



# National Security Review Bodies (Part II): Creating New Review Systems

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Some observers and Members of Congress have advocated for new or expanded national security review frameworks to examine transactions that may not be subject to existing procedures. Proposals in the 118<sup>th</sup> Congress include legislation that would [require](#) additional notification of outbound investment and [expand](#) the government’s authority to review certain foreign investments in agricultural land and in agriculture-related U.S. businesses. In addition to [policy debates](#) about the merits of individual programs, creating or expanding national security systems can raise legal issues about the programs’ structure and operations. This Legal Sidebar is the second installment in a two-part series examining legal frameworks authorizing the United States to regulate private commercial transactions to address national security risks. The [first installment](#) analyzes the legal frameworks governing export controls, sanctions administered by the Office of Foreign Asset Control (OFAC), the Committee on Foreign Investment in the United States (CFIUS), and sector-specific review bodies. This installment discusses legal issues that could arise from proposals to expand or create new review mechanisms.

## Procedural Due Process

The [Due Process Clause](#) of the Constitution’s Fifth Amendment requires, among other things, that the government provide a person deprived of a property right with notice of the government action and a [meaningful opportunity](#) to contest it. This requirement—known as procedural due process—can be relevant in legal challenges to national security reviews. For example, the U.S. Court of Appeals for the District of Columbia Circuit [held](#) that, before the President can order a company to divest an acquisition under the CFIUS process, due process requires the government to provide the affected company with the unclassified information on which it based its decision and an opportunity to respond. In challenges to designations on OFAC lists, by contrast, [courts](#) have [concluded](#) that the government’s interest in national security outweighed litigants’ needs for a [pre-deprivation hearing](#) and access to classified information supporting the designation.

## Judicial Review

An issue related to due process is the extent to which those affected by national security review bodies’ actions can seek judicial review. Some review bodies’ decisions, such as OFAC [licensing](#) decisions, are

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considered [final agency actions](#) subject to judicial review under the Administrative Procedure Act (APA). The APA requires courts to give [deference](#) to agencies' decisionmaking while allowing courts to overturn agency actions that are arbitrary, capricious, or outside an agency's legal authority. Other statutes seek to limit judicial review of certain national security review bodies' decisions by [exempting](#) some decisions from the APA, requiring litigation to be brought in a [specified court](#), or [prohibiting](#) judicial review altogether. Even the most restrictive of these provisions, however, have not completely foreclosed judicial review. In cases involving restrictive statutes, courts have adjudicated certain issues, such as whether the national security review bodies exceeded statutory authority (called [ultra vires review](#)) and whether they complied with judicially enforceable constitutional requirements, [including](#) procedural due process standards.

### **Extraterritoriality**

Another consideration tied to the Due Process Clause is the extraterritorial scope of the review system. Statutes underlying national security review frameworks generally require some nexus between the transaction under review and a U.S. person or property interest. IEEPA-based sanctions, for example, apply to transactions involving U.S. persons or property subject to U.S. jurisdiction, and export controls apply to U.S.-origin goods, services, and technology or the [direct product](#) of those items. Apart from these statutory requirements, some [courts](#) have [stated](#) that the Due Process Clause imposes an overarching constitutional [requirement](#) for a link between the United States and the prohibited action. [Not all](#) courts, however, [agree](#) that this territorial constitutional constraint applies in every case.

### **Confidentiality**

Government reviews of private commercial transactions can require a balance between the transacting parties' desire for confidentiality and the public interest in the process. Several national security review frameworks include confidentiality mandates, which differ depending on the legal paradigm. Some frameworks [prohibit](#) the government from disclosing parties' private information gathered during the review process unless an exception applies. CFIUS's legal authorities provide even stricter confidentiality by stating that materials submitted during its review process are [exempt](#) from the Freedom of Information Act absent an exception. To keep Congress informed, confidentiality requirements may allow [disclosure to Congress](#) and require periodic briefing and reports to relevant congressional committees.

### **Classified Information**

The United States must often rely on classified information when making national-security-driven decisions, and some transaction review frameworks provide specialized [processes](#) for handling that information. For instance, [2018 amendments](#) to CFIUS's statutory authorities added [provisions](#) governing the use of classified and other protected information deemed necessary to resolve the judicial proceedings.

### **Trade Agreements**

Creating or expanding national security review programs could potentially implicate U.S. obligations under its [trade agreements](#). Many [bilateral](#) and [multilateral](#) trade agreements state that they do not prevent parties from actions needed to protect "[essential security interests](#)," but the scope of this national security exception is the subject of significant debate, discussed in this [CRS Legal Sidebar](#).

## First Amendment

National security review systems can implicate the [First Amendment's](#) protections for freedom of speech and association—although the Supreme Court has frequently [suggested](#) that courts may give greater deference to the government in order to address national security issues. [Some entities](#) have made First Amendment claims under the theory that they were sanctioned for expressing a particular viewpoint or supporting certain causes. Most [First Amendment](#) challenges of this [type](#) have [failed](#), but at least one federal appellate court [held](#) that an OFAC regulation that barred “coordinated advocacy” with an organization on a Specially Designated Nationals and Blocked Persons List violated the First Amendment’s guarantee of freedom of speech. In 2021, the communications app WeChat obtained a [preliminary injunction](#) on First Amendment grounds that barred the Department of Commerce from implementing a Trump Administration [executive order](#) that would have largely prevented U.S. users from using WeChat. That executive order, which President Biden [revoked](#), likely violated the First Amendment, [according](#) to the court, by closing a medium of public expression that was one of the only viable means for communication in some communities.

## IEEPA Exceptions

When national security systems rely on the NEA and IEEPA, statutory exceptions to the President’s transaction-blocking authority may be a point of consideration. Under IEEPA’s [exceptions](#), the President does not have authority to regulate or prohibit personal communications, medicine and humanitarian assistance, informational materials, and travel-related transactions. As discussed in this [Legal Sidebar](#), during the Trump Administration, [two](#) federal district [courts](#) concluded that IEEPA did not provide authority to restrict access to the [TikTok](#) video-sharing app because TikTok’s services could be considered personal communications or informational material. President Biden [revoked](#) the executive order on which those TikTok restrictions were based, but [media](#) outlets [report](#) that the Biden Administration continues to negotiate with TikTok on [measures](#) to address the government’s national security concerns using the CFIUS process.

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