



CFIUS REVIEWS SHOULD BE SUBJECT TO JUDICIAL SCRUTINY

BY JOHN TAISHU PITT AND ELLIOT SILVERBERG

John Taishu Pitt (jtp82@georgetown.edu) is an international trade associate at an international law firm. Elliot Silverberg (eis15@georgetown.edu) is a national security consultant.

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On Jan. 3, 17 days before the inauguration of President Donald Trump, former President Joe Biden blocked Nippon Steel's planned acquisition of US Steel on national security grounds. Although Biden later extended the review period until June 2025, and the deal now seems to be shifting to a form of investment with limited control in US Steel without outright ownership as initially planned, his decision raises broader questions about whether the power of the president to block foreign transactions pursuant to the Committee on Foreign Investment in the United States (CFIUS) should be subject to a tiered framework and judicial scrutiny.

Scrutinizing foreign acquisitions for national security reasons—even when the risks appear minimal, as in the case of US Steel—is expected to remain a priority under the second Trump administration. As such, it highlights the continuing need for a more strategic investment-screening process that balances national security with economic openness, particularly when involving critical allies such as Japan.

Biden's decision underscored two key challenges with the current CFIUS process: the absence of a clear tiered framework to distinguish strategic relevance

and risk, and the extreme limitation on judicial review of rulings.

First, the absence of a clear tiered framework makes it difficult to distinguish businesses in genuinely advanced technology sectors, such as artificial intelligence (AI), microelectronics, and quantum, from traditional industries with more limited national security implications, such as manufacturing fields not directly tied to critical technologies. Furthermore, the current system does not adequately differentiate between investments from adversaries and those from important allies such as Japan, despite the latter being critical partners in maintaining economic and geopolitical stability.

Second, judicial review of CFIUS decisions is [currently limited](#). Congress designed CFIUS and the president's authority under the Foreign Investment Risk Review Modernization Act (FIRREA) to be largely insulated from court intervention. Although necessary in circumstances involving actual matters of national security, the deliberate limitation raises [issues of politicization](#) and lack of accountability. Expanding CFIUS's mandate to provide a carefully scoped pathway for judicial review—particularly for lower-risk sectors—could address those concerns without compromising security.

Since the creation of CFIUS in 1975, presidents have blocked nine transactions, nearly all involving advanced technology sectors critical to national security (see table 1). Moreover, all past cases, except for one, involved acquirers based in China. The US Steel case represents a significant departure from that precedent, raising fundamental questions about the shifting scope of CFIUS's mandate and its alignment with protecting critical national security interests.

Presidential authority to intercede in a foreign acquisition after CFIUS review originates from the 1988 Exon-Florio Amendment to the Defense Production Act of 1950. Exon-Florio resulted from mounting national security concerns about Japanese investment in the 1980s—notably, microelectronics giant Fujitsu's [attempted purchase](#) of Fairchild Semiconductor, another [struggling US manufacturing](#)

[“crown jewel.”](#) Opposition to the Fujitsu-Fairchild sale allowed US rival National Semiconductor to acquire Fairchild at half the original Japanese offer, incurring significant financial losses. Despite the different geopolitical contexts, blocking Nippon Steel’s acquisition of US Steel could also risk American jobs and deter future investments from allies, underscoring the need for a more objective lens that balances national security and economic interests.

A tiered framework would create a structured approach to national security evaluations, ensuring efficient resource allocation and transparency. CFIUS could formally categorize businesses as high or low risk, providing clarity for regulators and stakeholders. Under that framework, Congress could allow judicial scrutiny for certain lower-risk traditional industries with less strategic relevance. That could include items not covered under the [“United States Munitions List”](#) of the International Traffic in Arms Regulations, the [“Commerce Control List”](#) of the Export Administration Regulations (EAR) (i.e., EAR99 items), and certain CCL items that are only subject to [National Security Column 2 controls](#). Courts would assess whether such decisions align with the tiered framework and are supported by adequate national security grounds. Meanwhile, advanced technologies with disruptive and game-changing applications—such as industries defined in the Defense Department’s [“Critical Technologies List”](#)—would be classified as high priority and exempt from judicial review, as their importance to national security should justify that insulation.

By aligning definitions to existing agency determinations, CFIUS would leverage established classifications to prioritize resources effectively while maintaining coherence with broader US national security policies.

To further streamline the process, the number of CFIUS members involved in reviewing transactions in traditional industries could be limited. Focusing reviews on core agencies such as the Treasury and Defense Departments would enhance efficiency and reduce unnecessary bureaucratic delays. That approach would prevent overreach in lower-risk sectors, focusing resources on high-priority industries.

By integrating those adjustments, CFIUS reviews could better balance safeguarding national security and promoting economic openness. The tiered approach would enhance transparency, accountability, and fairness while preserving robust protections for critical industries central to US strategic interests.

Nippon Steel acquiring control over a [TID US business](#) (given US Steel’s role in steel production for [critical infrastructure](#)) could bring the transaction under CFIUS jurisdiction, but its strategic relevance to modern national security is unclear. Traditional industries such as steel remain essential to the broader manufacturing base but will perhaps not warrant the same scrutiny as advanced technologies that are disruptive or game-changing. An enhanced judicial review process would help lift the veil on decision-making in such instances.

A final critical adjustment would be to grant Japan [“excepted foreign states”](#) status under FIRRMA, similar to countries like Australia, Canada, New Zealand, and the United Kingdom. [That designation](#) exempts nations with robust investment-screening mechanisms from CFIUS’s expanded authorities. Japan has already implemented new regulations in 2020 that [appear to align](#) with CFIUS principles, meeting the criteria for the designation. Including Japan in that category would recognize its alignment with US security objectives, reduce unnecessary scrutiny of Japanese investments, and strengthen economic ties with a vital ally.

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