.S.C. § 301 (2018) (authorizing the President to designate any agency head or political appointee “to perform without approval, ratification, or other action by the President (1) any function which is vested in the President by law, or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President”). As this law is purely administrative and unrelated to the quasi-legislative nature of executive orders or intragovernmental power-sharing during national emergencies that concern this Comment, this Comment does not discuss this law further.

19. U.S. CONST. art. II.

A. *The Balance of Power During National Emergencies*

In the Constitution, the Framers granted distinct but sometimes overlapping authority to each branch of government. This Section focuses on the interaction between the branches when conducting foreign affairs—first, through the separation of powers principle broadly and, second, through emergency powers and statutes.

1. *Separation of powers generally*

The legislative branch possesses all lawmaking power pertaining to the specific issues that Article I of the Constitution identifies and can take actions “necessary and proper” to fulfill Congress’s explicit duties.²⁰ The powers of appropriating funds, “regulat[ing] Commerce with foreign Nations,” and declaring war are especially significant in the national security and international trade contexts because they represent limitations on the President’s role as the “sole organ” of foreign relations in the federal government.²¹

The only congressional delegation of authority to the executive branch explicitly mentioned in Article II concerns political appointments and the conditional waiver of advice and consent.²² Article II suggests that the President may occasionally share information with Congress—and, under extraordinary circumstances, convene Congress—to urge Members of Congress to take action on issues he deems “necessary and expedient.”²³ Although the President is the Commander-in-Chief of the Armed Forces, his ability to exercise authority in that capacity largely depends on Congress’s funding of the military and declaring war.²⁴ Additionally, despite the President’s authority to make treaties

20. *Id.* art. I, §§ 1, 8.

21. *Id.* art. I, § 8; *see* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (establishing the “sole organ” doctrine granting the President broad discretion to conduct international relations with minimal congressional oversight or involvement).

22. U.S. CONST. art. II, § 2.

23. *Id.* art. II, § 3; *see, e.g.*, Alonzo L. Hamby, *Harry S. Truman: Campaigns and Elections*, MILLER CTR., <https://millercenter.org/president/truman/campaigns-and-elections> [<https://perma.cc/CEG7-MG3E>] (discussing how President Truman used his authority to convene Congress into session ostensibly to enact his legislative agenda, even though this was merely a political stunt to exploit the obstinacy and inefficiency of Republican lawmakers in an election year).

24. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Jackson, J., concurring) (illustrating the separation of powers principle in explaining that the President cannot act as Commander-in-Chief of the Armed Forces if Congress does not appropriate funds to maintain the armed forces).

and lead the government on foreign relations, Congress's power to regulate commerce with foreign nations highlights Congress's role in international trade.²⁵ Presidents have found a basis for discretionary executive authority, particularly in the context of national emergencies, in the oath of office clause, and their duty to "take Care that the Laws be faithfully executed."²⁶

The "arising under" clause in Article III suggests that the federal judicial power extends to almost all dispute resolution involving federal law; however, the questionable legal status of executive orders makes determining whether Article III courts have the power of judicial review over them complicated.²⁷ While executive orders are not expressly "Laws of the United States,"²⁸ the Supreme Court has treated executive orders that derive authority from statutes as having the "force and effect of law."²⁹ The Supreme Court has the power to declare acts of Congress unconstitutional.³⁰ Because executive orders founded on congressional legislation have the "force and effect of law,"³¹ the power of judicial review extends to executive orders as applications of relevant acts of Congress.³² Moreover, Article III, Section 2 notes that the judicial power applies "to Controversies to

25. U.S. CONST. art. I, § 8; *id.* art. II, § 2.

26. U.S. CONST. art. II, §§ 1, 3 ("I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."); *see* Glenn E. Fuller, Note, *The National Emergency Dilemma: Balancing the Executive's Crisis Powers with the Need for Accountability*, 52 S. CAL. L. REV. 1453, 1480 (1979) (suggesting that these clauses implicitly grant the President the discretion to construe and refrain from enforcing laws according to his good-faith effort to promote the "best interests of the country").

27. U.S. CONST. art. III, § 2; *see infra* Section I.B.

28. U.S. CONST. art. III, § 2.

29. *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 (1979) (describing when an executive order has the "force and effect of law"); *see, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 663, 674 (1981) (upholding Executive Orders issued pursuant to IEEPA and the Trading with the Enemy Act).

30. U.S. CONST. art. III, § 2; *see also Marbury v. Madison*, 5 U.S. 137, 180 (1803) ("[T]he particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.").

31. *Chrysler Corp.*, 441 U.S. at 304.

32. *See Marbury*, 5 U.S. at 173–74 (grounding this power in the text of Article III, Section 2).

which the United States shall be a Party,³³ which could encompass litigation stemming from the executive branch's enforcement of executive orders.³⁴

2. *Emergency powers and statutes*

As *Youngstown Sheet & Tube Co. v. Sawyer*³⁵ and *Dames & Moore v. Regan*³⁶ indicate, Presidents often use executive orders to declare national emergencies and invoke corresponding powers to bolster their quasi-legislative action.³⁷ Congress passed the primary emergency statutes, the NEA and IEEPA, to clarify the requirements for and limitations on congressional delegations of authority to the executive branch during national emergencies, which vague constitutional parameters and permissive common-law precedent previously governed.³⁸ In practice, both laws' oversight mechanisms have proven inadequate to resist creeping executive discretion in declaring national emergencies and acting during them.³⁹ For the purposes of this Comment, the discussion of the emergency powers and statutes will be confined to

33. U.S. CONST. art. III, § 2.

34. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2404, 2406 (2018) (addressing the State of Hawaii's claims that President Trump's proclamation restricting entry into the United States from certain foreign countries harmed the State as the operator of the University of Hawaii system, "which recruits students and faculty from the designated countries"). Thus, this constitutional provision is particularly useful for private litigants trying to establish standing, given that courts generally do not interpret executive orders to contain a private right of action. Newland, *supra* note 2, at 2076; see *infra* Section I.D (providing a detailed overview of standing and the justiciability doctrine). Scholars distinguish a private litigant's ability to sue another private party for violating an executive order from when a private party challenges the government's enforcement of an executive order, which, although seldom successful, courts are more willing to review. John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 837 (1981); see, e.g., *Micei Int'l v. Dep't of Commerce*, 613 F.3d 1147, 1153 (D.C. Cir. 2010) (stating that IEEPA does not give the President the power to create federal court jurisdiction).

35. 343 U.S. 579 (1952).

36. 453 U.S. 654 (1981).

37. See *infra* Section I.B.2 for a detailed discussion of these cases.

38. See Fuller, *supra* note 26, at 1453–55 (detailing the events leading up to the passage of the NEA); Note, *The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power*, 96 HARV. L. REV. 1102, 1102 (1983) [hereinafter Harvard] (describing why Congress passed IEEPA).

39. See Fuller, *supra* note 26, at 1455–56 (explaining that the NEA's statutory loopholes prevent proper oversight of the President); Harvard, *supra* note 38, at 1104 (concluding that IEEPA does not significantly constrain presidential power compared to prior legislation).

their genesis, their impact on the separation of powers principle today, and how their application to Executive Order 13,873 compares to other situations where Presidents have used these laws as the underlying statutory authority for similar executive orders.⁴⁰

a. National Emergencies Act of 1976 (NEA)

Congress passed the NEA because of concerns that the Nixon Administration was taking advantage of obscure legislation to use non-appropriated funds for alleged emergency purposes related to military operations in Cambodia without sufficient oversight.⁴¹ The main problem with emergency statutes, including the NEA, is that they give the President broad leeway to declare a national emergency and almost unbridled authority to act in any manner he deems appropriate during that emergency to resolve the problem.⁴² The NEA sought to control the President's authority during a national emergency by requiring him to publish the specific statutory authority he believes the government must invoke to sufficiently address the emergency at hand.⁴³ However, Congress did not include firm requirements or determining factors to guide the President when he considers declaring a national emergency because some lawmakers did not want to impede the President's ability to swiftly respond to emergency situations.⁴⁴ Furthermore, Congress relinquished the opportunity to preempt spurious national emergencies when it imposed few requirements on the President to declare national emergencies under the NEA.⁴⁵ Additionally, Congress has seldom

40. *Infra* Section I.C.1–2.

41. Fuller, *supra* note 26, at 1453–54 n.4 (quoting *National Emergency: Hearings Before the S. Spec. Comm. on the Termination of the National Emergency*, 93d Cong. 502 (1973) (statement of Tom C. Clark, J. of the Supreme Court)) (second alteration in original) (“[T]he emergency power now existing in the Executive is incalculable; and the exertion of it in situations not intended with specific grants [of power] is massive.”).

42. *Id.* at 1458 (“The test for when a national emergency exists is completely subjective—anything the President says is a national emergency is a national emergency.”); *see, e.g.*, Patrick A. Thronson, Note, *Toward Comprehensive Reform of America’s Emergency Law Regime*, 46 U. MICH. J.L. REFORM 737, 786 (2013) (quoting Exec. Order No. 13,405, 3 C.F.R. 231 (2006)) (raising a concern that classifying the Belarusian government’s political repression and public corruption as an “unusual and extraordinary threat to the national security and foreign policy of the United States” risked rendering the term “national emergency” meaningless).

43. 50 U.S.C. § 1631 (2012); Fuller, *supra* note 26, at 1463.

44. Fuller, *supra* note 26, at 1464.

45. *Id.* at 1465.

exercised its limited remaining authority to check the President's power after he has invoked the NEA to declare a national emergency.⁴⁶

b. International Economic Emergency Powers Act of 1977 (IEEPA)

Congress passed IEEPA primarily to curb the President's previously unbridled economic authority during peacetime emergencies.⁴⁷ Nonetheless, Section 203 of IEEPA empowers the President to impose controls on transactions involving foreign interests and foreign property subject to U.S. jurisdiction.⁴⁸ Executive Order 13,873's language is very similar to that of Section 203, but the Trump Administration has extended its application to ICTS transactions.⁴⁹ Similar to the NEA, IEEPA does not contain a definition for "emergency" under the statute; however, IEEPA does provide a few preconditions to exercising IEEPA emergency powers: (1) there must be an "unusual and extraordinary threat" to the U.S.'s national security, foreign policy, or economy that stems primarily from outside the United States; (2) the President must declare a national emergency in response to that threat; and (3) the

46. See 50 U.S.C. § 1622(b) ("Not later than six months after a national emergency is declared, and not later than the end of each six-month period thereafter that such emergency continues, each House of Congress shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated."); Fuller, *supra* note 26, at 1470–71 (explaining that the concurring resolution is not only a cumbersome, ineffective tool to check the President's power, but it may even serve as an unconstitutional congressional veto on the President's role in the legislative process); see also Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1080 (2004) (noting that Congress has failed to fulfill its statutory duty as no vote has taken place).

47. See Harvard, *supra* note 38, at 1102 (explaining that IEEPA restricted the President's power under the Trading with the Enemy Act of 1917).

48. *Id.* at 1106–07.

49. See *id.* (highlighting the President's power to impose regulations on foreign currency and banking transactions, as well as controls on foreign property that is subject to U.S. jurisdiction). Compare 50 U.S.C. § 1702(a)(1)(A) (2012) (authorizing the President to control any foreign currency, credit, securities, or other banking transaction "by any person, or with respect to any property, subject to the jurisdiction of the United States"), and § 1702 (a)(1)(B) (giving the President broad power to control any transaction involving foreign property that is subject to U.S. jurisdiction), with Exec. Order No. 13,873 § 1(a)(i), 84 Fed. Reg. 22,689, 22,689–90 (May 15, 2019) (prohibiting "any acquisition, importation, transfer, installation, dealing in, or use of any information and communications technology or service (transaction) by any person, or with respect to any property, subject to the jurisdiction of the United States . . . [where] the transaction involves information and communications technology or services designed, developed, manufactured, or supplied, by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary").

President may only exercise the relevant IEEPA powers to address the threat.⁵⁰

B. *The Legal Status of Executive Orders*

Presidents' power to issue executive orders mainly stems from Congress delegating authority to the President via statute and the President invoking his independent Article II authority.⁵¹ Presidents have used executive orders to officially demarcate their positions on policy issues, restructure the executive branch, and facilitate policy reform when Congress is gridlocked.⁵²

1. *Statutory checks on executive action exercised under executive orders*

Executive orders are not subject to the legislative process, and the President's actions are not subject to the Administrative Procedure Act of 1946⁵³ (APA); thus, the President has extensive freedom to issue executive orders without any procedural roadblocks.⁵⁴ Nonetheless, courts have held that executive orders possess the "force and effect of law."⁵⁵ In *Youngstown Sheet & Tube Co.*, the Supreme Court concluded that the President's power is strongest when congressional authorization

50. 50 U.S.C. § 1701(a)–(b); Harvard, *supra* note 38, at 1115.

51. Newland, *supra* note 2, at 2030–31.

52. *Id.* at 2031; *see, e.g.*, Exec. Order No. 13,781 § 1, 82 Fed. Reg. 13,959, 13,959 (Mar. 13, 2017) (directing the Office of Management and Budget to develop a plan to reassign governmental functions and dissolve unnecessary agencies "to improve the efficiency, effectiveness, and accountability of the executive branch"); Exec. Order No. 13,767 § 2(a), 82 Fed. Reg. 8793, 8793 (Jan. 25, 2017) (announcing the Trump Administration's policy to build a physical wall to fortify the southern border of the United States); Exec. Order No. 13,658 § 1, 79 Fed. Reg. 9851, 9851 (Feb. 12, 2014) (setting a minimum wage for federal government contractors at \$10.10 amid a legislative logjam); *see also* Barack Obama, President of the United States, State of the Union Address (Jan. 28, 2014) ("[W]henver I can take steps without legislation to expand opportunity for more American families, that's what I'm going to do.").

53. 5 U.S.C. §§ 500–596 (2018).

54. *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) (finding that APA provisions do not constrain the President); Newland, *supra* note 2, at 2031–32; Stack, *supra* note 5, at 553 ("[G]enerally in the areas of foreign affairs and government efficiency, there are no general procedural requirements for issuing executive orders imposed [on the President] by statute."). *But see* 44 U.S.C. § 1505(a), (c) (2012) (requiring the President to publish executive orders in the Federal Register to ensure the public has notice of prohibited conduct that could result in criminal penalties, unless the United States is under attack or threat of attack).

55. *See, e.g.*, Legal Aid Soc. v. Brennan, 381 F. Supp. 125, 130 (N.D. Cal. 1974) (determining that the executive order at issue commanded the "force and effect of law" because Congress statutorily authorized the President to promulgate the order).

and intent—ideally through an explicit delegation of authority in legislation—support his actions.⁵⁶ However, more recently, courts have given the executive branch increasing deference to enforce executive orders that confer power on the executive that the legislative branch did not expressly delegate.⁵⁷ Furthermore, some courts find that executive orders generally do not create private rights of action.⁵⁸ Additionally, courts sometimes find that they cannot review presidential action stemming from a presidential directive, such as an executive order, when the statutory authority underlying the directive granted discretion to the President.⁵⁹

Although the APA does not apply directly to the President, the law may still constrain agency action pursuant to an executive order.⁶⁰ The APA stipulates rulemaking and adjudication procedures, as well as standards for judicial review of final agency actions, for all executive branch and independent agencies.⁶¹ The executive branch operates under the presumption that Congress generally prefers judicial review of administrative action, except where statutes granting the underlying authority for the administrative action in question preclude judicial review or where a law has allowed agency discretion in carrying out the

56. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”).

57. See, e.g., *Rattigan v. Holder*, 643 F.3d 975, 984 (D.C. Cir. 2011) (implying that a statute and an executive order signed with constitutional authority provided exclusively to the President are equal in judicial stature).

58. See *Micei Int’l v. Dep’t of Commerce*, 613 F.3d 1147, 1153 (D.C. Cir. 2010) (refusing to expand the scope of 28 U.S.C. § 1331(a), which defines the parameters of federal subject-matter jurisdiction, to civil actions arising from executive orders); see also *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 457 (D.C. Cir. 1965) (explaining that any challenges to an executive order should be directed to the executive branch, rather than the courts, as the issuing body and for the sake of upholding the separation of powers principle).

59. *Dalton v. Specter*, 511 U.S. 462, 474 & n.6 (1994).

60. Steven Ostrow, Note, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659, 666 (1987) (“[C]ourts should look to the APA as an alternative basis for judicial review of an agency’s violation of an order.”).

61. 5 U.S.C. §§ 701–06 (2018); TODD GARVEY, CONG. RES. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW I (2017).

administrative action.⁶² The APA permits plaintiffs to seek judicial review of agency action that “adversely affect[s] or aggrieve[s]” them.⁶³ To challenge the enforcement of an executive order under the APA in court, a plaintiff must show “(1) that the challenged governmental conduct constitutes ‘agency action’ within the meaning of the APA[;] (2) that the action is final and that there is no other adequate court remedy . . . [;] (3) that the plaintiff has standing to obtain judicial relief”; (4) that the executive order has a “delegation of authority from Congress,” indicating that the executive order has the “force and effect of law”; and (5) that the “terms and purpose” of the executive order suggest the President’s intent to create a private right of action.⁶⁴

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,⁶⁵ the Court held that courts should generally defer to agencies’ interpretations of the statutes that the agencies administer because agencies are more familiar with the practical implications of various statutory interpretations due to their subject-matter expertise.⁶⁶ Additionally, the Court in *Chevron* emphasized that agency deference promotes uniformity in the law by preventing various courts from adopting different readings of the same statute.⁶⁷ However, courts have subsequently created exceptions to *Chevron* deference, namely when the case concerns a constitutional question.⁶⁸ For example, the constitutional question exception would apply if a court addressed the hypothetical case regarding the Due Process Clause of the Fifth Amendment that this Comment explores.⁶⁹

62. § 701(a); see *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 671 (1986) (quoting S. REP. NO. 79-752, at 26 (1945)) (“Very rarely do statutes withhold judicial review.”).

63. § 702.

64. *Id.*; Ostrow, *supra* note 60, at 664, 671; see *Indep. Meat Packers Ass’n v. Butz*, 526 F.2d 228, 234, 236 (8th Cir. 1975).

65. 467 U.S. 837 (1984).

66. *Id.* at 865–66.

67. See *id.*

68. See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574–75 (1988) (holding that “where an otherwise acceptable [agency] construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress”).

69. *Infra* Section II.A. As *Chevron* deference is not at issue in the hypothetical case used to establish standing in a challenge against Executive Order 13,873 in the Analysis Section, further discussion of the test to determine whether to apply *Chevron* deference in a given case involving agency action is beyond the scope of this Comment.

2. *Challenging executive orders in court*

Very few executive orders have been completely overturned during the tenure of the administration that issued them.⁷⁰ The most iconic example is President Harry S. Truman's executive order to seize American steel mills on national security grounds to keep them operating during the Korean War and prevent a nationwide strike over a wage dispute between the steelworkers and mill owners.⁷¹ Truman issued Executive Order 10,340 based on his constitutional power as President of the United States and Commander-in-Chief of the Armed Forces, which he argued allowed him to authorize the Secretary of Commerce to seize American steel mills after negotiations between the union and mill owners collapsed.⁷² The Supreme Court found Truman's executive order unconstitutional because the President did not have the authority to intervene in a labor dispute based solely on his own constitutional power without congressional support through its delegation of authority.⁷³ Truman's executive order also could not fall under his power as Commander-in-Chief, which does not include the authority to seize private property to resolve labor disputes and force production to continue.⁷⁴ Moreover, Truman's executive order was legislative in nature and, thus, beyond the President's power to advise Congress to make laws he supports or veto those with which he disagrees.⁷⁵

In 1947, Congress had previously declined to include an amendment in the Taft-Hartley Act that would have permitted emergency governmental seizures of companies during labor disputes to avoid work stoppages.⁷⁶ Given that Truman directly contradicted the will of Congress and lacked adequate constitutional authority to act in this

70. See, e.g., Newland, *supra* note 2, at 2038 (highlighting that only 13 percent of a sample of 150 cases pertaining to executive orders dealt with whether those executive orders violated constitutional rights, and only one of those challenges succeeded in proving a due process violation).

71. See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (finding the executive order unconstitutional because President Truman had neither a statutory delegation of authority from Congress nor sufficient constitutional power to independently enforce the executive order); Exec. Order No. 10,340, 17 Fed. Reg. 3139 (Apr. 8, 1952) (providing President Truman's reasons for ordering the steel mill seizures and his alleged authority to execute them).

72. Exec. Order No. 10,340, 17 Fed. Reg. at 3139, 3141.

73. *Youngstown Sheet & Tube Co.*, 343 U.S. at 587–88.

74. *Id.* at 587.

75. *Id.*

76. *Id.* at 586.

manner as President, the Court found no support for Truman's attempt to nullify Congress's legislative power via executive order.⁷⁷ In his concurrence, Justice Jackson outlined a framework to assess the strength and validity of presidential power relative to three degrees of congressional support.⁷⁸ Jackson's framework continues to provide the test through which courts analyze the President's use of his emergency powers.⁷⁹

In *Dames & Moore*, the Court explained that a dearth of jurisprudence regarding the general limits of executive power within the tripartite system of government exists because the Court analyzes the particular facts surrounding each application of executive power and challenges to it on the narrowest possible grounds.⁸⁰ In the wake of the Iran hostage crisis in 1979, President Jimmy Carter declared a national emergency and signed an executive order that froze all Iranian assets subject to U.S. jurisdiction.⁸¹ The President subsequently prohibited the courts from entering any judgments against Iran but authorized select proceedings, including pre-judgment attachment.⁸² *Dames & Moore's* subsidiary earned a pre-judgment attachment against the Atomic Energy Organization (AEO) for outstanding payment for part-performance when the AEO terminated the parties' contract for the

77. *See id.* at 637 (Jackson, J., concurring) (classifying Truman's authority in the weakest category of presidential power because his actions contradicted the will of Congress).

78. *See id.* at 635–38. Jackson identified three degrees of presidential authority relative to congressional support for a given executive action: (1) “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum”; (2) “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority”; and (3) “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.” *Id.* at 635–37.

79. *See* Stack, *supra* note 5, at 557 (explaining that many courts still “reflexively” rely on Justice Jackson's framework to analyze the legitimacy of executive orders).

80. *See* *Dames & Moore v. Regan*, 453 U.S. 654, 660–62 (1981) (emphasizing that separation-of-powers decisions do not establish sweeping precedent regarding the overarching bounds of executive power because the judicial power is limited to resolving specific issues, and the issues raised by the daily decisions of the executive branch are so varied).

81. *Id.* at 662–63; Exec. Order No. 12,279, 46 Fed. Reg. 7919, 7919–20 (Jan. 19, 1981) (invoking presidential authority under the Constitution, IEEPA, and the NEA to take this action).

82. *Dames & Moore*, 453 U.S. at 663.

subsidiary to inspect Iran's nuclear facilities.⁸³ However, in exchange for Iran's release of American hostages on January 20, 1981, the United States agreed to "terminate all litigation" between the two governments or any of the countries' nationals and resolve unsettled disputes via binding arbitration.⁸⁴ The district court granted Dames & Moore summary judgment against the AEO, but the company could not collect on its damages because of Presidents Carter's and Reagan's executive orders, which forced the district court to vacate the attachments pursuant to the U.S.-Iran agreement.⁸⁵ Consequently, Dames & Moore sued the President and Secretary of the Treasury to enjoin them from enforcing these executive orders, which the company argued exceeded the statutory and constitutional powers of the executive branch.⁸⁶ The Supreme Court rejected Dames & Moore's argument, explaining that IEEPA, the Hostage Act, and the International Claims Settlement Act permitted the President to nullify the attachment, settle claims through executive agreement, and suspend unresolved claims.⁸⁷ However, the President did not have the power to suspend Americans' litigation in American courts under the Due Process Clause because the purpose of that litigation was merely to assign liability and levy damages, neither of which concerned any particular Iranian property within U.S. jurisdiction.⁸⁸

83. *Id.* at 663–64.

84. *Id.* at 664–65.

85. *Id.* at 666; Exec. Order No. 12,294, 46 Fed. Reg. 14,111, 14,111–12 (Feb. 24, 1981); Exec. Order No. 12,279, 46 Fed. Reg. at 7919–20.

86. *Dames & Moore*, 453 U.S. at 666–67.

87. *See id.* at 671, 673 (finding that IEEPA allows the President to invalidate the exercising of any right pertaining to foreign property or that which is within U.S. jurisdiction and to use frozen assets as a "bargaining chip" when negotiating with adversaries); *id.* at 676 (quoting 22 U.S.C. § 1732 (2018)) ("[I]f the release [of a hostage] so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release . . ."); *id.* at 683 (quoting *Ozanic v. United States*, 188 F.2d 228, 231 (2d Cir. 1951)) ("The constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States . . . The continued mutual amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations.").

88. *Id.* at 675.

3. *Executive Order 13,873 and the Trump Administration*

The defense trade is often noted as the third arm of diplomacy, along with the more traditional forms of relationships forged through political and economic partnership.⁸⁹ Accepting a realist philosophy of international affairs, much of the United States' post-World War II clout has stemmed from the network of military equipment that connects its allies around the world, provides them with a technological advantage over their regional adversaries, and ensures their long-term dependence on the United States for their own national security.⁹⁰ Emerging technologies, like 5G infrastructure and artificial intelligence, challenge traditional notions of security threats to the point where trade policy predicated on national security is no longer the exception to the rule.⁹¹

The weaponization of trade policy has been particularly prevalent in the Trump Administration.⁹² President Trump has been quick to use

89. See *U.S. Arms Sales and Defense Trade*, BUREAU POL.-MIL. AFF. (May 21, 2019), <https://www.state.gov/u-s-arms-sales-and-defense-trade> [<https://perma.cc/HA65-ZWMF>]; see also *Defense Trade and Arms Transfers*, DEF. SECURITY COOPERATION AGENCY, <https://www.dsca.mil/programs/defense-trade-and-arms-transfers> [<https://perma.cc/WL4Z-UQBY>] (defining the defense trade as “[t]he transfer of defense articles and services [to international partners] via sale, lease or grant, in furtherance of national security and foreign policy objectives”); Amy Ebitz, *The Use of Military Diplomacy in Great Power Competition: Lessons Learned from the Marshall Plan*, BROOKINGS INST. (Feb. 12, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/02/12/the-use-of-military-diplomacy-in-great-power-competition> [<https://perma.cc/S7J6-7ZD6>] (noting that, despite a preference for “diplomacy in the traditional sense of a State Department mission,” leveraging military prowess and relationships has been a key feature of U.S. foreign policy since the Marshall Plan).

90. See BUREAU POL.-MIL. AFF., *supra* note 89 (referring to the economic and operational efficiency gains the U.S. armed services and military-industrial complex accrue through properly regulated defense trade).

91. *Emerging Technology and National Security: Findings and Recommendations to Develop and Deploy Advanced Technologies Through Effective Partnerships that Promote Economic, Technological, and National Security Competitiveness*, DEP'T HOMELAND SEC. (July 26, 2018), https://www.dhs.gov/sites/default/files/publications/2018_AEP_Emerging_Technology_and_National_Security.pdf [<https://perma.cc/UE2F-D92B>], 3–4 (urging the private sector to consider national security risks when making partnership decisions for the sake of innovation and to collaborate on national security challenges with the government).

92. See Brian Kingsley Krumm, *Regulatory Policy in the Trump Era and Its Impact on Innovation*, 70 MERCER L. REV. 685, 701–03 (2019) (citing the Trump Administration's “America First” policies on foreign investments in American companies and immigration as examples of actions that have increasingly isolated the United States from the global economy).

trade policy to accomplish non-economic goals and embellish national security concerns to circumvent defense trade protocol and expedite the supply of arms to controversial allies.⁹³ This tactic presents a puzzling conflict within an administration that ostensibly supports small government and free markets but takes steps to significantly increase its surveillance and market-control powers.⁹⁴

Executive Order 13,873 aligns with President Trump's protectionist trade policies in the name of "America First," as well as his trade war with China.⁹⁵ The following excerpt from the Executive Order provides pertinent language to contextualize this Comment's subsequent discussion of the justiciability and policy issues surrounding the Executive Order. The Executive Order prohibits:

any acquisition, importation, transfer, installation, dealing in, or use of any information and communications technology or service⁹⁶ (transaction) by any person,⁹⁷ or with respect to any property,

93. See, e.g., Marcia Robiou, *What You Need to Know About Trump's \$8 Billion Saudi Arms Deal*, PBS FRONTLINE (July 16, 2019), <https://www.pbs.org/wgbh/frontline/article/saudi-arabia-arms-deal-trump-what-to-know> [<https://perma.cc/5SGS-KR3H>] (describing an arms deal with Saudi Arabia that President Trump authorized in the face of vigorous congressional dissent and without clear support to justify the alleged "emergency" action).

94. See Greg Bensinger & Reed Albergotti, *Trump's Huawei Sanctions Underscore U.S. Dependency on China Tech*, WASH. POST (May 16, 2019, 6:20 PM), <https://www.washingtonpost.com/technology/2019/05/16/trumps-huawei-sanctions-underscore-us-dependency-china-tech> ("[The ban] will do significant economic harm to the American companies with which Huawei does business, affect tens of thousands of jobs, and disrupt the current collaboration and mutual trust that exist on the global supply chain."); Michael Grunwald, *How Trump Could Shrink the Government (While Still Keeping the Good Stuff)*, POLITICO (January/February 2017), <https://www.politico.com/magazine/story/2017/01/how-trump-could-shrink-the-government-while-still-keeping-the-good-stuff-214679> (explaining the two-sided rhetoric that purports to support small government while also promising big government reforms that will "take care of the people").

95. See Eric Geller, *Trump Signs Order Setting Stage to Ban Huawei from U.S.*, POLITICO (May 15, 2019, 7:05 PM), <https://www.politico.com/story/2019/05/15/trump-ban-huawei-us-1042046> [<https://perma.cc/WV68-YGMZ>] (describing the Executive Order as "the latest salvo in a broad campaign to combat what U.S. officials call China's unfair and disruptive practices").

96. Exec. Order No. 13,873 § 3(c), 84 Fed. Reg. 22,689, 22,691 (May 15, 2019) (defining ICTS as "any hardware, software, or other product or service primarily intended to fulfill or enable the function of information or data processing, storage, retrieval, or communication by electronic means, including transmission, storage, and display").

97. See *id.* § 3(d), 84 Fed. Reg. at 22,691 (defining a person as an "individual or entity"); see also *id.* § 3(a), 84 Fed. Reg. at 22,691 (defining an entity as "a partnership,

subject to the jurisdiction of the United States, where the transaction involves any property in which any foreign country or a national thereof has any interest (including through an interest in a contract for the provision of the technology or service), where . . . the Secretary of Commerce . . . , in consultation with [the heads of other constituent agencies], has determined that[] (i) the transaction involves information and communications technology or services designed, developed, manufactured, or supplied, by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary;⁹⁸ and (ii) the transaction: (A) poses an undue risk of sabotage to or subversion of the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of information and communications technology or services in the United States; (B) poses an undue risk of catastrophic effects on the security or resiliency of United States critical infrastructure or the digital economy of the United States; or (C) otherwise poses an unacceptable risk to the national security of the United States or the security and safety of United States persons.⁹⁹

The broad scope of “foreign adversary” in Executive Order 13,873 suggests that the Trump Administration may be attempting to combine more traditional national security nomenclature of “foreign power” and “agent of a foreign power” into one term.¹⁰⁰ In Section 6(c) of the Executive Order, the President explicitly declares that the Executive Order does not create a private right of action for any party wishing to challenge its enforcement.¹⁰¹ Part II of this Comment argues

association, trust, joint venture, corporation, group, subgroup, or other organization”); *id.* § 3(e), 84 Fed. Reg. at 22,691 (defining a U.S. person as “any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States”).

98. *Id.* § 3(b), 84 Fed. Reg. at 22,691 (defining a foreign adversary as “any foreign government or foreign non-government person engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or security and safety of United States persons”).

99. *Id.* § 1(a)(i)–(ii)(C), 84 Fed. Reg. at 22,691.

100. *See, e.g.*, 50 U.S.C. § 1801(a) (2012) (defining a “foreign power” as a foreign country, corporation or political organization “not substantially composed of United States persons,” state-run corporation, international terrorist organization, or entity “engaged in the international proliferation of weapons of mass destruction”); *id.* § 1801(b) (defining an “agent of a foreign power” as any non-U.S. person operating on behalf of a foreign power in the United States or any person who “knowingly engages in clandestine intelligence gathering activities,” identity fraud, or international terrorism on behalf of a foreign power).

101. Exec. Order No. 13,873, § 6(c), 84 Fed. Reg. at 22,692.

that this clause does not preclude parties' ability to obtain Article III standing to challenge the enforcement of this Executive Order on due process grounds.¹⁰²

C. Laws and Regulations at the Nexus of National Security and Trade

This Section highlights the major laws and regulations that govern the intersection of national security and trade policy, as well as the executive agencies that have played key enforcement roles in the space. Additionally, the examples discussed below establish the foundation for this Comment's recommendations regarding the new framework's implementing regulations.

1. Export control

The International Traffic in Arms Regulation (ITAR) is the main export-control regime for conventional military technology, which is classified on the United States Munitions List¹⁰³ (USML). The see-through rule for ITAR-controlled items, which are classified on the USML, provides the U.S. government with permanent, geographically limitless jurisdiction over all listed items and their components.¹⁰⁴ This system is simple, but it is inflexible and inherently inequitable because it controls too much.¹⁰⁵

The Export Administration Regulations¹⁰⁶ (EAR) focus on dual-use items, which have both civilian and military applications.¹⁰⁷ The EAR allow for control of end uses and end users, even if the law and list-based regulation cannot keep current with emerging underlying technology.¹⁰⁸

102. *Infra* Section II.A.

103. 22 C.F.R. § 121.1(a)(2) (2018).

104. *See* Eric L. Hirschhorn, Under Sec'y for Indus. & Sec., Dep't of Commerce, Remarks at the 92nd Annual Conference for the American Association of Exporters and Importers in Washington, DC (June 18, 2013) ("Under the 'see-through rule,' the presence of a single, non-critical ITAR-controlled part, such as a switch or a bolt, will render an entire foreign-made end product, such as an Airbus A-320 passenger aircraft, subject to U.S. reexport controls.").

105. Kevin J. Wolf, Partner, Akin Gump Strauss Hauer & Feld LLP, Keynote Address at the American University National Security Law Brief Symposium: The Evolution of CFIUS & Export Controls: Law & Policy Pertaining to National Security (Apr. 18, 2019). For example, a special nut required for proper wing operation of Boeing civil and military aircraft is listed on the USML and, thus, any repairs or replacements of this benign but essential part require inefficient government approval. *Id.*

106. 15 C.F.R. § 730 (2020).

107. § 730.3.

108. § 732.3(h).

Furthermore, the EAR are much more flexible than ITAR and feature a de minimis rule when a see-through rule would be unnecessary and cumbersome.¹⁰⁹

On August 13, 2018, Congress enacted the Export Control Reform Act of 2018¹¹⁰ (ECRA) as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019¹¹¹ (NDAA). ECRA is the permanent statutory authority for the EAR.¹¹² ECRA requires the Bureau of Industry and Security to collaborate with other agencies to identify “‘emerging’ and ‘foundational’ technologies that are ‘essential to the national security of the United States’” and apply the EAR controls to them.¹¹³ ECRA allows for control of end use, end user, and destination, rather than merely the list-based technology itself, which might have non-threatening, non-military uses.¹¹⁴ Willfulness, for which there must be proof of knowledge that one’s conduct was illegal, is the mens rea for ECRA violations.¹¹⁵

2. *Committee on Foreign Investment in the United States (CFIUS)*

CFIUS is an interagency committee, led by the Secretary of the Treasury and comprised of the Secretaries of State, Defense, Homeland Security, Commerce, and Energy; the Attorney General; the U.S. Trade Representative; and the Director of the Office of Science and Technology Policy.¹¹⁶ CFIUS aims to both protect national security and

109. § 732.2(d)(1)-(3); Hirschhorn, *supra* note 104. Under the EAR’s de minimis rule, the United States can lose jurisdiction if the technology in question does not constitute a certain percentage of the end item. *Id.*

110. Pub. L. No. 115-232, §§ 1741-68, 132 Stat. 2208 (2018) (to be codified at 50 U.S.C. § 4801).

111. Pub. L. No. 115-232, 132 Stat. 1636 (2018).

112. See Akin Gump Strauss Hauer & Feld LLP, *The Export Control Reform Act of 2018 and Possible New Controls on Emerging and Foundational Technologies*, INT’L TRADE ALERT (Sept. 12, 2018), at 1, 2 (explaining that ECRA codified the patchwork of executive orders and declarations issued under IEEPA that had previously kept the EAR in effect).

113. *Id.*

114. *Id.* at 3.

115. See *Bryan v. United States*, 524 U.S. 184, 189-90 (1998) (stating that the firearms statute at issue in the case is a specific intent statute requiring proof that the defendant violated the statute with the knowledge that his actions were unlawful).

116. *Resource Center: CFIUS Overview*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/composition-of-cfius> [https://perma.cc/M4MS-3FGP].

allow desirable foreign investment into the United States.¹¹⁷ The key factor in determining whether to restrict a given transaction is whether a foreign entity has “control” over a U.S. company, demonstrated by the ability to determine, direct, or decide an important matter at a company.¹¹⁸ CFIUS may choose to review a transaction if it implicates any of the factors on the following non-exhaustive list: technology transfers, geographic proximity to military installations or government facilities, critical infrastructure, or global supply chain.¹¹⁹ CFIUS is primarily concerned with “front-door access” abuse¹²⁰ of legitimate means, such as international investment, used as a Trojan horse to gather intelligence, conduct terrorism, threaten U.S. military supremacy, or thwart counter-proliferation efforts.¹²¹

117. Jonathan Wakely & Andrew Indorf, *Managing National Security Risk in an Open Economy: Reforming the Committee on Foreign Investment in the United States*, 9 HARV. NAT'L SECURITY J. 1, 7 (2018); see also *CFIUS Reform: Examining the Essential Elements: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 115th Cong. 11 (2018) [hereinafter *CFIUS Reform*] (statement of Scott Kupor, Managing Partner, Andreessen Horowitz) (“If we make it harder for foreign investment to come into U.S.-domiciled companies, that money will simply go to other countries that are more welcoming, and we risk losing the leading competitive position in innovation that the United States has long held.”). Losing the competitive edge in innovation is a major threat to U.S. national security. *CFIUS Reform*, *supra*, at 9.

118. See Wakely & Indorf, *supra* note 117, at 16.

119. See Amy Deen Westbrook, *Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions*, 102 MARQ. L. REV. 643, 671, 680 (2019) (discussing the evolution of CFIUS review to consider both the defense and economic implications of foreign investment in critical technology and infrastructure); CFIUS'S PROPOSED REGULATIONS TO IMPLEMENT EXPANDED JURISDICTION OVER REAL ESTATE TRANSACTIONS 2, COVINGTON & BURLING LLP (Sept. 27, 2019), https://www.cov.com/-/media/files/corporate/publications/2019/09/cfiuss_proposed_regulations_to_implement_expanded_jurisdiction_over_real_estate_transactions.pdf [<https://perma.cc/KKK9-VKBW>] (noting that CFIUS may review foreign persons' investments in real estate near sensitive U.S. government facilities for national security reasons).

120. See *CFIUS Reform*, *supra* note 117, at 13, 35 (statements of Sen. John Cornyn, Member, S. Comm. on Banking, Hous., & Urban Affairs and James Mulvenon, General Manager, Special Programs Division, SOS International) (discussing “straight acquisitions” and “traditional acquisitions” of U.S. companies as means of front-door access on which CFIUS, prior to the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), would primarily focus its review efforts).

121. See Harry Clark & Clark McFadden, *Line of Sight: The US Government Is Planning to Strengthen Oversight of Chinese Companies Involved in Technology Transactions with the US*, 79 INT'L FIN. L. REV. 55, 55–57 (2019) (indicating that CFIUS is particularly interested in imposing restrictions on the transfer of critical technology to China).

CFIUS operates in secret and with limited transparency, as it does not publish opinions or any reasoning; therefore, relevant non-government parties struggle to understand how CFIUS defines “control” in each case.¹²² Likewise, the precise definition of “national security” is unclear and frequently changes with the advent of dual-use, emerging technologies and the transformation of economic integration into a security threat.¹²³ Furthermore, extensive experience with CFIUS filings is the only way for non-government actors to find a trend regarding the common obstacles to their transactions that are eligible for CFIUS review because CFIUS does not provide filers with detailed, post-determination reasoning that justifies enforcement action.¹²⁴ The core feature of a CFIUS filing is the joint voluntary notice (JVN), which gives subject parties and CFIUS the opportunity to communicate about a transaction under review.¹²⁵ After the JVN process, CFIUS conducts a risk assessment, which consists of threat, vulnerability, and consequence,

122. See Kevin Granville, *CFIUS, Powerful and Unseen, Is a Gatekeeper on Major Deals*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/business/what-is-cfius.html> (describing CFIUS review as the “ultimate regulatory bazooka”).

123. See Westbrook, *supra* note 119, at 665, 670 (“CFIUS operates in an environment in which the economy, and many private commercial actors in the economy, are an essential component of national security.”). As electronic and cyber warfare have become increasingly prevalent in recent years, the executive branch has also established “Team Telecom”—comprised of officials from the Departments of Homeland Security, Justice, and Defense—to specifically oversee “foreign investments in U.S. communications assets” and counsel the Federal Communications Commission on licensing decisions and the conditions of foreign access to U.S. networks. Megan Brown et al., *Companies Will Feel the Weight of Team Telecom Oversight*, LAW360 (June 4, 2018, 3:31 PM), <https://www.law360.com/articles/1049718/companies-will-feel-the-weight-of-team-telecom-oversight>.

124. See Wakely & Indorf, *supra* note 117, at 8 (noting that the parties take a trial-and-error approach to the CFIUS filing process). Despite the D.C. Circuit’s finding that due process requires CFIUS to provide parties the opportunity to review and rebut unclassified evidence that supported enforcement action, the government has broad discretion to conceal certain unclassified information if it is tangential to national security threats. See Christopher M. Fitzpatrick, Note, *Where Ralls Went Wrong: CFIUS, the Courts, and the Balance of Liberty and Security*, 101 CORNELL L. REV. 1087, 1106 (2016); see also Christina E. Wells, “National Security” Information and the Freedom of Information Act, 56 ADMIN. L. REV. 1195, 1197 (2004) (raising concerns over how the government manipulates the classification process to cloak otherwise unclassified information).

125. JVNs consist of (1) a description of and rationale for the relevant transaction; (2) relevant personally identifiable information (PII) and the parties involved; (3) the foreign acquirer’s intentions with regard to the transaction in question; (4) a listing of the foreign acquirer’s past CFIUS filings; and (5) a response from CFIUS with questions and points of clarification. 31 C.F.R. § 800.402 (2018).

to determine whether mitigation measures or outright blocking is appropriate in a given situation.¹²⁶

The lack of clarity surrounding CFIUS review is of particular concern for small companies and startups, for whom the financial and opportunity cost of retaining a law firm to navigate this process is especially burdensome.¹²⁷ Despite CFIUS's lack of transparency, its scope is much narrower than Section 232 of the Trade Expansion Act of 1962¹²⁸ and Section 301 of the Trade Act of 1974.¹²⁹ Moreover, entities subject to CFIUS review are quickly gaining a much clearer sense of the boundaries regarding inappropriate investment in U.S. companies, despite the enduring obscurity of CFIUS's internal review process itself.¹³⁰

126. Threat refers to the nature of the relationship between the foreign entity in question and the United States; vulnerability considers the features of a specific transaction and companies involved that could be used to harm national security; and consequence addresses the likelihood that the risk of harm will manifest, based on the transaction, technology, or foreign entity's capability to cause harm, as well as the projected magnitude of that harm. See JAMES K. JACKSON, CONG. RES. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 10–11 (2020).

127. See *CFIUS Reform*, *supra* note 117, at 10; Scott Kupor, *On CFIUS Reform: Examining the Essential Elements*, ANDRESSEN HOROWITZ (June 17, 2019), <https://a16z.com/2019/06/17/cfius-firma-reform-policy-testimony-january-2018> [<https://perma.cc/CEP6-SE8F>] (arguing that forcing venture funds that possess foreign limited partners to submit a CFIUS filing before every attempted startup investment would be inefficient for CFIUS and the startups, which need capital to grow quickly and take advantage of market opportunity).

128. 19 U.S.C. § 1862 (2018).

129. 19 U.S.C. § 2411 (2018); CONG. RES. SERV., R45148, U.S. TRADE POLICY PRIMER: FREQUENTLY ASKED QUESTIONS 41 (2019) (quoting § 1862) (explaining that Section 232 of the Trade Expansion Act, known as the “National Security Clause,” allows the President to “impose restrictions on imports that the Secretary of Commerce determines are being imported in ‘such quantities or under such circumstances as to threaten to impair the national security’”); *id.* at 41 (showing that Presidents have invoked the National Security Clause infrequently since 1963 (only twenty-eight times in fifty-six years), while President Trump had done so twice in the first thirteen months of his presidency); *id.* at 41–42 (highlighting Section 301's significance as the primary statutory provision that grants the President broad leeway in responding to “unfair” trade practices, most recently to authorize the tariffs and trade war against China).

130. See, e.g., Letter from Aimen N. Mir, Deputy Assistant Sec'y of Inv. Sec., Dep't of the Treasury, to Mark Plotkin, Covington & Burling LLP, and Theodore Kassinger, O'Melveny & Myers LLP (Mar. 11, 2018) (on file with the Securities Exchange Commission) (signifying that U.S. companies involved in microelectronics and big data analytics are off-limits to foreign investors).

The Exon-Florio Amendment to the Omnibus Trade and Competitiveness Act of 1988¹³¹ declared that courts could not review presidential decisions to suspend or block deals.¹³² Despite this restriction on judicial review, Ralls Corporation, a Chinese-owned company, sued CFIUS to challenge CFIUS's order compelling Ralls to postpone its wind-farm construction on land near a U.S. Navy training facility in Oregon, as well as President Barack Obama's subsequent executive order prohibiting the acquisition of the property altogether.¹³³ The District Court for the District of Columbia dismissed the case because the court did not believe it had jurisdiction to review either the CFIUS order or the President's veto.¹³⁴ On appeal, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held that, although Ralls could not challenge the President's conclusion that the transaction in question constituted a national security threat, Ralls could legitimately challenge the President's veto for violating the company's property interests by failing to comply with the Fifth Amendment's due process requirements.¹³⁵

When the government deprives a party of its life, liberty, or property interests, the government must provide the affected party with notice of the official action, access to the unclassified supporting evidence, and the opportunity to rebut that evidence to satisfy due process.¹³⁶ The government failed to fulfill its due process requirements in deciding to block Ralls's acquisition of and construction on the subject plot of land because the government did not provide any of the unclassified evidence the President used to make his decision.¹³⁷ Thus, the D.C. Circuit reversed the district court's decision to dismiss Ralls's challenge to the President's veto and remanded the case to the district court to address the procedural due process question (separate from

131. Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425 (1988).

132. § 5021(d), 102 Stat. at 1426; Wakely & Indorf, *supra* note 117, at 21.

133. *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, 758 F.3d 296, 301–02, 304 (D.C. Cir. 2014).

134. *Id.* at 302.

135. *Id.* at 319–20.

136. *Id.* *But see id.* at 319 (clarifying that due process does not compel the government to divulge *classified* information that supports official action); *see also Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 208–09 (D.C. Cir. 2001) (emphasizing that classified information “is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect”).

137. *Ralls Corp.*, 758 F.3d at 319–20.

any illegitimate challenge on national security grounds).¹³⁸ The D.C. Circuit also remanded the case to the district court to determine whether CFIUS's interim mitigation measures fell outside its authority and deprived Ralls of due process because the mitigation measures effectively prohibited the transaction—an action only within the President's authority.¹³⁹ On August 13, 2018, Congress enacted the Foreign Investment Risk Review Modernization Act of 2018¹⁴⁰ (FIRRMA), broadening the scope of CFIUS review.¹⁴¹ FIRRMA created a formal avenue for judicial review of CFIUS determinations by requiring plaintiffs to file all legal challenges to CFIUS orders with the D.C. Circuit.¹⁴²

3. *Department of State*

Department of State officers overseas enforce international agreements pertaining to trade and investment.¹⁴³ These Foreign Service Officers collaborate with their counterparts stationed in Washington, D.C. to identify foreign trade barriers that fail to comply with international trade agreements.¹⁴⁴ The drafters of Executive Order 13,873 and its implementing regulations could refer to Executive Order 13,224, which includes the factors the enforcing agencies consider when deciding to label an individual or entity as a Foreign Terrorist Organization (FTO) or Specially Designated Global Terrorist (SDGT), and how that executive order delegates authority to the relevant agencies.¹⁴⁵ Executive Order

138. *Id.* at 325.

139. *Id.* at 322–23, 325. This issue remains unresolved because Ralls & CFIUS settled before the district court had the opportunity to address this question on remand. *July 2019: Legal Challenges to CFIUS Reviews*, QUINN EMANUEL URQUHART & SULLIVAN, LLP, <http://quinnemanuel.com/the-firm/publications/article-july-2019-legal-challenges-to-cfius-reviews> [<https://perma.cc/ZJJ3-NEQA>] [hereinafter *CFIUS Reviews*].

140. Pub. L. No. 115-232, §§ 1701–28, 132 Stat. 2174 (2018).

141. *See, e.g., CFIUS Reviews, supra* note 139 (noting that, under FIRRMA, CFIUS may review more transactions not traditionally associated with national security, such as automobile imports).

142. § 1715, 132 Stat. at 2191–92; *CFIUS Reviews, supra* note 139.

143. INTERAGENCY TRADE ENF'T CTR., TRADE ENFORCEMENT: ISSUES, REMEDIES, AND ROLES 47 (2015) [hereinafter TRADE ENFORCEMENT].

144. *Id.*

145. Exec. Order No. 13,224, 3 C.F.R. 786 (2001); *Terrorism Designations FAQs*, DEP'T OF STATE (Feb. 27, 2018), <https://www.state.gov/terrorism-designations-faqs> [<https://perma.cc/JMW3-V4EG>].

13,224 aims to deter, disrupt, and raise public awareness about the conduct that earns an individual or entity an FTO or SDGT label.¹⁴⁶

Shortly after September 11, 2001, President George W. Bush signed Executive Order 13,224 to stem the flow of financial support to persons or entities that intend to harm U.S. citizens and national security.¹⁴⁷ The Departments of State and the Treasury are both responsible for enforcement and designation, and do so in slightly different circumstances.¹⁴⁸ The Department of State designates certain entities FTOs if they qualify as foreign organizations that engage in terrorist activity.¹⁴⁹ The Department of State marks individuals or entities as SDGTs if they “have committed, or . . . pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.”¹⁵⁰ The Department of the Treasury can only designate SDGTs and focuses primarily on identifying those individuals who are either owned or controlled by an existing SDGT or “provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism.”¹⁵¹ Executive Order 13,224 features similarly vague, sweeping language and scope to Executive Order 13,873, marking another example of the deliberate ambiguity that has become the standard for executive orders related to national security to imbue the enforcement agencies with sufficient flexibility to respond to unusual and unforeseen, but covered, threats.¹⁵²

4. *Department of the Treasury*

In addition to collaborating with the Department of State to identify SDGTs, the Department of the Treasury plays a “substantial role regarding the negotiation, implementation, and enforcement of the

146. *Executive Order 13224*, DEP'T OF STATE, <https://www.state.gov/executive-order-13224> [<https://perma.cc/Y4ZK-Q2AV>] [hereinafter *Executive Order 13224*].

147. *Id.*

148. *Id.*

149. *Terrorism Designations FAQs*, *supra* note 145.

150. Exec. Order No. 13,224 § 1(b), 3 C.F.R. at 787.

151. *Id.* § 1(c), (d) (i), 3 C.F.R. at 787; *Terrorism Designations FAQs*, *supra* note 145.

152. Compare Exec. Order No. 13,224 § 1(c), 3 C.F.R. at 787, and § 1(d) (i), 3 C.F.R. at 787, with Exec. Order No. 13,873 § 1(a) (i), 84 Fed. Reg. 22,689, 22,690 (May 15, 2019) (“persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary”), and § 1(a) (ii) (C) (“otherwise poses an unacceptable risk to the national security of the United States or the security and safety of United States persons”).

financial services provisions of U.S. trade agreements.”¹⁵³ In particular, the Office of Foreign Assets Control (OFAC) enforces economic and trade sanctions against foreign entities that pose risks to the economy, foreign policy, or national security of the United States.¹⁵⁴ For example, OFAC freezes all SDGTs’ property and property interests in the United States as part of its enforcement authority under Executive Order 13,224.¹⁵⁵

D. *Standing and the Justiciability Doctrine*

The standing inquiry focuses on *who* can sue, while ripeness and mootness govern *when* one can sue.¹⁵⁶ To establish a court’s jurisdiction to hear a case, a plaintiff must show injury-in-fact, causation, redressability, and, if seeking injunctive relief, a non-probabilistic, “certainly impending” injury.¹⁵⁷ Article III, Section 2 “case” or “controversy” language represents the closest textual support for this doctrine and limits courts’ power by prohibiting the airing of abstract grievances in the courts without showing the aforementioned factors.¹⁵⁸ The standing doctrine serves as a limitation on judicial review to prevent the courts

153. See TRADE ENFORCEMENT, *supra* note 143, at 50 (detailing the Department of the Treasury’s role in eradicating foreign trade barriers and protecting domestic industry).

154. *About: Terrorism & Financial Intelligence: Office of Foreign Assets Control (OFAC)*, U.S. DEP’T OF THE TREASURY, <https://www.treasury.gov/about/organizational-structure/offices/pages/office-of-foreign-assets-control.aspx> [https://perma.cc/B6YW-HW5Y].

155. *Executive Order 13224*, *supra* note 146.

156. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (emphasizing that individualized harm is a cornerstone of standing jurisprudence in the United States). As they raise separate issues from those directly pertaining to standing, ripeness and mootness fall beyond the scope of this Comment.

157. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410 (2013) (stating that a “threatened injury must be certainly impending,” rather than “objectively reasonabl[y] likel[y],” to establish an injury-in-fact); *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (ruling that the case satisfied the redressability requirement because the EPA could partially alleviate the harm the Commonwealth of Massachusetts and its residents suffered as a result of climate change); *Lujan*, 504 U.S. at 560–61 (explaining that an injury-in-fact must be concrete and particularized and actual or imminent); *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973) (indicating that there must be a logical connection between the injury and the action of the opposing party to establish causation).

158. U.S. CONST. art. III, § 2; see also *Marbury v. Madison*, 5 U.S. 137, 170 (1803) (“The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.”).

from encroaching on the executive branch's discretionary enforcement authority.¹⁵⁹

Injury-in-fact is comprised of both a legal injury, which is one that is cognizable under existing doctrine, and a factual injury, which shows that the litigant before the court is the one suffering the injury.¹⁶⁰ In *Lujan v. Defenders of Wildlife*,¹⁶¹ animal rights activists sued the then-Secretary of the Interior for restricting the geographic scope of the Endangered Species Act to the United States and the high seas, thus ceasing federal protection of wildlife in foreign countries.¹⁶² Writing for the Court, Justice Scalia concluded that the activists did not have standing because they lacked set plans to return abroad to study endangered species and thus failed to indicate any actual or imminent harm sustained as a result of the regulatory revision.¹⁶³ The activists proposed “nexus” theories, based on their individual stakes in a collective interest, to support their standing.¹⁶⁴ Although Justice Scalia rejected these arguments as insufficiently particularized and too attenuated, Justices Kennedy and Souter, who concurred in the judgment, left open the possibility of a plausible application of these nexuses in a more appropriate case.¹⁶⁵ As *Lujan* exemplifies, “generalized grievance[s]” that a certain class of plaintiffs widely share typically will not satisfy the injury-in-fact requirement because the legislative process is a more appropriate forum to address policy issues than the courts.¹⁶⁶

159. See *Marbury*, 5 U.S. at 170.

160. See *Lujan*, 504 U.S. at 560 (explaining that the injury must be concrete and particularized and actual or imminent, not conjectural or hypothetical).

161. 504 U.S. 555 (1992).

162. *Id.* at 558–59.

163. *Id.* at 564.

164. See *id.* at 565–66 (describing the various nexuses: ecosystem, through which “any person who uses *any part* of a ‘contiguous ecosystem’ adversely affected by a funded activity has standing even if the activity is located a great distance away”; animal, through which “anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing;” and vocational, through which “anyone with a professional interest in [endangered species] can sue”).

165. *Id.* at 579–80 (Kennedy, J., concurring) (citing *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 231 n.4 (1986), in which the Court accepted the nexus theory to decide that continued whale harvesting adversely affected the complaining wildlife association’s members’ ability to watch and study whales and, thus, was an injury-in-fact).

166. See *id.* at 575 (majority opinion) (providing examples of “generalized grievance[s],” which cannot imbue the plaintiff with standing because they are not unique, but rather shared by the entire public). *But see* *Massachusetts v. EPA*, 549 U.S. 497, 522 (2007) (justifying Massachusetts’s standing because of the significant amount

To satisfy the causation prong of the standing test, the injury the plaintiff alleges must have resulted from the enforcement of the challenged government policy.¹⁶⁷ The causal connection cannot be too speculative.¹⁶⁸ In *Linda R.S. v. Richard D.*,¹⁶⁹ a mother sued a district attorney on equal protection grounds for declining to prosecute her child's alleged father for failing to pay child support because the state statute did not require child support for "illegitimate" children.¹⁷⁰ The Court found that the mother lacked standing because she failed to show a "logical nexus" between her inability to obtain child support payments from the father and the district attorney's decision not to enforce the statute against him.¹⁷¹ Successful enforcement of the statute against a parent who failed to make child support payments would result in incarceration, not an injunction to make the required payments.¹⁷² Furthermore, courts generally require plaintiffs to sue the worst actor, whose actions caused the injury-in-fact.¹⁷³ In *Linda R.S.*, the alleged father would have been the worst actor and a more appropriate target of the mother's complaint than the district attorney.¹⁷⁴

Redressability implies that judges can provide some form of relief to remedy the injury.¹⁷⁵ In *Massachusetts v. EPA*,¹⁷⁶ the Commonwealth of Massachusetts sought to enjoin the EPA to exercise its enforcement authority to regulate greenhouse-gas emissions, which Massachusetts

of coastal property the Commonwealth owned and the particularized injury it suffered as a landowner).

167. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617–18 (1973).

168. *See, e.g., id.* at 618 (1973) (dismissing the petitioner's case because it was too speculative that she would have received child support payments from her child's father if the state had the same enforcement standards for legitimate and illegitimate children).

169. 410 U.S. 614 (1973).

170. *Id.* at 615–16.

171. *Id.* at 618.

172. *Id.*

173. *See id.*; *see also* *Allen v. Wright*, 468 U.S. 737, 757 (1984) (finding the Internal Revenue Service was not the worst actor because its granting of tax-exempt status to discriminatory private schools was not fairly traceable to black parents' alleged injury from those tax exemptions preventing their kids from attending racially integrated schools).

174. *See Linda R.S.*, 410 U.S. at 618.

175. *See Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (deciding that enjoining the EPA to regulate greenhouse-gas emissions via its enforcement powers would redress Massachusetts's injury associated with rising sea levels, despite the remote nature of any future "catastrophic harm").

176. 549 U.S. 497 (2007).

claimed were causing sea-level rise that threatened its numerous coastal communities and ecosystems.¹⁷⁷ The Court concluded rising sea levels resulting from greenhouse-gas emissions had already harmed Massachusetts and would continue to do so without EPA intervention.¹⁷⁸ Therefore, Massachusetts had standing to bring action against the EPA because requiring the EPA to regulate greenhouse-gas emissions could reverse the harm already done to some degree and mitigate future harm even though the remedy could not eliminate the injury entirely.¹⁷⁹

To avoid asserting a merely probabilistic injury, a plaintiff must show that the injury will likely occur again without judicial redress and that the anticipated recurrence is neither speculative nor based on a “highly attenuated chain of possibilities.”¹⁸⁰ In *Clapper v. Amnesty International USA*,¹⁸¹ Amnesty International claimed future harm resulting from an “objectively reasonable likelihood” that the U.S. government would monitor its communications with non-U.S. persons at some point, pursuant to the government’s authority under the Foreign Intelligence Surveillance Act of 1978¹⁸² (FISA).¹⁸³ Amnesty International also submitted the costs it incurred to keep its communications with non-U.S. persons confidential as evidence of its response to the risk of future harm.¹⁸⁴ Amnesty International lacked standing because its concerns of future harm were too speculative and the organization could not “manufacture” standing by spending money in anticipation of non-imminent harm.¹⁸⁵

Third-party, or *jus tertii*, standing is an exception to the rule that courts only adjudicate matters concerning litigants who are before the court.¹⁸⁶ To successfully assert third-party standing, the plaintiff

177. *Id.* at 505, 522–23.

178. *Id.* at 526.

179. *Id.* at 525–26.

180. *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (explaining that the future injury must be “certainly impending” to satisfy the injury-in-fact and non-probabilistic injury requirements).

181. 568 U.S. 398 (2013).

182. 50 U.S.C. §§ 1801–1885(c) (2012).

183. *Clapper*, 568 U.S. at 401.

184. *Id.* at 402.

185. *Id.* at 402, 410; *cf. Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (emphasizing that a plaintiff can receive an injunction to stop or compel the enforcement of the law to redress the causally related injury if the plaintiff has an *ongoing, forward-looking* injury).

186. *See, e.g., Craig v. Boren*, 429 U.S. 190, 193–94 (1976).

generally must have a special—confidential or fiduciary—relationship, such as doctor-patient or vendor-vendee, with the third party, who is not before the court and whose rights the plaintiff is asserting.¹⁸⁷ In *Craig v. Boren*,¹⁸⁸ the plaintiffs—a vendor and a male under the age of twenty-one—challenged an Oklahoma statute that prohibited sales of beer to males under the age of twenty-one and females under the age of eighteen, based on the assumption that males between the ages of eighteen and twenty would be more likely to drink and drive than their female counterparts.¹⁸⁹ The Court found that the vendor could assert third-party standing on behalf of her statutorily underage male customers because the statute imposed a legal duty directly on her and, thus, created a “concrete adverseness” between the vendor and the statute’s enforcement.¹⁹⁰ Furthermore, as a vendor with personal standing, the vendor also had a right to litigate the associated rights of third parties—her male customers between the ages of eighteen and twenty-one—who would sustain injury as a result of the failure of her constitutional challenge and the continued enforcement of the statute.¹⁹¹

Taken together, the foregoing laws and jurisprudence related to emergency powers, executive orders, national security and trade policy, and standing support affected parties’ ability to challenge the government’s enforcement of Executive Order 13,873 on due process grounds. The next Part explains why challengers of the Order have standing by applying existing, related precedents to two hypothetical due process claims. Additionally, the aforementioned precedents and agencies inspire the second Section of the Analysis, which concludes by offering policy recommendations for the final rule that will set the implementing regulations for Executive Order 13,873.

II. ANALYSIS

First, this Part uses the standing requirements to evaluate the justiciability of two potential due process claims—one by a U.S.-based but foreign-adversary-controlled telecommunications provider, and

187. See, e.g., *id.* at 193–95 (explaining that a vendor had third-party standing when contesting a drinking-age regulation because her personal right to sue as a regulation target allowed her to raise the rights of her adversely affected customers when her claim failed).

188. 429 U.S. 190 (1976).

189. *Id.* at 191–92, 200–01.

190. *Id.* at 194–95 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

191. *Id.* at 195.

one by a U.S. hospital using a foreign adversary's groundbreaking cancer treatment machine—that the plaintiffs could bring against the executive branch to challenge a decision to implement interim mitigation measures or blocking orders pursuant to Executive Order 13,873.¹⁹² The hypothetical demonstrates the due process implications that arise under this Executive Order for entities subject to its enforcement, namely the ambiguity surrounding whether the enforcing agencies will provide notice of, access to, and the opportunity to rebut the evidence they will use to justify interim mitigation measures or blocking orders.¹⁹³ As legal analysts have noted, this Executive Order aligns with the most recent NDAA, which identifies the telecommunications industry as a major national security risk because its constituent companies both build critical infrastructure and provide services that enable the broadband technology on which contemporary society depends.¹⁹⁴ 5G networks and the Internet of Things will cause traditionally disconnected services, like healthcare, to rely on the information and communications technology and services (ICTS) supply chain and create more vulnerabilities for foreign adversaries to exploit, despite optimizing those services by arming them with exponentially faster access to exponentially more information.¹⁹⁵ This Part also explains why the separation of powers principle and the APA indicate that the Framers and Congress would advocate for judicial review of challenges to Executive Order 13,873.¹⁹⁶

Second, this Part proposes policy recommendations for designing the review framework and implementing regulations to effectively and fairly enforce Executive Order 13,873, particularly focusing on facilitating transparency and accountability with due process in mind.¹⁹⁷ The policy

192. *Infra* Section II.A.1–4.

193. *See, e.g.,* *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, 758 F.3d 296, 314 (D.C. Cir. 2014) (explaining how the President violated the Due Process Clause of the Fifth Amendment when he failed to provide Ralls with the *unclassified* information that led him to block Ralls's attempt to build a wind-farm near a naval facility).

194. *See* Brown et al., *supra* note 7; *see also* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 6306(b)–(c) (2019) (commanding the Director of National Intelligence to form the “Supply Chain and Counterintelligence Risk Management Task Force” to facilitate information-sharing regarding those risks between the government's intelligence and acquisition agencies).

195. CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, OVERVIEW OF RISKS INTRODUCED BY 5G ADOPTION IN THE UNITED STATES 3, 8–10 (2019).

196. *Infra* Section II.A.

197. *Infra* Section II.B.

recommendations aim to clarify the key scope and enforcement provisions of the Executive Order, as well as foster information-sharing between the government and private sector, to preemptively resolve the due process concerns the hypothetical claim raises.

A. The Separation of Powers Principle, APA, and Standing Doctrine All Support Entities' Ability to Challenge Unfavorable Decisions of Executive Order 13,873's Interagency Committee in Article III Courts on Due Process Grounds.

The separation of powers principle exemplifies the Framers' intent to prioritize liberty over "efficiency."¹⁹⁸ The Framers strived to build protections against authoritarianism into the Constitution as they developed the structure of an "effective and accountable" American government.¹⁹⁹ While Article II grants the President the power to gather Congress and implore the legislative branch to act to address policy challenges he deems urgent, the Constitution does not expressly grant an independent, quasi-legislative capacity to the President that might have foreshadowed the advent of the executive order.²⁰⁰ The

198. See *Immigration & Naturalization Servs. v. Chadha*, 462 U.S. 919, 959 (1983) (Powell, J., concurring in judgment) (noting that "the Framers ranked other values higher than efficiency"); see also *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted . . . to preclude the exercise of arbitrary power."); Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 75 (2002) (stating that the Framers valued liberty above efficiency).

199. See *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (quoting THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961)) (alteration in original) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."); *Loving v. United States*, 517 U.S. 748, 757–58 (1996) (citation omitted) ("Deterrence of arbitrary or tyrannical rule is not the sole reason for dispersing the federal power among three branches, however Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking. Ill suited to that task are the Presidency, designed for the prompt and faithful execution of the laws and its own legitimate powers, and the Judiciary, a branch with tenure and authority independent of direct electoral control. The clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making . . . decisions essential to governance.").

200. U.S. CONST. art. II, § 3; see also Robert B. Cash, Note, *Presidential Power: Use and Enforcement of Executive Orders*, 39 NOTRE DAME LAW. 44, 45 (1963) (noting that executive orders were "administrative directive[s]" before World War II, but subsequently became more legislative in character, namely with Truman's executive order to seize the steel mills).

concept of executive orders and the President's emergency powers has emerged from an acceptance of the branches' need to share overlapping authority to optimize governance and from the ambiguous parameters the Constitution established around certain situations.²⁰¹

Some courts have found that the administrative recourse stipulated in a given executive order is the exclusive enforcement method and, thus, executive orders provide no private right of action in Article III courts.²⁰² Congress has occasionally entertained initiatives to reform the use, scope, and justiciability of executive orders.²⁰³ Proposals include statutorily extending standing to private individuals and institutional representatives, as well as removing the President's power to declare national emergencies.²⁰⁴ FIRRMA's delegation of a dedicated court for judicial review of CFIUS determinations offers precedent for judicial oversight in the executive branch's trade and investment decision making process.²⁰⁵ That provision only partially checks the executive

201. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) ("I . . . give to the [Constitution's] enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism.").

202. See, e.g., *Farkas v. Tex. Instrument, Inc.*, 375 F.2d 629, 633 (5th Cir. 1967) (finding no federal court jurisdiction where an executive order authorized administrative relief); Ostrow, *supra* note 60, at 666 (depicting *Farkas* as an illustration of the "formidable barriers" impeding a plaintiff's ability to assert a cause of action under an executive order). *But see* *Freeman v. Shultz*, 468 F.2d 120, 122 (D.C. Cir. 1972) (insinuating that a private party could seek injunctive relief related to the enforcement of an executive order once that party exhausted its administrative remedies); see also *Cannon v. Univ. of Chi.*, 441 U.S. 677, 706 n.41 (1979) (suggesting that a private party may seek judicial review before exhausting administrative remedies when the administrative process cannot guarantee a reasonably timely resolution of the party's complaint).

203. See, e.g., Separation of Powers Restoration Act, H.R. 864, 107th Cong. (2001); S. 1795, 106th Cong. (1999) (exemplifying bills that sought to reduce the President's reliance on executive orders, impose more requirements on the President before he could issue executive orders, and facilitate judicial review of executive orders).

204. *Congressional Limitation of Executive Orders: Hearing on H.R. 3131, H. Con. Res. 30 and H.R. 2655 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 106th Cong. 32–34 (1999); see also Branum, *supra* note 198, at 85 (offering suggestions of how legislation could curtail presidential discretion in emergencies, including specifying the situations in which the President may declare a national emergency and placing more rigid timelines and Congressional oversight on emergencies and their continuation).

205. *Supra* Section I.D; see Pub. L. No. 115–232, § 1715(2), 132 Stat. 2191 (2018) (designating the D.C. Circuit as the only court where parties may bring civil actions to challenge CFIUS review determinations). *But see* *Wakely & Indorf*, *supra* note 117, at

branch's authority in conducting CFIUS reviews because concentrating the burden to evaluate relevant challenges on one court will ultimately limit such challenges due to efficiency burdens.²⁰⁶ Additionally, although stipulating a specific court to review these complaints will likely support the APA's objectives to create a uniform interpretation of the relevant law, it also risks transforming judicial review of CFIUS determinations into a rubber-stamp process if affected parties have no meaningful way to challenge the interpretations of the only court with jurisdiction over these appeals.²⁰⁷

In *Youngstown Sheet & Tube Co.*, the Court sought to clarify the boundaries limiting the President's authority to act in a quasi-legislative capacity.²⁰⁸ In that case, the Court invalidated President Truman's attempt to seize steel mills to preempt an imminent labor strike via executive order and emergency power allegedly implied in Article II of the Constitution.²⁰⁹ The Court found that not only did the President lack the statutory authority to seize the steel mills, but the legislative history of the Taft-Hartley Act also showed that Congress had flatly rejected such an application of executive power to resolve labor disputes or other domestic economic crises.²¹⁰ Neither the President's executive power outlined in the Constitution nor established by statute

37–38 (explaining that, despite creating a formal path to judicial review, FIRRMA has actually made challenging CFIUS action more difficult by limiting valid claims to those involving the violation of a constitutional right and exempting CFIUS's actions, determinations, penalty assessments, and any other use of its enforcement authorities, as well as any APA claims). While the proposed rule noted that parties would have the opportunity to formally oppose the Commerce Secretary's preliminary determination regarding a questioned transaction, the rule did not expressly identify an Article III court where parties can sue for due process violations. *Securing the Information and Communications Technology and Services Supply Chain*, 84 Fed. Reg. 65,316, 65,317 (proposed Nov. 27, 2019) (to be codified at 15 C.F.R. pt 7). The proposed rule seemed to suggest that the interagency committee would act as more than an adjunct to an Article III court, which is an inappropriate usurpation of the judicial power. *See Crowell v. Benson*, 285 U.S. 22, 35 (1932) (“[A] party should not be deprived of the security of a judicial hearing heretofore plainly provided for . . .”).

206. *See CFIUS Reviews*, *supra* note 139 (indicating that potential challengers adversely affected by CFIUS review have not exercised their right to appeal a CFIUS decision in the D.C. Circuit since *Ralls Corp.*).

207. *See Wakely & Indorf*, *supra* note 117, at 37–38 (highlighting that the legislative intent behind FIRRMA was to restrict judicial review of CFIUS rulings to constitutional injuries).

208. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952).

209. *Id.* at 585, 587.

210. *Id.* at 586.

authorized him to seize the steel mills; thus, Executive Order 10,340 was unconstitutional.²¹¹

In the case of Executive Order 13,873, challengers likely would not prevail on a facial attack on the Order because both an explicit congressional delegation of authority to President Trump, as well as his own executive powers, probably support it.²¹² Under the NEA and IEEPA, Congress relinquished almost all of its decision making and oversight authority during national emergencies to the President.²¹³ Additionally, unlike the attempted steel mill seizures in *Youngstown Sheet & Tube Co.*, which concerned a domestic issue under the guise of a wartime national security threat, regulating ICTS transactions with foreign adversaries inherently implicates an international problem and the President's Article II powers to control foreign affairs.²¹⁴ Furthermore, since many internationally-focused emergencies and presidential directives do not implicate "U.S. persons," the prospects of achieving standing for a facial, constitutional claim are slim as constitutional protections do not extend to non-U.S. persons outside U.S. jurisdiction.²¹⁵ However, an entity within U.S. jurisdiction or classified as a U.S. person that the government accuses of violating this Executive Order would have standing to bring an as-applied challenge

211. *Id.* at 585, 587.

212. *See id.* at 635 (Jackson, J., concurring) (explaining that the combination of executive power and the power Congress can delegate to him gives the President the utmost authority to act).

213. Fuller, *supra* note 26, at 1455–56; Harvard, *supra* note 38, at 1104; *see also* William Hebe, Comment, *Executive Orders and the Development of Presidential Power*, 17 VILL. L. REV. 688, 701 (1972) (crediting the expansion of presidential power to the confluence of three factors: (1) Presidents' "strong personalities," (2) the emergencies they faced (e.g., the Civil War, World Wars, and Great Depression), and (3) Congress's inability to quickly respond to these crises).

214. *See* U.S. CONST. art. II, § 2; *Youngstown Sheet & Tube Co.*, 343 U.S. at 645 (Jackson, J., concurring) ("I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward . . . because of a lawful economic struggle between industry and labor, it should have no such indulgence."); *see also* *United States v. Curtiss-Wright Exp. Co.*, 299 U.S. 304, 320 (1936) (recognizing that only the Constitution, not any act of Congress, delimits the President's "exclusive power . . . as the sole organ of the federal government in the field of international relations").

215. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("[A]liens [only] receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.").

based on a constitutional injury, such as a due process violation resulting from the Executive Order's enforcement without adequate procedural safeguards, as well as an appropriate, workable remedy.²¹⁶ These incremental challenges to this Executive Order would act as a check on the executive branch's power and allow the courts to ensure the executive branch enforces this Executive Order appropriately while the American people await congressional amendments that will restore the separation of powers in the realm of national emergencies.

Affected parties could try to assert a constitutional injury-in-fact based on due process because Executive Order 13,873 prohibits any ICTS transaction between a U.S. person and "foreign adversary" that threatens the U.S. economy, intellectual property, or national security without ensuring that the government will share its unclassified rationale for impeding such an ICTS transaction.²¹⁷ Thus, the executive branch will violate due process if it enforces the Executive Order without adequate procedural safeguards pertaining to notice.²¹⁸ To succeed in a due process claim, plaintiffs must show that the government deprived them of their life, liberty, or property interests, and that the government procedures depriving those interests do not conform with the Due Process Clause of the Fifth Amendment.²¹⁹ Subject entities—such as a U.S.-based subsidiary of a foreign telecommunications provider, which the U.S. government suspects a foreign adversary controls, seeking to build critical 5G infrastructure on recently purchased land, or a hospital using a foreign adversary's unique, innovative telehealth machine to monitor the development of patients' cancer and receive treatment suggestions—could challenge a final

216. *See id.* at 269 (reiterating that Fifth Amendment rights do not extend to non-U.S. persons beyond the "sovereign territory" of the United States); *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, 758 F.3d 296, 314 (D.C. Cir. 2014) (recognizing federal court jurisdiction over a due process challenge to CFIUS enforcement action).

217. *See* Exec. Order 13,873 § 1(a), 84 Fed. Reg. 22,689, 22,689–90 (May 15, 2019).

218. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) (providing the components of a valid due process claim). Affected parties could include foreign companies and their U.S. subsidiaries, such as Huawei; foreign countries, such as China; or even individual investors, like a Saudi prince, whose attempts to exploit U.S. ICTS are deemed economic or national security threats. Exec. Order 13,873 § 1(a), 84 Fed. Reg. at 22,689 (stating the Executive Order applies to "any property in which any foreign country or a national thereof has any interest").

219. *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 59.

blocking order from the President on due process grounds, as Ralls Corporation successfully did in its CFIUS review case.²²⁰

First, the telecommunications provider and the hospital would both have valid property interests that the executive branch would deprive them of when it enforces the Executive Order: the land and the machine, respectively.²²¹ Second, the procedural safeguards that the Secretary of Commerce promises will accompany the government's enforcement of the Executive Order do not clearly ensure that subject entities will have adequate notice of, access to, and the opportunity to rebut the evidence against them in accordance with the Due Process Clause.²²² Thus, the hypothetical telecommunications provider and hospital satisfy the threshold requirements for a due process claim.²²³ Since the settlement between Ralls and CFIUS preempted the district court's decision on the question of whether CFIUS's mitigation measures violate due process for "effectively prohibiting" a transaction, which only the President may do, entities subject to the new framework may also gain traction in the courts by challenging the new interagency committee's authority to impose mitigation measures in light of due

220. *See Ralls Corp.*, 758 F.3d at 301–02 (insulating the President from substantive challenges to his national security decisions but not procedural ones that implicate constitutional rights).

221. *Cf. id.* at 315 (determining that Ralls's acquisition of four U.S. wind farm companies and their assets were valid state-law property interests, which thus qualified for constitutional protection).

222. *See* Exec. Order 13,873 § 1(b), 84 Fed. Reg. at 22,690 (authorizing the Secretary of Commerce, along with the other heads of the committee's constituent agencies, to "design or negotiate" mitigation measures to address non-compliant transactions without explicitly providing any safeguards to ensure due process); *see also* Securing the Information and Communications Technology and Services Supply Chain, 84 Fed. Reg. 65,316, 65,321–22 (proposed Nov. 27, 2019) (to be codified at 15 C.F.R. pt. 7) (pledging to provide parties to a reviewed transaction written notice of the Secretary's final determination, which will detail whether he will prohibit, permit, or, based on compliance with mitigation measures, conditionally permit that transaction). The proposed rule mentions that the Secretary will send written copies of his final determinations to affected parties and publish summaries of his final determinations on the Department of Commerce website and in the Federal Register. *Id.* at 65,322. However, the proposed rule provides no insight into the expected content of these summaries or a process through which affected parties may rebut the unclassified evidence supporting the Secretary's final determination. *See id.* Furthermore, the proposed rule does not discuss the potential for judicial review of the Secretary's final determination, which "shall constitute final agency action." *Id.*

223. *Cf. Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 59 (declaring that deprivation of a valid property interest without due process provides the basis for a due process claim).

process.²²⁴ The following subsections evaluate the justiciability of a hypothetical due process claim under a four-part standing analysis, concluding that the telecommunications provider and hospital can legitimately challenge the Executive Order's enforcement as applied to them individually in Article III courts.²²⁵

1. *Injury-in-fact*

While a party would not have standing to dispute a President's final blocking order because of broad presidential discretion on national security matters, a party has a valid claim for a due process violation if the party did not have notice of, access to, or the opportunity to rebut the unclassified evidence on which the President based his decision before he blocked the transaction.²²⁶ Unlike the plaintiffs in *Lujan*, who had neither plans to return abroad nor evidence that the new regulations would render them unable to study elephants, the due process violation here would be concrete and particularized because the Executive Order would deprive both the telecommunications provider and hospital of their property interests in the land and the cancer machine, respectively.²²⁷ Additionally, the injury resulting from

224. *Ralls Corp.*, 758 F.3d at 322–23, 325; *CFIUS Reviews*, *supra* note 139; *see also* Jonathan Wakely & Lindsay Windsor, *Ralls on Remand: U.S. Investment Policy and the Scope of CFIUS' Authority*, 48 INT'L LAW. 105, 106 (2014) (emphasizing the pressing need for courts to clarify executive agencies' authority to mitigate foreign investments without corresponding presidential action because the transactions that CFIUS reviews rarely require subsequent presidential action). *But see CFIUS Reviews*, *supra* note 139 (noting that a successful challenge to an executive agency or committee's authority does not bear on a President's non-reviewable order prohibiting a deal).

225. *See Franklin v. Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring in part and concurring in the judgment) ("Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive . . ."); Newland, *supra* note 2, at 2098 n.306 ("There are no special bars to judicial review of the *legality* of an executive order . . .").

226. *Ralls Corp.*, 758 F.3d at 314.

227. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992) (laying out the requirements for an injury-in-fact). The *Ralls Corp.* Court explained that the company did not relinquish its property interest by choosing not to seek CFIUS's approval before the acquisition because CFIUS's regulatory framework explicitly allows companies to request CFIUS's approval before or after a transaction. *Ralls Corp.*, 758 F.3d at 317; Wakely & Windsor, *supra* note 224, at 109. Similarly, Executive Order 13,873 does not require private parties to seek the interagency committee's pre-approval of an ICTS transaction. *See Exec. Order 13,873* § 1(b), 84 Fed. Reg. at 22,690 (noting only that the interagency committee can issue mitigation measures that "may serve as a precondition to the approval of a transaction" that the Executive Order would otherwise proscribe).

the hypothetical due process violation would be actual or imminent because the plaintiff lacked notice of, access to, and the opportunity to rebut evidence the President used against the plaintiff to support a blocking order as due process requires.²²⁸ A clause stating that the Executive Order does not establish a private right of action against the United States also seems to be a dubious denial of process.²²⁹

Furthermore, since no court has decided whether executive agencies actually have the authority to impose interim mitigation measures, affected parties could file suit to test this issue.²³⁰ Similar to the plaintiff in *Ralls Corp.*—where CFIUS prohibited Ralls from building a wind farm on land the company owned near a U.S. naval facility—the telecommunications provider could point to the deprivation of its property interests resulting from the interagency committee’s interim mitigation measures, which would likely preclude the provider from attempting to put its land to the provider’s desired use by laying fiberoptic cable or building cell towers to provide underserved communities with mobile phone and broadband access.²³¹ The hospital’s case is even more severe as the hospital could argue that mitigation measures that effectively prohibit it from providing essential healthcare to its patients deprive the patients of their liberty to make personal health decisions or even of their lives if the patients die because they lack necessary care.²³² The hospital could play a similar

228. See *Ralls Corp.*, 758 F.3d at 314 (providing the notice requirements that the government must follow to avoid a due process violation when issuing mitigation measures or blocking orders).

229. See *id.* at 311; *Ungar v. Smith*, 667 F.2d 188, 193–96 (D.C. Cir. 1981) (establishing that Congress must clearly intend to prohibit judicial review of constitutional claims pertaining to administrative decisions in order to overcome the presumption that plaintiffs may challenge constitutional violations in Art. III courts); *Ralpho v. Bell*, 569 F.2d 607, 620–22 (D.C. Cir. 1977) (holding that broad statutory bars to judicial review of certain decisions do not preclude judicial review of constitutional claims that challenge the process by which the President reached those decisions); *cf. Dames & Moore v. Regan*, 453 U.S. 654, 675 (1981) (arguing that IEEPA does not permit the executive branch to suspend Americans’ claims against foreign adversaries in American courts because those claims are focused on assigning liability and assessing damages, neither of which constitute transactions within IEEPA’s scope—those involving particular property within a foreign adversary’s jurisdiction).

230. See *supra* note 224 and accompanying text.

231. See *Ralls Corp.*, 758 F.3d at 305, 319 (summarizing the use restriction that CFIUS’s mitigation measures placed on Ralls’s land in Oregon and the corresponding due process issue regarding the deprived property interest).

232. The Court has found liberty interests in situations unrelated to incarceration. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (“[T]he right to marry is a

role to that of the vendor in *Craig v. Boren*, where the relevant statute's personal impact on her and her vendor-vendee relationship with her customers allowed her to assert the rights of those customers against whom the statute discriminated.²³³

2. Causation

The causation prong is straightforward on the due process claim because no investigation or subsequent mitigation measures regarding an ICTS transaction with a foreign adversary would occur pursuant to Executive Order 13,873 if the Executive Order did not exist. Therefore, the affected parties would not have been deprived of notice of, access to, or the opportunity to rebut evidence against them in the government's decision to restrict a given transaction if there was no executive order to enforce.²³⁴ The hypothetical plaintiffs would not struggle with the causation problem that the plaintiff mother faced in *Linda R.S.*, where the Court concluded that the government action it could enjoin would not redress the mother's injury because she failed to sue the worst actor, her child's biological father.²³⁵ Here, the government would be before the court, its failure to provide notice would have caused the due process violation, and a court could redress the affected parties' injury by enjoining the government to provide that notice. Unclassified evidence that the interagency committee could share with the hypothetical plaintiffs to avoid a due process

fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."); *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8, 265 (1970) (quoting Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)) (interpreting welfare as both a liberty interest because it sustains life and a property interest because society views government entitlements as "essentials, fully deserved, and in no sense a form of charity" to their beneficiaries).

233. *Craig v. Boren*, 429 U.S. 190, 194–95 (1976). Alternatively, trade associations may attempt to assert third-party standing on behalf of entire industries in a class action. However, courts are reluctant to give third parties standing unless they have a special relationship with the people not before the court and the application of the given law against the litigant will harm the rights of others not before the court. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992). Thus, courts would likely not grant standing to trade associations or startup incubators on behalf of their member-companies or founders because their ability to conduct ICTS transactions with whomever they wish is not a fundamental right, and courts generally hold that Congress is the proper forum to resolve widely-shared grievances. *See id.* at 575–76.

234. *See Ralls Corp.*, 758 F.3d at 314.

235. *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973).

violation and help them comply with Executive Order 13,873 might include explanations of why the government found the types of information or technology that the plaintiffs shared with alleged foreign adversaries threatened national security, or why the controls or financing structures of the telecommunications provider and cancer treatment machine's manufacturer raised concerns.²³⁶

3. *Redressability*

Injunctive relief against enforcement of the Executive Order, as well as damages to compensate for any economic loss resulting from the deprivation of the parties' property interests, could redress the hypothetical due process violation.²³⁷ Additionally, a court could order the President and interagency committee to release any unclassified information on which they based a blocking order or mitigation measures.²³⁸ Similar to the relief in *Ralls Corp.*, enjoining the President and interagency committee to provide the utmost possible transparency would cure the hypothetical due process violation by providing the telecommunications provider and hospital with an opportunity to rebut the evidence that led to unfavorable executive action against them.²³⁹ Even though the remedy in these situations would only

236. *Cf. Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 431 (1935) (holding that an executive order that "contain[ed] no finding... [or] statement of the grounds of the President's action" violated the Due Process Clause).

237. *See Stack*, *supra* note 5, at 555 (explaining that private plaintiffs generally sue a federal officer to enjoin an executive order's enforcement when they want a court to evaluate that executive order's legality); *see also Butz v. Economou*, 438 U.S. 478, 486 (1978) (suggesting that a private plaintiff may seek monetary damages for a "compensable injury to a constitutionally protected interest").

238. *See Ralls Corp.*, 758 F.3d at 320 (rejecting CFIUS's argument that withholding unclassified information pertaining to its review process served a "substantial interest in national security"). Allowing the telecommunications provider or hospital to resume their operations after modifying them to ensure they comport with the Executive Order and its national security objectives would provide some relief to the private entities. *Id.* This remedy would also mitigate the risk of recurring harm by compelling increased government transparency, which would delineate the boundaries of acceptable behavior and ICTS transactions under the Executive Order for private entities. *See Wakely & Windsor*, *supra* note 224, at 106.

239. *See Ralls Corp.*, 758 F.3d at 311 (confirming that the court could not review or redress any injury directly resulting from the President's order blocking Ralls's attempted acquisition and development of the property because of its national security implications; however, the court could review a constitutional challenge to the process that led to the President's blocking order).

partially redress the injury, the Supreme Court held that incomplete redress was sufficient in *Massachusetts v. EPA*.²⁴⁰

4. *Certainly impending injury*

If the hypothetical plaintiffs did not receive relief, the continued enforcement of Executive Order 13,873 would result in further due process violations as the plaintiffs would continue to lack both the evidence on which the government based unfavorable decisions and the necessary information to bring its operations into compliance with the Executive Order.²⁴¹ Unlike the *Clapper* and *Lujan* plaintiffs, whose future injuries were not “certainly impending,” both of the hypothetical plaintiffs’ businesses would suffer the effects of the due process violation immediately because both businesses would have to cease all pertinent operations without understanding potential ways to comply with Executive Order 13,873.²⁴² Thus, the hypothetical plaintiffs have established an actual, concrete, particularized injury that is “fairly traceable” to the enforcement of Executive Order 13,873, that the courts can redress, and that is more than likely to continue harming the plaintiffs without judicial intervention.²⁴³

In addition to the constitutional due process claim for which the telecommunications provider and hospital have obtained standing, the plaintiffs also have a cause of action under the APA to pursue judicial review of final agency action through the government’s enforcement

240. See *Massachusetts v. EPA*, 549 U.S. 497, 525–26 (2007) (acknowledging that regulating greenhouse-gas emissions would not eliminate climate change, but that such action would help to slow the rising sea levels that threatened the Massachusetts coastline). Similarly, in the hospital example, the cancer treatment machine may not cure patients’ diseases, but it certainly could abate some of their existing harm and help prevent future harm to the patients.

241. See *Ralls Corp.*, 758 F.3d at 319–20 (underscoring the ongoing due process violation stemming from Ralls’s inability to amend its proposal based on the government’s evidence, which the company had not received).

242. See *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410 (2013) (vitiating the plaintiff’s claim for lack of standing because a future injury based on a “speculative chain of possibilities” is not “certainly impending”); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992) (finding no “certainly impending” injury to the plaintiffs because they lacked concrete plans to return to Sri Lanka to study the endangered species that lost protection as a result of the government’s decision to relax its overseas enforcement of the Endangered Species Act).

243. *Clapper*, 568 U.S. at 410; *Massachusetts v. EPA*, 549 U.S. at 525–26; *Lujan*, 504 U.S. at 564; *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973).

of Executive Order 13,873.²⁴⁴ The hypothetical plaintiffs could show that a blocking order or mitigation measures constitute final agency action for which no alternative court remedy is available because the Executive Order does not provide a path to appeal those decisions within the executive branch.²⁴⁵ Furthermore, Congress delegated authority to the President to implement the Executive Order through the NEA and IEEPA.²⁴⁶ The final prong of a valid APA cause of action, which requires a showing of presidential intent to establish a private right of action through the text and purpose of the executive order, creates a potential conflict for litigants as the courts disagree on whether they have federal subject-matter jurisdiction over challenges to executive orders.²⁴⁷ Although courts often decline to adjudicate cases involving executive orders and explain that those grievances should be addressed to the executive branch, the separation of powers principle and Congress support Article III courts maintaining at least appellate jurisdiction over executive order cases to ensure impartiality.²⁴⁸

244. See Ostrow, *supra* note 60, at 668–69 (citing *Legal Aid Soc’y v. Brennan*, 608 F.2d 1319, 1330 (9th Cir. 1979)) (acknowledging that courts presume judicial review of administrative action without clear and convincing evidence of congressional intent to preclude it, and explaining that courts doubt that presidential intent interpreted from an executive order alone could preclude judicial review of agency action); see also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574–75 (1988) (identifying an exception to *Chevron* deference where a constitutional question—such as the due process violation in the hypothetical claim—is at issue).

245. See Ostrow, *supra* note 60, at 673 (“Agency action is ‘final’ for purposes of judicial review when it is a definite statement of the agency’s position (rather than a merely tentative or procedural decision) and when it possesses the status of law by imposing obligations and by determining legal rights.”).

246. Exec. Order 13,873 § 2(a), 84 Fed. Reg. 22,689, 22,690 (May 15, 2019).

247. See *Micei Int’l v. Dep’t of Commerce*, 613 F.3d 1147, 1153 (D.C. Cir. 2010) (excluding entirely civil actions stemming from executive orders from the scope of federal subject-matter jurisdiction); *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 457 (D.C. Cir. 1965) (rejecting appellate judicial review of challenged action taken pursuant to an executive order because the executive branch is the more appropriate body to handle such questions). *But see supra* note 244 and accompanying text; see also Noyes, *supra* note 31, at 858, 862 n.101 (conceding that courts have “routinely found” that they possess federal subject-matter jurisdiction over executive order challenges when those executive orders derive their authority from congressional legislation).

248. See *supra* note 34 and accompanying text; see also Wakely & Indorf, *supra* note 117, at 38 (“While litigation concerning CFIUS has been very limited, the fact that the Committee’s actions may be subject to review incentivizes the Committee to act in a manner that comports with due process and is not arbitrary or capricious, in order to

Despite some courts' aversion to reviewing challenges to executive orders, other courts have stated that the President does not have the authority to declare that a private right of action does not exist regarding a particular presidential action.²⁴⁹ Additionally, the APA stipulates judicial review of agency action, except when the underlying statutory authority precludes judicial review or the action is "committed to agency discretion by law."²⁵⁰ Because neither of those exceptions applies here, the implementing regulations for Executive Order 13,873 must include a provision that creates a path to judicial review once the affected party has exhausted the available executive branch remedies.²⁵¹

Before FIRRMA, parties wishing to challenge CFIUS's review decisions lacked a clear opportunity to appeal outside the executive branch.²⁵² As the *Ralls Corp.* decision shows, courts are better equipped than the executive branch to resolve a constitutional question related to due process that arises when the executive branch restricts business conduct without providing adequate notice.²⁵³ Although the D.C.

avoid being hauled into court. Removing the prospect of judicial review would remove one incentive for a Committee that already acts in secret to maintain high standards of fairness.").

249. See *supra* note 229 and accompanying text.

250. 5 U.S.C. § 701(a) (2018); see also *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 79-752, at 212 (1945)) (clarifying that the latter exception only applies when the legislature writes a statute so broadly that "there is no law to apply" nor question for the courts to review); Ostrow, *supra* note 60, at 668. Thus, courts interpret statutes to presume judicial review of agency action when, as with the NEA and IEEPA here, statutes provide "standards, definitions, or other grants of power [to] deny or require action in given situations or confine an agency within limits as required by the Constitution." *Citizens to Pres. Overton Park*, 401 U.S. at 410; S. REP. NO. 79-752, at 212 (1945).

251. Despite the precedent of judicial deference to the executive branch during national emergencies that the NEA and IEEPA govern, neither statute precludes judicial review of action that an agency takes under the authority of either statute. See Thomas J. McCarthy et al., *Challenging Executive Actions Under IEEPA*, NAT'L L.J. (June 2018), <https://www.akingump.com/a/web/80382/Updated-NLJ-Reprint-IEEPA.pdf> ("IEEPA neither contains an independent right of judicial review nor imposes limits on such review."); see also Fuller, *supra* note 26, at 1498; Harvard, *supra* note 38, at 1113.

252. Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, § 1715(3), 132 Stat. 2174, 2191 (creating an official path to judicial review for CFIUS orders).

253. See *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, 758 F.3d 296, 312 (D.C. Cir. 2014) ("We hardly think that, by reserving to itself such limited review of presidential actions and critical technology assessments, the Congress intended to abrogate the courts' traditional role of policing governmental procedure for

Circuit has not heard any similar appeals since FIRRMA became law, affected parties' knowledge that they can bring their challenges to a neutral body serves as a check on executive power and may also foster trust in the efficacy of this new transactional review process.²⁵⁴ Precedent indicates that courts prefer not to hear executive order challenges and interfere with the executive branch's domain; thus, judicial decisions requiring the Trump Administration to provide more unclassified information underpinning the enforcement of Executive Order 13,873 would clarify its boundaries upfront, support due process, and reduce litigation in the long term.²⁵⁵ The interagency committee can learn from the successes and shortcomings of previous security-trade regulations and strive for user-friendly implementing regulations that support transparency in its new framework.²⁵⁶

B. Policy Recommendation for the New Framework and Its Implementation

Uncertainty beckons the death of trade.²⁵⁷ The new interagency framework, which prohibits ICTS transactions with foreign adversaries, could negatively impact trade and investment in the United States by imposing unpredictable obstacles to trade and intruding into private business at the will of the President, thereby fomenting uncertainty and reluctance to participate in the U.S. economy.²⁵⁸ Trade policy is a key diplomatic tool, but its integration with national security policy is only appropriate in circumstances involving listed technologies or those with a specific application that threatens U.S. national security.²⁵⁹ The interagency committee charged with developing this new framework should emulate recent legislative and regulatory overhauls at the trade-security nexus, which have resulted in increased clarity regarding the scopes, targets, and enforcement methods of these

constitutional infirmity and perform that function itself."); *see also* Landon v. Plasencia, 459 U.S. 21, 34–35 (1982) (clarifying that the courts may assess whether the procedures of its coordinate branches “meet the essential standard of fairness under the Due Process Clause,” even regarding issues “largely within the control of the Executive and the Legislature”).

254. Wakely & Indorf, *supra* note 117, at 38; *CFIUS Reviews*, *supra* note 139.

255. *See* Newland, *supra* note 2, at 2035 (“Perhaps our system [of government] is better served by a jurisprudence that grounds each executive order in its respective siloed, substantive area of law—for example, procurement, labor, or national security law—rather than one that adopts a transsubstantive doctrine of executive orders.”).

256. *Infra* Section II.B.

257. *See* Wolf, *supra* note 105.

258. *Supra* Section I.C.

259. *See* Bensinger & Albergotti, *supra* note 94 and accompanying text.

policies.²⁶⁰ These reforms will enable policymakers to promote national security without neutralizing economic opportunities.

Executive Order 13,873 is primarily focused on managing global supply chain risk and preventing China from obtaining critical technologies directly or through third-party countries.²⁶¹ The key challenge is protecting what is truly sensitive to U.S. national security without suppressing wanted economic activity.²⁶² Striking that balance may prove difficult in many cases involving emerging technologies, such as artificial intelligence, autonomous vehicles, robotics, and 5G infrastructure, where that cost-benefit analysis is equivocal. In the 5G context, the U.S. government is fighting to ensure that neither the domestic buildup nor that of the United States' allies becomes dependent on Chinese standards or technology.²⁶³ The scope of Executive Order 13,873 creates a massive opportunity for excessive government intervention into private business, which will spur an onslaught of litigation in response to the "intelligence bonanza" in the form of a list of all suppliers to, investors in, or beneficiaries of foreign adversaries that enforcement of this Executive Order will create.²⁶⁴ Clarifying the limitations on foreign involvement in U.S. ICTS transactions for

260. *Supra* Part I.B.

261. *See, e.g.*, Brown et al., *supra* note 7 (underscoring the threats that China's role in the technology sector poses to the United States and the various responses the United States has taken to mitigate those risks, including tariffs, export bans, and investment restrictions); *cf.* Brendan Catalano, Note, *Balancing National Security Interests Against the Value of Chinese Capital*, 47 HOFSTRA L. REV. 293, 297 (2018) (footnotes omitted) ("China is one of the five largest exporters of investment capital in the world, and over the past ten years the value of Chinese capital in the United States has increased by a factor of over one hundred. . . . [This has] creat[ed] jobs with wages substantially higher than industry averages.").

262. Catalano, *supra* note 261, at 297.

263. This is particularly challenging, given China's immense leverage over the global telecommunications market as both a supplier and customer. *See, e.g.*, Cecilia Kang, *Huawei Ban Threatens Wireless Service in Rural Areas*, N.Y. TIMES (May 25, 2019), <https://www.nytimes.com/2019/05/25/technology/huawei-rural-wireless-service.html> (highlighting much of rural America's dependency on Huawei to support wireless carriers throughout "sprawling, sparsely populated regions" because its signal-transmitting equipment is significantly cheaper than its competitors' offerings); Raymond Zhong, *Trump's Latest Move Takes Straight Shot at Huawei's Business*, N.Y. TIMES (May 16, 2019), <https://www.nytimes.com/2019/05/16/technology/huawei-ban-president-trump.html> ("Of the \$70 billion that Huawei spent on components and other supplies last year, \$11 billion went to American companies . . .").

264. *See* Bensinger & Albergotti, *supra* note 94 (explaining legal consequences of enforcing Executive Order 13,873).

private entities through judicial review of blocking orders or mitigation measures will imbue Executive Order 13,873's new framework with transparency and credibility, which are crucial to fostering investment in the U.S. economy, without sacrificing national security.²⁶⁵

The concerns stemming from the addition of Huawei to the Bureau of Industry and Security Entity List on May 16, 2019—as a quasi-companion regulation to the Executive Order in President Trump's ongoing trade war with China—highlight areas of needed clarification that also apply to the new framework as the drafters finalize the implementing regulations.²⁶⁶ Observers do not know how the restrictions associated with the executive action will work in practice.²⁶⁷ Stakeholders disagree as to whether a chip designed mostly within the United States would make it a U.S. product, even if it was manufactured elsewhere.²⁶⁸ Uncertainty remains regarding the ways in which the committee will manage transactions diverted to a foreign adversary from a neutral party.²⁶⁹ Discussing the Trump Administration's trade and security policy, Kevin Wolf, a former Assistant Secretary of Commerce for Export Administration during the Obama Administration, said: "In every other administration, the entity listing was purely a tool of law enforcement and national security The thing to watch is whether this will become a tool of trade policy and used as leverage in the negotiations."²⁷⁰ The interagency committee must design a framework and implementing regulations that do not exceed executive powers or impinge upon the rights of private parties.²⁷¹

1. *Use ECRA as an example for a clear, but flexible statutory scheme to respond to unforeseen and unique situations as they emerge.*

A leading cause of the decline of American innovation is the burdensome regulatory regime, which President Trump has exacerbated

265. See Wakely & Indorf, *supra* note 117, at 5.

266. 15 C.F.R. pt. 744 (2019).

267. See, e.g., Bensinger & Albergotti, *supra* note 94 (noting companies' confusion regarding whether they could still sell Huawei chips designed in the United States but manufactured elsewhere and how this ambiguity has caused some companies to cut ties with potential customers on the Entity List).

268. *Id.*

269. *Id.*

270. Zhong, *supra* note 263.

271. See Brown et al., *supra* note 7 (discussing subject matter the regulations are likely to cover, including a list of foreign adversaries and their subjects, as well as potential transaction or technology criteria that would trigger categorical inclusion in or exclusion from the Executive Order's prohibitions).

with protectionist measures despite his overarching deregulatory tack.²⁷² Just as understanding “control” is essential to participating in the CFIUS review process, enforcing the new framework will require the Committee to peel back the layers in individual supply and investment chains to understand who has actual control over affected parties.²⁷³ The interagency structure reflects the Administration’s focus on information-sharing and expanding access to non-public information at least among different executive agencies.²⁷⁴ However, the lack of an explicit process requiring the Committee to share the information on which the Committee bases its decision to impose mitigation measures raises due process concerns because the Committee deprives affected parties of their property interests without providing notice of, access to, or the opportunity to rebut the unclassified information undergirding the property infringement.²⁷⁵ The threat of judicial review and Article III standing might incentivize the government to be more proactive and forthcoming with its rationale for issuing mitigation measures or blocking orders for certain ICTS transactions, thus bolstering public-private communication.²⁷⁶ In situations where litigation is necessary, courts can clarify the meaning of core terms of Executive Order 13,873 through common law precedent to help private entities understand how to comply with the Executive Order and protect private parties’ due process rights by ensuring appropriate enforcement safeguards exist.²⁷⁷

While clear definitions and qualifications for terms of art are crucial for effective enforcement of and compliance with Executive Order

272. Krumm, *supra* note 92, at 701–03 (arguing that using executive power to block foreign investment through an expansive, protectionist application of CFIUS review has contributed to decreasing innovation in the United States).

273. For example, an individual may only be a passive investor but may also have access to foundational technology and, thus, could pose a national security threat. *See supra* note 218 and accompanying text.

274. *See CFIUS Reviews, supra* note 139 (describing interagency structure of CFIUS in greater detail).

275. *See Ralls Corp. v. Comm. on Foreign Inv. in the United States*, 758 F.3d 296, 319 (D.C. Cir. 2014) (holding that the government deprived Ralls of its constitutionally protected property interests without due process of law).

276. *See Wakely & Indorf, supra* note 117, at 38.

277. *See, e.g., Micei Int’l v. Dep’t of Commerce*, 613 F.3d 1147, 1153 (D.C. Cir. 2010) (analyzing the effect of the language of Executive Order No. 13,222 on the court’s jurisdiction); *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 455–57 (D.C. Cir. 1965) (interpreting the terms of Executive Order No. 10,988 to preclude judicial review of the Postmaster General’s decision regarding personnel policy).

13,873, a flexible enforcement scheme is also important to allow for compromise with industry partners and to avoid being handcuffed by rigid language.²⁷⁸ The proposed rule offers a non-exhaustive list of “Telecommunications and Information Technology Equipment and Service Providers,” whose standard business operations fall within the scope of the Executive Order, but the implementing regulations could provide even more information to affected parties to avoid gratuitous transaction evaluations.²⁷⁹ For example, the framework could include licensing requirements to authorize transactions the Executive Order otherwise prohibits.²⁸⁰ The drafters could establish intermediate negotiation procedures to allow for risk mitigation and a more malleable application of the framework to ensure that mitigation, or even blocking, is appropriate and necessary in the given circumstances.²⁸¹ Ultimately, as the D.C. Circuit clearly stated in *Ralls Corp.*, affected parties cannot challenge mitigation measures or blocking orders in themselves because the executive branch has broad discretion to make national security decisions; however, this reality does not foreclose affected parties’ opportunity to challenge the process that the executive

278. The new committee should adopt a similar case-specific approach to that of CFIUS instead of categorical action. *See* Wakely & Indorf, *supra* note 117, at 8–9. The merger-specific review that CFIUS conducts has allowed the Administration to achieve particular policy objectives most efficiently, while also limiting CFIUS’s potentially unbridled power. *See id.*

279. Securing the Information and Communications Technology and Services Supply Chain, 84 Fed. Reg. 65,316, 65,318–19 (proposed Nov. 27, 2019) (to be codified at 15 C.F.R. pt. 7).

280. *See* Aerospace Industries Association, Comments of Aerospace Industries Association (AIA) to Proposed Rule Entitled “Securing the Information and Communications Technology and Services Supply Chain, 84 Fed. Reg. 65,316 (November 27, 2019) (Jan. 10, 2020), <https://www.regulations.gov/document?D=DOC-2019-0005-0065>, at 2 (lobbying for a licensing capability, similar to those featured in the export control and CFIUS schemes, to foster a more efficient regulatory framework). For example, in the hospital hypothetical, there may be a way to block the transmission of patients’ health data back to the foreign adversary or sever any residual control the manufacturer maintains over regular use of the cancer treatment machine.

281. *See* Westbrook, *supra* note 119, at 660–61, 670 (noting that the President has officially blocked just five transactions as a result of CFIUS review, and that CFIUS typically negotiates a compromise with the foreign entity or threatens a negative recommendation to the President to deter acquisitions that may put national security at risk).

branch took to arrive at its conclusions.²⁸² Moreover, implementing regulations that encourage increased collaboration between the private sector and executive branch when developing effective mitigation agreements support transparency, government accountability, and due process through information-sharing.

2. *Create categories of technologies and transactions that correspond to predicted enforcement responses, similar to CFIUS.*

Similar to the use of “critical technologies” in the CFIUS regulations, providing specific examples of technologies that would likely or definitely be subject to scrutiny under this new framework would put key stakeholders on notice and allow them to adjust their businesses and policies accordingly.²⁸³ Establishing a test or set of factors through the implementing regulations to help key stakeholders understand which technologies are within the scope of this framework and why would also further the due process objectives of providing adequate notice of and access to information that supports the Committee’s decisions, as well as diminish the likelihood of litigation by bolstering the capabilities of private parties to self-regulate.²⁸⁴

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

283. See 31 C.F.R. § 800.209 (2019) (defining “critical technologies” as defense articles or services on the USML, items on the Commerce Control List controlled for various reasons implicating national security, “[n]uclear facilities, equipment, and material,” specific chemical “agents and toxins,” and “[e]merging and foundational technologies”). More than thirty trade associations—representing the electronics, internet, telecommunications, hospitality, shipping, science, and automotive industries—worry that foreign ICTS partners, whose collaboration is essential to the U.S. economy at large, may cease working with American companies without more clearly defined parameters because perfectly complying with the broad scope of the proposed rule will be too burdensome. ACT: The App Association et al., Multi-Association Letter on ICTS Proposed Rule (Jan. 10, 2020), <https://www.regulations.gov/document?D=DOC-2019-0005-0021>, at 2 (“As written, the proposal would force companies to operate in an environment where *all* ICTS transactions with foreign entities could be subject to review, making it more difficult to enter into such relationships out of fear that they could be suddenly and unexpectedly severed, eroding trust in U.S. companies, and marking them as unreliable.”).

284. See, e.g., Wolf, *supra* note 105 (“A ‘critical technology’ is most technology that is controlled on a U.S. export control list . . . [and] must be: (i) utilized in connection with the U.S. business’s activity in one or more of targeted industries [and] (ii) designed by the U.S. business specifically for use in one or more of the targeted industries.”). Many stakeholders suggested that the final rule should contain categorical inclusions or exclusions for certain ICTS, transactions, and parties from its scope. See, e.g., GSMA, Comments of GSMA in the Matter of Securing the Information

Under FIRRMA, “covered transactions” also include acquisitions of interests in real estate that are part of U.S. ports or near U.S. military or government facilities, as well as those that change the rights a foreign person has relative to a U.S. business and those deliberately designed to elude CFIUS’s review process.²⁸⁵ Additionally, clarifying distinctions between “controlling investments” and “other investments,” like CFIUS does, as well as the difference between active and passive investors, would alert entities to how pervasively the new Committee will investigate the funding of subject entities to enforce the Executive Order.²⁸⁶ For example, if a company knows that a certain percentage of investment from even a passive investor with a minority stake in the company will trigger review or mitigation measures under Executive Order 13,873, that company may prefer to reject that investment altogether rather than violate the Executive Order and endanger the property interests on which the company’s business depends.

and Communications Technology and Services Supply Chain (Jan. 10, 2020), <https://www.regulations.gov/document?D=DOC-2019-0005-0068>, at 16–17 (offering as a model NDAA § 889, which exempts “transactions for services that connect to the facilities of a third party . . . and telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data”). *But see* Huawei Technologies, Comments of Huawei Technologies Co., Ltd. and Huawei Technologies USA, Inc. (Jan. 10, 2020), <https://www.regulations.gov/document?D=DOC-2019-0005-0018>, at 15–16 (arguing against categorical exclusions—in curious alignment with the Trump Administration—because they discourage supplier diversity and, thus, threaten cybersecurity, which depends on risk-sharing similar to securitization in the financial services industry).

285. Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, § 1703(4)(C), 132 Stat. 2174, 2177–78. Key stakeholders, including the GSMA (the global trade association for mobile operators), criticize the proposed rule’s use of broad terms of art, like “covered transactions,” without a corresponding narrowing of their scopes in the specific context of Executive Order 13,873. GSMA, *supra* note 284, at 15. For example, GSMA suggests that covered transactions subject to enforcement “must have as [their] primary purpose the promotion or expansion of the ICTS business of a company associated with a foreign adversary,” while “transactions that involve incidental or derivative use of ICTS by third parties” would fall beyond the rule’s scope. *Id.* at 15–16.

286. Westbrook, *supra* note 119, at 678–79 (footnote omitted) (defining “other investment” as “a direct or indirect investment by a foreign person in a U.S. business that does not constitute foreign control, but that affords the foreign person (1) access to material non-public technical information in possession of the U.S. business; (2) membership or observer rights on the board of directors, or the right to nominate a board member, of the U.S. business; or (3) any involvement (other than voting shares) in the substantive decision making of the U.S. business regarding sensitive personal data, critical technologies, or critical infrastructure”).

3. *Delegate specific authority to each of the agencies named in the Executive Order.*

The interagency model consisting of both security and non-security agencies has proven effective in similar contexts, such as CFIUS review and SDGT designation, to ensure expertise and sensitivity to the various, discrete issues surrounding the complex challenges related to critical technologies.²⁸⁷ The new interagency committee should emulate CFIUS's structural methods of disciplining its process, particularly requiring the members to reach a consensus before acting, which prevents any individual agency from using CFIUS's authority to take an extreme position that its peers do not support.²⁸⁸

The new committee should also use Executive Order 13,224 and the multiagency process for identifying SDGTs as a model.²⁸⁹ Assigning specific enforcement responsibilities to certain agencies depending on the transaction at issue and agencies' respective areas of expertise would also help private entities establish standing because a clear committee structure would facilitate identifying the worst actor for litigation purposes.²⁹⁰ To increase accountability and transparency, the framework's implementing regulations should require the executive to publicly identify the list of entities it defines as "foreign adversaries" and the reasons for that determination, as the Departments of State

287. Per *Ralls Corp.*, the government should share each agency's unclassified input on a given ICTS transaction with the relevant parties or publish it for all private entities conducting ICTS transactions to review. See 758 F.3d at 319. This action would preempt the due process violation the government committed in *Ralls Corp.*, and it would make compliance more intuitive for private entities. See *id.*

288. Jackson, *supra* note 126, at 25.

289. See *supra* Section I.C.3-4 (authorizing the Department of State to designate persons SDGTs when they pose a direct threat of terrorism, while charging the Department of the Treasury with the responsibility of designating funders of terrorist organizations).

290. See *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973) (emphasis omitted) (explaining the importance to standing of a plaintiff's establishing sustenance of a "direct" injury "as the result of" a law's enforcement). The proposed rule mentions the classified threat and vulnerability assessments that the Office of the Director of National Intelligence and the Department of Homeland Security conduct to tailor the rule to national security concerns pertaining to ICTS, but the proposed rule does not address the roles and responsibilities of the Committee's other constituent agencies. Exec. Order 13,873 § 5(a)-(b), 84 Fed. Reg. 22,689, 22,691 (May 15, 2019); *Securing the Information and Communications Technology and Services Supply Chain*, 84 Fed. Reg. 65,316, 65,317 (proposed Nov. 27, 2019) (to be codified at 15 C.F.R. pt. 7).

and the Treasury do with SDGTs and FTOs.²⁹¹ Publishing such lists would explicitly warn all parties against doing business, particularly ICTS transactions, with publicly designated foreign adversaries to avoid violating Executive Order 13,873. Providing clear definitions of terms to facilitate compliance today without sacrificing adaptability for emerging challenges, designing a committee structure with well-defined roles for each constituent agency, and sharing the utmost unclassified information with partners in business and foreign governments would likely resolve the due process issues currently stemming from the Executive Order.²⁹² Consequently, proactive transparency would also

291. This action should also encompass establishing criteria to identify “persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary.” Exec. Order 13,873 § 1(a)(i), 84 Fed. Reg. 22,689, 22,689–90 (May 15, 2019); see James A. Lewis, Center for Strategic & International Studies Comments on Proposed Rule, <https://www.regulations.gov/document?D=DOC-2019-0005-0041>, at 2 (“It is the combination of country of origin and sensitivity of application that determine risk, and the rule would benefit from articulating its approach to risk and by providing guidelines for companies to make this risk assessment.”). Huawei is an obvious example as the United States views the company as an arm of the Chinese government because both its organization and its equipment are likely susceptible to government-run espionage and hacking. Bensinger & Albergotti, *supra* note 94. However, the application of the foreign adversary moniker may be more problematic in cases where certain entities could be both allies and threats. For example, Israel is a close economic, political, and military ally of the United States; however, Israel also ranks as one of the United States’ most capable, aggressive espionage threats. See Barton Gellman & Greg Miller, “Black Budget” Summary Details U.S. Spy Network’s Successes, Failures and Objectives, WASH. POST (Aug. 29, 2013), https://www.washingtonpost.com/world/national-security/black-budget-summary-details-us-spy-networks-successes-failures-and-objectives/2013/08/29/7e57bb78-10ab-11e3-8cdd-bcdc09410972_story.html (noting that, despite its alliance with the United States, Israel is one of the Central Intelligence Agency’s top five counterintelligence targets—along with China, Russia, Iran, and Cuba—as a result of Israel’s past espionage attempts against the United States). Additionally, Israeli companies invest heavily in information technology, security, and related sensitive industries in the United States. See *Fact Sheet U.S.-Israel Economic Relationship*, U.S. EMBASSY IN ISR., <https://il.usembassy.gov/our-relationship/policy-history/fact-sheet-u-s-israel-economic-relationship> [<https://perma.cc/PF7C-6ZT9>] (stating that Israeli investment in the U.S. economy is approaching \$24 billion, and that the countries collaborate in myriad industries, including “IT, bio-tech, life sciences, health care solutions, energy, pharmaceuticals, food and beverage, defense industries, cyber-security, and aviation”).

292. Related to these issues is the widespread concern among stakeholders that the new framework is overly broad, and it ignores and is duplicative of a number of existing regulatory regimes that govern ICTS transactions. See GSMA, *supra* note 284, at 6–7 (emphasizing the distinct but complementary roles of CFIUS, the EAR, Team Telecom, the Federal Communications Commission, and NDAA § 889 in promoting

benefit the executive branch by decreasing the prospects of litigation and allowing the executive branch to maintain more power to decide the types of information it wants to disclose without judicial involvement.²⁹³

CONCLUSION

In its current form, Executive Order 13,873 gives the federal government expansive power to interfere with all sorts of private businesses by granting the enforcement agencies the authority to subject certain technologies to the Executive Order or label entities as foreign adversaries even in the absence of an imminent national security threat when such action is merely a political convenience. Many of the businesses this Executive Order targets—including telecommunications, technology, healthcare, and financial services companies—have never had to consider national security compliance until now and are, thus, ill-equipped to do so.²⁹⁴ Experts maintain that bootstrapping national security policy into trade policy should remain an exceptional tool, reserved for situations that raise honest concerns regarding the safety and security of the American people.²⁹⁵ Additionally, when national security and trade policy converge, the government must be clearer about the scope of and rationale for such multipurpose executive action to limit uncertainty in the U.S. economy among U.S. trading partners.²⁹⁶

Executive orders are intentionally ambiguous to keep the authority they grant to the executive branch extremely broad and allow the executive branch to use its discretion when deciding whether to intervene in a non-military situation on national security grounds.²⁹⁷

national security by regulating ICTS transactions); Aerospace Industries Association, *supra* note 280, at 1; Multi-Association Letter, *supra* note 283, at 2.

293. See Wakely & Indorf, *supra* note 117, at 32 (explaining how transparency increases the predictability of legal outcomes); *supra* note 255 and accompanying text.

294. Brown et al., *supra* note 7.

295. See Zhong, *supra* note 263 (sharing former Assistant Secretary of Commerce for Export Administration Kevin Wolf's insight that adding Huawei to the Entity List is "the trade equivalent of a nuclear bomb," and that previous administrations have only applied such action in law enforcement and national security contexts, not as a negotiation tool).

296. See Fuller, *supra* note 26, at 1458–59, 1463 (raising concerns about the lack of restraint on the President's ability to declare a national emergency, and Congress's limited oversight authority in such a situation, which extends no further than the opportunity to terminate a national emergency based on a semiannual review of the executive branch's expenditures on a particular national emergency).

297. *Id.* at 1455, 1459.

Deliberate vagueness allows the executive to exercise its authority when it wants and refrain from asserting that authority when other foreign policy priorities take precedence.²⁹⁸ The executive branch likely will not enforce Executive Order 13,873 to prohibit technology transactions within the full scope that the language provides.²⁹⁹ However, as currently written, the Executive Order fails to provide potential affected parties with a reasonable opportunity to understand the conduct it prohibits as a whole. Key terms, namely “foreign adversary,” are poorly defined, which makes complying with the Executive Order or defending against enforcement difficult because parties currently have no way of confirming whether their business activity falls within the scope of the Executive Order before the government enforces it against them.

Judicial review is the most meaningful and efficient (relative to congressional action) way that individual litigants can check an abuse of executive power exercised through quasi-legislative action via executive order.³⁰⁰ Because courts treat executive orders with the “force and effect of law,” parties suffering injury as a result of Executive Order 13,873’s enforcement must have the opportunity to challenge the Executive Order before an impartial judiciary in accordance with the separation of powers principle and standing doctrine.³⁰¹ The Executive Order does not currently include any express procedural safeguards that provide affected parties with notice of, access to, and the opportunity to rebut the unclassified evidence the government gathers against them. Because the government may use that information to impose interim mitigation measures or blocking orders related to questionable ICTS transactions involving foreign adversaries, the government risks depriving affected parties of their property rights without due process. Furthermore, these affected parties have standing to sue the executive branch for due process violations when the executive branch fails to provide its rationale for enforcing the

298. *Id.* For example, the executive branch may want to treat a Chinese company that is attempting to invest in or buy sensitive U.S. technology differently than a Canadian company taking the same action.

299. Wakely & Indorf, *supra* note 117, at 40 (arguing that CFIUS review should interfere with commercial activity only when it is necessary to preserve national security).

300. *Cf.* *Marbury v. Madison*, 5 U.S. 137, 170, 180 (1803) (granting the courts the power to rule on individual rights and the constitutionality of laws and their applications).

301. *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 (1979).

Executive Order in specific cases.³⁰² Thus, litigation and the consequential disclosure of more unclassified information will hopefully help increase executive transparency and accountability in enforcing Executive Order 13,873, ultimately lending greater integrity to the executive branch's efforts to protect national security through trade policy without violating due process.³⁰³

302. See Newland, *supra* note 2 and accompanying text.

303. See Wakely & Indorf, *supra* note 117, at 38 (arguing that the mere threat of judicial review may motivate the executive branch to preemptively ensure that it complies with due process and does not abuse secrecy in conducting national security policy to forestall litigation).