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## National Security Law

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## National Security Law

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## National Security Law

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This article surveys 2018 international legal developments relevant to National Security Law.

### I. Tensions between the United States and Russia

The relationship between the United States and Russia endured frequent and tumultuous changes in 2018. Some of the Trump Administration's Russian policies related to the Countering America's Adversaries Through Sanctions Act (CAATSA).<sup>1</sup> In January 2018, as required by Sections 241 and 242 of the CAATSA, the U.S. Department of the Treasury (Treasury Department) submitted to Congress a Report on Senior Foreign Political Figures and Oligarchs in the Russian Federation (Section 241 Report) and a Report on Effects of Expanding Sanctions to Include Sovereign Debt and Derivative Products (Section 242 Report).<sup>2</sup> The Section 242 Report generated little fanfare because the United States did not expand sanctions against Russia to include sovereign debt and derivative products.<sup>3</sup> Conversely, even though the Treasury Department made clear it was not a

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\* The committee co-editors of this article were Dr. Joseph D. Prestia (managing) and Ms. Anne R. Jacobs. Mr. Geoffrey M. Goodale, Partner, FisherBroyles, LLP, and Mr. Jonathan M. Meyer, Attorney at Law, contributed "Tensions Between the United States and Russia"; Mr. Philip D. O'Neill, Jr., Independent Arbitrator, contributed "Cybersecurity Policy"; Captain Sergio L. Suarez, Judge Advocate, U.S. Army, contributed "Intelligence & Surveillance"; Mr. Guy C. Quinlan, President, Lawyers Committee on Nuclear Policy, contributed "Nuclear Arms Control"; Ms. Loren Voss, Truman National Security Project, Security Fellow, contributed "The United States' Abandonment of the Iran Deal: International Legal Implications"; Mr. Mario Mancuso (Partner), Ms. Lucille Hague (Associate), and Mr. J. Matthew O'Hare (Associate), Kirkland & Ellis, LLP, contributed "Expansion of CFIUS' Jurisdiction and Authority under FIRRMA." The views expressed in this article are solely those of the authors in their private capacities and do not in any way represent the views of the United States or any United States government entity.

1. See generally Countering America's Adversaries Through Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017).

2. See *id.* §§ 241 – 242.

3. See DEP'T OF THE TREASURY, REPORT TO CONGRESS PURSUANT TO SECTION 242 OF THE COUNTERING AMERICA'S ADVERSARIES THROUGH SANCTIONS ACT OF 2017 REGARDING POTENTIAL EFFECTS OF EXPANDING SANCTIONS TO INCLUDE SOVEREIGN DEBT AND THE FULL RANGE OF DERIVATIVE PRODUCTS (2018), <https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/r5nYIUf7jwuU/v0>.

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sanctions list, the Section 241 Report created a stir because the public version listed 114 Russian political figures and ninety-six Russian oligarchs.<sup>4</sup>

In fact, the Treasury Department subsequently placed numerous individuals and entities listed in the Section 241 Report on the List of Specially Designated Nationals and Blocked Persons (SDN List) on April 6, 2018 (April 2018 Sanctions Notice).<sup>5</sup> These individuals and entities included seven oligarchs and twelve companies that the oligarchs either owned or controlled, seventeen senior Russian government officials, and a state-owned Russian weapons trading company and its subsidiary (a bank) that the Treasury Department determined had engaged in malign activities for or on behalf of the Russian Government.<sup>6</sup> Significantly, the Treasury Department established general licenses to authorize certain limited types of transactions with some of the entities identified in the April 2018 Sanctions Notice to avoid extremely detrimental effects on those sanctioned entities and potentially affected U.S. persons.<sup>7</sup>

The U.S. Government also utilized CAATSA to impose sanctions on Russian persons identified in indictments brought by the Department of Justice (Justice Department) in connection with the special investigation related to Russian interference in the 2016 presidential election. On March 15, 2018, the Treasury Department added nineteen individuals and five entities to the SDN List for engaging in malign Russian cyber activity (March 2018 Sanctions Notice).<sup>8</sup> In addition, on September 20, 2018, the Department of State (State Department) placed on the Section 231 List the individuals and entities identified in the March 2018 Sanctions Notice, as well as twelve Russian intelligence officers named in a Justice Department indictment in July 2018 for their role in cyber hacking the computers of numerous U.S. persons during the 2016 presidential election.<sup>9</sup>

The U.S. Government also took actions against Russia for its alleged involvement in the nerve-agent attack on Sergei and Yulia Skripal in the United Kingdom in March 2018.<sup>10</sup> Specifically, in March 2018, the U.S.

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4. *See id.*

5. *See* Notice of OFAC Sanctions Actions, 83 Fed. Reg. 19138 (May 1, 2018).

6. *See id.* at 19138 – 40.

7. The Treasury Department has periodically amended the general licenses issued to permit limited transactions with certain entities identified in the April 2018 Sanctions Notice. At the time of this writing, the Treasury Department had most recently amended the general licenses on November 9, 2018. *See* Press Release, Dep't of the Treasury, OFAC Extends Expiration Date of General Licenses Related to EN+, RUSAL, and GAZ (Nov. 9, 2018), <https://home.treasury.gov/news/press-releases/sm544>.

8. *See* Notice of OFAC Sanctions Actions, 83 Fed. Reg. 12238 (Mar. 20, 2018); Notice of OFAC Sanctions Actions, 83 Fed. Reg. 12239 (Mar. 20, 2018).

9. *See* Notice of Department of State Sanctions Actions Pursuant to Section 231(a) of the Countering America's Adversaries Through Sanctions Act of 2017 (CAATSA) and Executive Order 13849 of September 20, 2018, and Notice of Additions to the CAATSA Section 231(d) Guidance, 83 Fed. Reg. 50433 (Oct. 5, 2018).

10. *See, e.g., Skripal Attack: Russia Faces US Sanctions over Poisoning*, BBC NEWS (Aug. 9, 2018), <https://www.bbc.com/news/world-us-canada-45122723>.

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Government expelled sixty Russian diplomats and closed Russia's consulate in Seattle, to which Russia responded by expelling sixty U.S. diplomats and closing the U.S. consulate in St. Petersburg, Russia.<sup>11</sup> Subsequently, on August 27, 2018, to impose additional sanctions on Russia for the use of a nerve agent on U.K. soil, the State Department issued a rulemaking notice that significantly restricted the types of goods and technologies U.S. persons can export to Russia without first obtaining an export license from the cognizant U.S. government agency.<sup>12</sup>

Notwithstanding the above actions the U.S. took against Russia, President Trump and President Putin participated in a summit in Helsinki on July 16, 2018, during which the two leaders attempted to ease tensions between the two countries.<sup>13</sup> While the summit yielded few concrete results, both leaders described it as being quite successful, and they are planning to hold another summit in 2019.<sup>14</sup>

## II. Cybersecurity Policy

This year, the pendulum swung from the more risk-averse and reactive defensive process previously favored<sup>15</sup> to one of cyber exploitation and offense intended to deter adversaries.<sup>16</sup> The increasing number of malicious attacks on U.S. cyber interests prompted the Trump administration to opt for a more "forward-based," pre-emptive defense to confront and deter<sup>17</sup> States that pose long-term, competitive strategic threats (i.e., Russia and China).<sup>18</sup> President Trump rescinded the former Presidential Policy Directive 20 in August 2018<sup>19</sup> and replaced it with a highly-classified legal

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11. See, e.g., Oren Dorrell, *What Does it Mean to Expel a Diplomat? Russia Tells 60 Americans to Go Home*, USA TODAY (Mar. 26, 2018, 2:55 PM), <https://www.usatoday.com/story/news/world/2018/03/26/what-expelling-russian-diplomats-means/458474002/>.

12. See Determinations Regarding Use of Chemical Weapons by Russia Under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, 83 Fed. Reg. 43723 (Aug. 27, 2018).

13. See, e.g., Vladimir Isachenkov, *Putin, Trump to Hold Summit in Helsinki on July 16*, AP NEWS (June 28, 2018), <https://www.apnews.com/d42a93669d224845811c7b6c5871417a>.

14. See, e.g., Andrew Kramer, *Putin Says Trump's Critics in U.S. are Trying to Undermine Meeting*, N.Y. TIMES, July 19, 2018, A16, <https://www.nytimes.com/2018/07/19/world/europe/putin-donald-trump-summit.html>.

15. See, e.g., Presidential Policy Directive 20, U.S. Cyber Operations Policy (Oct. 16, 2012), <https://fas.org/irp/offdocs/ppd/ppd-20.pdf>.

16. For a description of the historical struggle over cyber national security policy, see generally FRED KAPLAN, DARK TERRITORY: THE SECRET HISTORY OF CYBER WAR (2016).

17. For a discussion of cyber-deterrence, see generally Michael Sulmeyer, *How the U.S. Can Play Cyber Offense: Deterrence Isn't Enough*, COUNCIL ON FOREIGN RELATIONS (Mar. 22, 2018), <https://www.foreignaffairs.com/articles/world/2018-03-22/how-us-can-play-cyber-offense>.

18. See generally Nina Kollars & Jacquelyn Schneider, *Defending Forward: The 2018 Cyber Strategy Is Here*, WAR ON THE ROCKS (Sep. 20, 2018), <https://warontherocks.com/2018/09/defending-forward-the-2018-cyber-strategy-is-here/>.

19. PPD-20 was originally highly classified when issued in 2012, but Edwin Snowden leaked it to the public in 2013. See, e.g., Eric Geller, *Trump Scraps Obama Rules on Cyberattacks, Giving*

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regime that lowered the threshold necessary for a response.<sup>20</sup> Together with the September 2018 release of an unclassified summary of the new Department of Defense (DOD) Cyber Strategy<sup>21</sup> and, days later, a new National Cyber Strategy,<sup>22</sup> these documents illuminate an evolving devolution of cyber force authority.<sup>23</sup> This loosening of prior restrictions, combined with new authorities,<sup>24</sup> is expected<sup>25</sup> to permit offensive cyber engagement to penetrate foreign networks for the purpose of contesting “the full spectrum of conflict.”<sup>26</sup>

The DOD mission extends to defense of the “critical infrastructure” from “a significant cyber incident.”<sup>27</sup> A “significant cyber incident” is an event or group of related events that is “likely to result in demonstrable harm to the national security interests, foreign relations, or economy of the United States or to public confidence, civil liberties, or public health and safety of the American people (Presidential Policy Directive 41).”<sup>28</sup> This mission statement should be read in conjunction with the John S. McCain Defense Authorization Act for Fiscal Year 2019 (NDAA),<sup>29</sup> which expressly authorizes

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*Military Freer Hand*, POLITICO (Aug. 16, 2018, 2:39 PM), <https://www.politico.com/story/2018/08/16/trump-cybersecurity-cyberattack-hacking-military-742095>.

20. See Dustin Volz, *Trump, Seeking to Relax Rules on U.S. Cyberattacks, Reverses Obama Directive*, WALL ST. J. (Aug. 15, 2018, 11:36 PM), <https://www.wsj.com/articles/trump-seeking-to-relax-rules-on-u-s-cyberattacks-reverses-obama-directive-1534378721>; see also Patrick Barry, *The Trump Administration Just Threw Out America's Rules for Cyberweapons*, FOREIGN POL'Y (Aug. 21, 2018, 1:35 PM), <https://foreignpolicy.com/2018/08/21/the-trump-administration-just-threw-out-americas-rules-for-cyberweapons/>; Mack DeGeurin, *U.S. Silently Enters New Age of Cyberwarfare*, N.Y. MAG. INTELLIGENCER (Sept. 11, 2018), <http://nymag.com/intelligencer/2018/09/us-rescinds-ppd-20-cyber-command-enters-new-age-of-cyberwar.html>.

21. See generally DEP'T OF DEF., SUMMARY: DEPARTMENT OF DEFENSE CYBER STRATEGY (2018), [https://media.defense.gov/2018/Sep/18/2002041658/-1/-1/1/CYBER\\_STRATEGY\\_SUMMARY\\_FINAL.pdf](https://media.defense.gov/2018/Sep/18/2002041658/-1/-1/1/CYBER_STRATEGY_SUMMARY_FINAL.pdf). De-escalation of cyber conflict is no longer reflected as a strategic goal. See Josephine Wolff, *Trump's Reckless Cyber Plan*, N.Y. TIMES, Oct. 2, 2018, A27, <https://www.nytimes.com/2018/10/02/opinion/trumps-reckless-cybersecurity-strategy.html>.

22. See generally NATIONAL CYBER STRATEGY OF THE UNITED STATES OF AMERICA (2018), <https://www.whitehouse.gov/wp-content/uploads/2018/09/National-Cyber-Strategy.pdf>.

23. PPD-20 required, with narrow exceptions, compliance with a significant inter-agency deliberative process and often presidential decision before authorizing cyber-attacks. See Presidential Policy Directive 20, *supra* note 15, at 3 – 4.

24. See Robert Chesney, *The 2018 DOD Cyber Strategy: Understanding 'Defense Forward' in Light of the NDAA and PPD-20 Changes*, LAWFARE (Sept. 25, 2018, 6:45 PM), <https://www.lawfareblog.com/2018-dod-cyber-strategy-understanding-defense-forward-light-ndaa-and-ppd-20-changes>.

25. See Elis Groll, *Trump Has a New Weapon to Cause 'the Cyber' Mayhem*, FOREIGN POL'Y (Sept. 21, 2018, 4:58 PM), <https://foreignpolicy.com/2018/09/21/trump-has-a-new-weapon-to-cause-the-cyber-mayhem/> (National Security Adviser Bolton describing the changes as moving the decision-making authority for cyber attacks down the chain of command).

26. See DEPARTMENT OF DEF., *supra* note 21, at 1.

27. *Id.* at 3.

28. *Id.* at 3 n.3.

29. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (2018), <https://www.congress.gov/bill/115th-congress/house-bill/5515/text>. The 2019 National Defense Authorization Act also included authorization of the so-called

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the DOD “to take appropriate and proportional action in foreign cyberspace to disrupt, defeat and deter” in response to an active, systematic, and ongoing campaign of attacks against the government or people of the United States in cyberspace, including attempting to influence American elections and democratic political processes where the malicious source is Russian, Chinese, Iranian or North Korean state actors.<sup>30</sup> The NDAA also clarifies that such activity is “traditional military activity” under the Title 50 exception to the definition of covert action.<sup>31</sup>

The new 2018 strategies<sup>32</sup> and tactical shifts otherwise range from the Department of Homeland Security’s revision of critical infrastructure risk prioritization<sup>33</sup> to the Treasury Department’s imposition of greater costs on those attacking our financial system.<sup>34</sup> As such, this year’s issuance of new, more comprehensive strategies builds upon a process the administration began last year, which had included agency review pursuant to an executive order<sup>35</sup> and, in 2018, the elevation of the U.S. Cyber Command to a unified combatant command<sup>36</sup> with the goal of achieving and maintaining cyberspace superiority.<sup>37</sup> These and other steps are calculated to maintain

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“Cyber Solarium Commission,” a fourteen-person commission that will report on developing strategic defense policy for cyber space and national security by September 1, 2019. *See generally* Press Release, Senator Ben Sasse, Final Defense Bill Includes Sasse’s Cyberspace Solarium Commission (July 23, 2018), <https://www.sasse.senate.gov/public/index.cfm/2018/7/final-defense-bill-includes-sasse-s-cyberspace-solarium-commission>.

30. *See* John S. McCain National Defense Authorization Act for Fiscal Year 2019 § 1624.

31. *See* Chesney, *supra* note 24.

32. *See also* DEP’T OF HOMELAND SEC., U.S. DEPARTMENT OF HOMELAND SECURITY CYBER SECURITY STRATEGY (2018), [https://www.dhs.gov/sites/default/files/publications/DHS-Cybersecurity-Strategy\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/DHS-Cybersecurity-Strategy_1.pdf).

33. *See, e.g.*, Phil Goldstein, *DHS’ New Cybersecurity Strategy Highlights Risk Prioritization*, FEDTECH MAG., (May 22, 2018), <https://fedtechmagazine.com/article/2018/05/dhs-new-cybersecurity-strategy-highlights-risk-prioritization>; *see also* Press Release, Dep’t of Homeland Sec., Statement by Secretary Kirstjen M. Nielsen on the Release of the National Cyber Strategy (Sept. 20, 2018), <https://www.dhs.gov/news/2018/09/20/statement-kirstjen-m-nielsen-national-cyber-strateg>.

34. *See, e.g.*, Press Release, Dep’t of the Treasury, Secretary Mnuchin Statement on National Cyber Strategy (Sept. 20, 2018), <https://home.treasury.gov/news/press-releases/sm491>.

35. *See, e.g.*, Zack Whittaker, *Trump’s Cybersecurity Executive Order Met with Mixed Reviews*, ZD NET (May 11, 2017), <https://www.zdnet.com/article/trump-signs-impossible-cybersecurity-order-say-critics/>.

36. *See* Jim Garamone & Lisa Ferdinando, *DoD Initiates Process to Elevate U.S. Cyber Command to Unified Combatant Command*, DEP’T OF DEF. (Aug. 18, 2017), <https://dod.defense.gov/News/Article/Article/1283326/dod-initiates-process-to-elevate-us-cyber-command-to-unified-combatant-command/>.

37. *See generally* U.S. CYBER COMMAND, ACHIEVE AND MAINTAIN CYBER SUPERIORITY (2018), <https://www.cybercom.mil/Portals/56/Documents/USCYBERCOM%20Vision%20April%202018.pdf?ver=2018-06-14-152556-010>.

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an open and secure digital foundation for U.S. national economic interests and way of life.<sup>38</sup>

As part of its National Cyber Strategy, and despite these changes, the United States remains expressly committed to using recognized norms to shape global governance of responsible state behavior.<sup>39</sup> But the shift to an offensive cyber posture implemented by less transparent action suggests a reliance on customary practice, harkening back to the unwritten rules of conduct in the Cold War.

### III. Intelligence & Surveillance

#### A. FISA AMENDMENTS REAUTHORIZATION ACT OF 2017

Early in 2018, the U.S. Congress was tasked to determine whether it would recertify the controversial section 702 of the Foreign Intelligence Surveillance Act (FISA) Amendment Act.<sup>40</sup> The FISA Amendments Reauthorization Act of 2017 had several important provisions, the most telling of which addressed “about” communication. “About” communication contains a reference to, but is not to or from, a target.<sup>41</sup> The law gives the government, mainly the Federal Bureau of Investigation (FBI), the authority to collect communications (e.g., emails, text messages, phone calls) of individuals not in the United States who have been targeted for intelligence surveillance.<sup>42</sup> The Director of National Intelligence (DNI) and the Attorney General must adopt procedures consistent with the requirements of the Fourth Amendment for information collected under the authority of section 702.<sup>43</sup> The act also prohibits the FBI from accessing communications of U.S. persons unless part of an existing criminal investigation and subsequent court order.<sup>44</sup> Critics assert that, as written, this provision will not prevent surveillance of Americans’ private communications.<sup>45</sup> Congress also provided for review of upstream “about”

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38. See NATIONAL CYBER STRATEGY OF THE UNITED STATES OF AMERICA, *supra* note 22, at 6 (reflecting the protection of the “American People, the Homeland, and the American Way of Life” as the first pillar of the strategy).

39. *Id.* at 20 – 21.

40. See Kaitlyn Schallhorn, *FISA Surveillance Program: What Is It and Why Is It So Controversial?*, FOX NEWS (Mar. 7, 2018), <https://www.foxnews.com/politics/fisa-surveillance-program-what-is-it-and-why-is-it-so-controversial>.

41. FISA Amendments Reauthorization Act of 2017, Pub. L. No. 115-118, § 103(b)(1), 132 Stat. 3, 10 (2018).

42. Charlie Savage, *Warrantless Surveillance Is Headed for Renewal*, N.Y. TIMES, Jan. 16, 2018, A11, <https://www.nytimes.com/2018/01/16/us/politics/senate-vote-section-702-fisa-amendments-surveillance.html>.

43. Emma Kohse, *Summary: The FISA Amendments Reauthorization Act of 2017*, LAWFARE (Jan. 18, 2018, 4:29 PM), <https://www.lawfareblog.com/summary-fisa-amendments-reauthorization-act-2017>.

44. See FISA Amendments Reauthorization Act of 2017 § 101(a)(1).

45. See Savage, *supra* note 42.



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collection, i.e., information gathered from internet communications based on the mention of certain selectors found within the communication itself.<sup>46</sup>

The act's oversight provision requires the DNI and the Attorney General to notify Congress within thirty days of initiating surveillance under the previous program.<sup>47</sup> The notice must contain a Foreign Intelligence Surveillance Court (FISC) order, opinion, or decision approving the program together with a "summary of the protections in place to detect any material breach."<sup>48</sup> Additionally, the law includes a provision requiring the appointment of an amicus curiae under FISA section 103(i)(2)(A) to litigate "novel or significant interpretations of the law" before a section 702 certification authorizing "about" collection.<sup>49</sup>

**B. U.S. COURTS WEIGH IN ON SURVEILLANCE**

The case of *United States v. Hasbajrami* tested the viability of the newly-enacted authorization provisions of section 702.<sup>50</sup> The case addressed a request to suppress evidence obtained under the section,<sup>51</sup> focusing on the constitutionality and applicability of 50 U.S.C. § 1881a(a), (c), and (i)(3)(A)—the so-called "warrantless wiretap" provisions.<sup>52</sup> The district court determined that warrantless surveillance of communications between a U.S. person and individuals who are legitimate targets of section 702 surveillance does not violate the Fourth Amendment because (a) the Fourth Amendment does not apply to foreign persons abroad, and (b) incidental collection does not trigger a warrant requirement.<sup>53</sup> The court also determined that collection under the National Security Agency's (NSA) code name PRISM program is reasonable under the Fourth Amendment due to the diminished expectation of privacy of email communication sent between U.S. persons and non-U.S. persons outside the United States.<sup>54</sup> Further, the targeting and minimization procedures, as codified, are reasonable given the limitation on the amount of information actually collected when balanced against the government's security interest in intelligence.<sup>55</sup>

The district court also examined the practice of "U.S. person queries," warrantless searches into the collected 702 database to identify and compile

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46. See Kohse, *supra* note 43.

47. See Chinmayi Sharma, *Summary: FISA Amendments Reauthorization Act*, LAWFARE (Oct. 27, 2017, 3:30 PM), <https://www.lawfareblog.com/summary-fisa-amendments-reauthorization-act>.

48. See FISA Amendments Reauthorization Act of 2017 § 103(b)(3).

49. *Id.* § 103(b)(6).

50. See generally *United States v. Agron Hasbajrami*, No. 11-CR-623 (JG), 2016 WL 1029500 (E.D.N.Y. Mar. 8, 2016).

51. See *id.* at \*1.

52. See *id.* at \*5.

53. See *id.* at \*9 nn.14 – 15, \*14.

54. See *id.* at \*12 n.20.

55. *Id.* at \*10.

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information regarding a specific U.S. person.<sup>56</sup> This practice, which entails the government's use of identifiers to search through collected information, provides few avenues for judicial review and may circumvent the individualized judicial review generally required by the Fourth Amendment.<sup>57</sup> The government's argument relied on a reasonableness analysis and further contended that a foreign intelligence exception exists under the Fourth Amendment.<sup>58</sup> The U.S. Supreme Court, in a recent case requiring search warrants for cell-site records, made clear that its decision was narrow and did not consider other collection techniques involving foreign affairs or national security.<sup>59</sup> Given the contentious nature of this electronic surveillance and the Supreme Court's willingness to scrutinize law enforcement tools,<sup>60</sup> it is foreseeable that the Court soon will have to answer whether a foreign intelligence exception applies to section 702 collected data.

#### IV. Nuclear Arms Control

On October 20, 2018, the United States announced its intention to withdraw from the Intermediate Nuclear Forces (INF) Treaty.<sup>61</sup> The treaty prohibits the development or possession of ground-launched missiles with a range of 500 km to 5,500 km and launchers for such missiles.<sup>62</sup> For several years, the United States has alleged that Russia is developing a missile forbidden by these limits.<sup>63</sup> Simultaneously, the United States has denied a Russian allegation that it is the United States, with its use of a particular type of launcher in its missile defense program, that is the party in violation of the treaty.<sup>64</sup> Most U.S. allies expressed concern about the proposed withdrawal

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56. Sharon Bradford Franklin, *What Happened at the Court: The Hasbajrami Oral Argument on Section 702 of FISA and the Fourth Amendment*, JUST SECURITY (Aug. 29, 2018), <https://www.justsecurity.org/60505/happened-court-hasbajrami-oral-argument-section-702-fisa-fourth-amendment/>.

57. *Id.*

58. *Id.*

59. *Carpenter v. United States*, 138 S.Ct. 2206, 2220 (2018) (“[O]ur opinion does not consider other collection techniques involving foreign affairs or national security.”).

60. Cristian Farias, *The Supreme Court Just Put a Ding in the Surveillance State*, N.Y. MAG. INTELLIGENCER (June 22, 2018), <http://nymag.com/intelligencer/2018/06/the-supreme-court-just-put-a-ding-in-the-surveillance-state.html?gtm=top&gtm=top>.

61. *See, e.g.*, Sophie Tatum et al., *Trump Says U.S. Is Ending Decades-Old Nuclear Arms Treaty with Russia*, CNN (Oct. 21, 2018, 4:59 PM), <https://www.cnn.com/2018/10/20/politics/donald-trump-us-arms-agreement-russia/index.html>. *See generally* Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, U.S.-U.S.S.R., Dec. 8, 1987, S. TREATY DOC. NO. 100-11 (1988), <https://www.state.gov/t/avc/trty/102360.htm#text>.

62. Daryl Kimball & Kingston Reif, *Trump's Counterproductive Decision to "Terminate" the INF Treaty*, ARMS CONTROL ASS'N (Oct. 21, 2018), <https://www.armscontrol.org/issue-briefs/2018-10/trumps-counterproductive-decision-terminate-inf-treaty>.

63. *See id.*

64. *See id.*

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and urged reconsideration.<sup>65</sup> The inspection and verification provisions of the INF Treaty expired by their terms in 2001, and neither party has suggested their revival.<sup>66</sup>

The New Strategic Arms Reduction Treaty (START),<sup>67</sup> which limits the United States and Russia to 1,550 deployed strategic warheads and 700 delivery vehicles, expires by its terms in February 2021 but can be renewed by agreement of the two presidents.<sup>68</sup> As this article went to press, some informal preliminary discussions had apparently begun but no substantive announcements had been made.

In 2018, all of the world's nuclear powers continued to modernize their nuclear arsenals.<sup>69</sup> The Nuclear Posture Review announced by the United States in February 2018 called for the development of new low-yield nuclear warheads to provide more flexible options for possible use and expanded the list of situations in which the United States might consider the first use of nuclear weapons.<sup>70</sup> In November 2018, Pakistan announced it would match India's deployment of a nuclear missile submarine.<sup>71</sup>

No nuclear arms control negotiations among the five permanent members of the U.N. Security Council<sup>72</sup> took place or were scheduled in 2018. In May, the Secretary General of the United Nations called for a new disarmament initiative.<sup>73</sup> He urged the nuclear weapons states to assume "primary responsibility" for moving forward with their Non-Proliferation Treaty (NPT) obligation<sup>74</sup> of good faith negotiations for an end to the

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65. See *Top Senators Slam Trump's INF Treaty Pullout, Call It 'Gift to Russia'*, RT (Dec. 5, 2018), <https://www.rt.com/usa/445556-senators-blast-trump-quitting-inf/>.

66. See Kimball & Reif, *supra* note 62.

67. Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, Russ.-U.S., Apr. 8, 2010, S. TREATY DOC. NO. 111-5 (2010), <https://www.state.gov/documents/organization/140035.pdf>.

68. *Id.* art. II, XIV.

69. See *Modernization of Nuclear Weapons Continues: Number of Peacekeepers Declines*, STOCKHOLM INT'L PEACE RES. INST. (June 18, 2018), <https://www.sipri.org/media/press-release/2018/modernization-nuclear-weapons-continues-number-peacekeepers-declines-new-sipri-yearbook-out-now>.

70. See DEP'T OF DEF., NUCLEAR POSTURE REVIEW 12 (2018), <https://media.defense.gov/2018/Feb/02/2001872886/-1/-1/1/2018-NUCLEAR-POSTURE-REVIEW-FINAL-REPORT.pdf>.

71. Farhan Bokhari, *India's Nuclear Submarine Provokes Pakistan to Renew Arms Race*, NIKKEI ASIAN REV. (Nov. 12, 2018), <https://asia.nikkei.com/Politics/International-relations/India-s-nuclear-submarine-provokes-Pakistan-to-renew-arms-race>.

72. United States, Russia, China, United Kingdom and France are the permanent members of the United Nations Security Council. The "P5" are also the Nuclear Weapons States recognized under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). See generally Treaty on the Non-Proliferation of Nuclear Weapons, Jul. 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT], <https://www.un.org/disarmament/wmd/nuclear/npt/text/>.

73. António Guterres, Sec'y Gen., United Nations, Remarks at the University of Geneva on the Disarmament Agenda (May 24, 2018), <https://www.un.org/sg/en/content/sg/speeches/2018-05-24/launch-disarmament-agenda-remarks>.

74. See NPT, *supra* note 72, art. VI.

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nuclear arms race and elimination of nuclear arsenals and noted that some of these obligations are “decades overdue.”<sup>75</sup>

Tensions eased in Korea after a summit meeting between President Trump and Chairman Kim Jong Un of the Democratic People’s Republic of Korea (DPRK),<sup>76</sup> at which “President Trump committed to provide security guarantees to the DPRK, and Chairman Kim Jong Un reaffirmed his firm and unwavering commitment to the complete denuclearization of the Korean peninsula.”<sup>77</sup> As this issue went to press, talks were continuing on the implementation of these general statements; plans for a second summit were announced, but no date had been set.

With the support of 122 non-nuclear weapons states, the First Committee of the U.N. General Assembly<sup>78</sup> adopted a resolution<sup>79</sup> endorsing the 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW)<sup>80</sup> and calling on all states to adopt it “at the earliest possible date.” All nine of the nations possessing nuclear weapons, which had boycotted the conference adopting the treaty, also opposed this resolution.<sup>81</sup> Another First Committee resolution, expressing concern that “several thousand nuclear weapons remain on high alert ready to be launched within minutes,” called on the nuclear powers to take steps “ensuring that all nuclear weapons are removed from high alert.”<sup>82</sup> While 173 nations voted for the resolution, the United States joined with Russia, the United Kingdom, and France in opposing it.

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75. See Guterres, *supra* note 73.

76. See Mark Landler, *President’s Pitch to Kim Yields Vow with Few Details*, N.Y. TIMES, June 12, 2018, A1, <https://www.nytimes.com/2018/06/12/world/asia/north-korea-summit.html>.

77. See Press Release, Joint Statement of President Donald J. Trump of the United States of America and Chairman Kim Jong Un of the Democratic People’s Republic of Korea at the Singapore Summit (June 12, 2018), <https://www.whitehouse.gov/briefings-statements/joint-statement-president-donald-j-trump-united-states-america-chairman-kim-jong-un-democratic-peoples-republic-korea-singapore-summit/>.

78. The First Committee, consisting of all UN Member-States, “considers all disarmament and international security matters within the scope of the [UN] Charter . . .” See *Disarmament and International Security (First Committee)*, UNITED NATIONS, <http://www.un.org/en/ga/first> (last visited Mar. 31, 2019). First Committee resolutions are normally adopted as a matter of course by the General Assembly when it meets in plenary session.

79. 1st Comm. GAOR Res., U.N. Doc. A/C.1/73/L.24 (Oct. 19, 2018). The First Committee’s draft resolution was later adopted at a plenary meeting of the General Assembly. See G.A. Res. 73/48 (Dec. 12, 2018).

80. See *generally* Treaty on the Prohibition of Nuclear Weapons, Sept. 20, 2017, 729 U.N.T.S. 161. As of April 7, 2019, the TPNW had been ratified by 70 states, exceeding the 50 ratifications necessary for its entry into force. See Disarmament Treaties Database: Treaty on the Prohibition of Nuclear Weapons, UNITED NATIONS, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVI-9&chapter=26&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-9&chapter=26&clang=_en).

81. These nations are the United States, Russia, China, United Kingdom, France, India, Pakistan, Israel and North Korea. See, e.g., Aria Bendix, *122 Nations Approve ‘Historic’ Treaty Banning Nuclear Weapons*, ATLANTIC (July 8, 2017), <https://www.theatlantic.com/news/archive/2017/07/122-nations-approve-historic-treaty-to-ban-nuclear-weapons/533046/>.

82. 1st Comm. GAOR Res., U.N. Doc. A/C.1/73/L.52 (Oct. 17, 2018). The First Committee’s draft resolution was later adopted at a plenary meeting of the General Assembly. See G.A. Res. 73/60 (Dec. 13, 2018).

In 2018, several expert studies reported that new developments in technology are increasing the danger of nuclear war by accident or miscalculation.<sup>83</sup>

Following its earlier decision to withdraw from the agreement limiting Iran's nuclear program,<sup>84</sup> as well as a subsequent partial re-imposition of sanctions,<sup>85</sup> the U.S. government announced on November 2, 2018, the revival of sanctions on Iranian oil exports, effective November 5, 2018, but also granted temporary waivers to several of the largest importers of Iranian oil, including China, India, and Japan.<sup>86</sup> In November 2018, the International Atomic Energy Agency reported that Iran continues to comply with the agreement.<sup>87</sup>

## **V. The United States' Abandonment of the Iran Deal: International Legal Implications**

On May 8, 2018, President Trump announced that he was pulling the United States out of the Joint Comprehensive Plan of Action (JCPOA), an international agreement that lifted nuclear-related sanctions on Iran in exchange for Iranian commitments to constrain certain nuclear-related activities.<sup>88</sup> A presidential memorandum claimed two violations of the JCPOA: (1) Iran had publicly declared that it would deny the International

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83. See generally EDWARD GEIST & ANDREW LOHN, HOW MIGHT ARTIFICIAL INTELLIGENCE AFFECT THE RISK OF NUCLEAR WAR? (2018), <https://www.rand.org/pubs/perspectives/PE296.html>; CHRISTOPHER BIDWELL & BRUCE MACDONALD, EMERGING DISRUPTIVE TECHNOLOGIES AND THEIR POTENTIAL THREAT TO STRATEGIC STABILITY AND NATIONAL SECURITY (2018), [https://fas.org/wp-content/uploads/media/FAS-Emerging-Technologies-Report.pdf?utm\\_source=FAS+General&utm\\_campaign=9b44d2bccd-EMAIL\\_CAMPAIGN\\_2017\\_02\\_21\\_COPY\\_01&utm\\_medium=email&utm\\_term=0\\_56a7496199-9b44d2bccd-222162373](https://fas.org/wp-content/uploads/media/FAS-Emerging-Technologies-Report.pdf?utm_source=FAS+General&utm_campaign=9b44d2bccd-EMAIL_CAMPAIGN_2017_02_21_COPY_01&utm_medium=email&utm_term=0_56a7496199-9b44d2bccd-222162373); PAGE STOUTLAND & SAMANTHA PITTS-KIEFER, NUCLEAR WEAPONS IN THE NEW CYBER AGE (2018), [https://media.nti.org/documents/Cyber\\_report\\_finalsmall.pdf](https://media.nti.org/documents/Cyber_report_finalsmall.pdf); Beyza Unal & Patricia Lewis, CYBERSECURITY OF NUCLEAR WEAPONS SYSTEMS (2018), <https://www.chathamhouse.org/sites/default/files/publications/research/2018-01-11-cybersecurity-nuclear-weapons-unal-lewis-final.pdf>.

84. Mark Landler, *Trump Abandons Iran Pact He Long Scorned*, N.Y. TIMES, May 8, 2018, A1, <https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html>.

85. Press Release, Statement from the President on the Reimposition of Sanctions with Respect to Iran (Aug. 6, 2018), <https://www.whitehouse.gov/briefings-statements/statement-president-reimposition-united-states-sanctions-respect-iran/>.

86. Garinder Harris, *U.S. Reimposes but Exempts Big Customers*, N.Y. TIMES, Nov. 2, 2018, A10, <https://www.nytimes.com/2018/11/02/world/middleeast/us-iran-sanctions-oil-waivers.html>.

87. Kiyoko Metzler, *UN Nuclear Watchdog Says Iran Abiding with 2015 Limits*, AP NEWS (Nov. 12, 2018), <https://www.apnews.com/544bd03f7f264e57827fba5ca99fa5ff>.

88. Memorandum from President Trump on Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon (May 8, 2018), <https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon/>.

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Atomic Energy Agency access to military sites, and (2) Iran had twice violated the JCPOA's heavy-water stockpile limits in 2016.<sup>89</sup>

The memorandum also directed the immediate commencement of steps to reimpose all U.S. sanctions lifted or waived in relation to the JCPOA.<sup>90</sup> All steps were to be completed no later than 180 days after the date of the memorandum, with the last set of sanctions coming into force on November 5, 2018.<sup>91</sup>

The Obama Administration understood the JCPOA to be a nonbinding political commitment.<sup>92</sup> Under this interpretation of the JCPOA, the decision by President Trump to withdraw from the agreement was valid under international and domestic law.<sup>93</sup> But United Nations Security Council Resolution (UNSCR) 2231 endorsed the JCPOA and called "upon all Member States, regional organizations and international organizations to take such actions as may be appropriate to support the implementation of the JCPOA."<sup>94</sup> If one believes that UNSCR 2231 made the JCPOA binding under international law, the President's withdrawal is somewhat more contested.<sup>95</sup> Most jurists agree that while decisions of the U.N. Security Council are binding on states, in most cases recommendations are just that and, therefore, have no binding force.<sup>96</sup> On its face, UNSCR 2231 appears to contain a combination of non-binding recommendations and binding

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89. *See id.*

90. *Id.*

91. *Id.*; *see also* Matthew Lee, *US Restores Iran Sanctions Lifted Under Obama Nuclear Deal*, AP NEWS (Nov. 2, 2018) <https://www.apnews.com/8740cd7cc98646fa883984e03cea178b>.

92. *See* OFFICE OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 123 (2015), <https://www.state.gov/documents/organization/258206.pdf> (referring to the JCPOA as a "non-binding political arrangement").

93. This article does not cover the domestic law implications of leaving the JCPOA. For additional information on this topic, refer to the Iran Nuclear Agreement Review Act (providing certain congressional review and oversight over the JCPOA) and STEPHEN MULLIGAN, CONG. RESEARCH SERV., R44761, WITHDRAWAL FROM INTERNATIONAL AGREEMENTS: LEGAL FRAMEWORK, THE PARIS AGREEMENT, AND THE IRAN NUCLEAR AGREEMENT (2018), <https://fas.org/sgp/crs/row/R44761.pdf> (discussing the domestic law implications of leaving the JCPOA).

94. S.C. Res. 2231, ¶ 1 – 2 (July 20, 2015).

95. *See* Colum Lynch & John Hudson, *Obama Turns to U.N. to Outmaneuver Congress*, FOREIGN POL'Y (July 15, 2015, 7:18 PM), <http://foreignpolicy.com/2015/07/15/obama-turns-to-u-n-to-outmaneuver-congress-iran-nuclear-deal/> (stating that a Security Council resolution makes a U.S. president "legally required" to comply with the many of the "key provisions" in the JCPOA).

96. *See* Mulligan, *supra* note 93, at 23 nn.189 & 191, providing the following citations: Marko Divac Öberg, *Agora: The ICJ's Kosovo Advisory Opinion: The Legal Effects of United Nations Resolutions in the Kosovo Advisory Opinion*, 105 AM. J. INT'L L. 81, 82 (2011); John Quigley, *Who Admits New Members to the United Nations (Think Twice Before You Answer)*, 44 GEO. WASH. INT'L L. REV. 179, 222 (2012); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Preliminary Objection, 1998 I.C.J. 9, ¶ 44 (Feb. 27) ("As to Security Council resolution 731 (1992) . . . it could not form a legal impediment to the admissibility of the latter because it was a mere recommendation without binding effect. . . .").

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decisions.<sup>97</sup> By using the word “decide,” the Security Council clearly intended that the provision that lifted prior sanctions on Iran be binding.<sup>98</sup> On the other hand, some jurists appear to interpret the language of UNSCR 2231—i.e., “calls upon”—to indicate that the resolution is a recommendation.<sup>99</sup> But even if one believes the Security Council intended for the resolution to be binding, the resolution calls upon states to support the implementation of the JCPOA, which itself refers to the commitments within it as *voluntary* measures, providing additional support for its non-binding nature.<sup>100</sup>

On July 16, 2018, Iran instituted proceedings in the International Court of Justice (ICJ) against the United States regarding the imposition of sanctions as alleged violations of the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States (Treaty of Amity).<sup>101</sup> Iran made a request for indication of provisional measures.<sup>102</sup> On October 3, 2018, the ICJ rejected the U.S. challenge to its jurisdiction to hear the case.<sup>103</sup> The ICJ issued a unanimous order indicating limited provisional measures against the United States, specifically mandating that the United States ensure that reimposed sanctions exempt certain humanitarian goods and equipment and services related to civil aviation safety.<sup>104</sup>

As a result, Secretary of State Pompeo announced the termination of the Treaty of Amity with Iran.<sup>105</sup> But in accordance with article XXIII(3) of the treaty, the U.S. withdrawal will not affect the ICJ case because the withdrawal will only come into force a year after Secretary Pompeo’s announcement.<sup>106</sup> The upcoming merits stage of the case will determine if this litigation will present any significant obstacle to the U.S. nuclear

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97. See Mulligan, *supra* note 93, at 24.

98. See U.N. Charter art. 41; Frederic L. Kirgis Jr., *The United Nations at Fifty: the Security Council’s First Fifty Years*, 80 AM. J. INT’L L. 506, 520 (1995).

99. See Mulligan, *supra* note 93, at 24 – 25; see also S.C. Res. 2231, *supra* note 94, ¶ 1 – 2.

100. Joint Comprehensive Plan of Action, July 14, 2015, 55 I.L.M. 108 (referring to the phrase “Iran and E3/EU+3 will take the following voluntary measures within the timeframe as detailed in this JCPOA and its Annexes” placed before the “NUCLEAR” section of the JCPOA).

101. See *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.)*, Order on Request for the Indication of Provisional Measures, 2018 I.C.J. 175, ¶ 1 (Oct. 3).

102. *Id.*

103. *Id.* ¶ 52.

104. *Id.* ¶ 98.

105. Secretary of State Michael Pompeo Remarks to the Media, U.S. DEP’T OF STATE (Oct. 3, 2018), <https://www.state.gov/secretary/remarks/2018/10/286417.htm>; Roberta Rampton et al., *U.S. Withdraws from International Accords, Says U.N. World Court ‘Politicized’*, REUTERS, (Oct 3, 2018, 12:35 PM), <https://www.reuters.com/article/us-usa-diplomacy-treaty/us-reviewing-agreements-that-expose-it-to-world-court-bolton-idUSKCN1MD2CP>.

106. Elena Chachko, *What to Make of the ICJ’s Provisional Measures in Iran v. U.S. (Nuclear Sanctions Case)*, LAWFARE (Oct. 4, 2018, 7:23 AM), <https://www.lawfareblog.com/what-make-icjs-provisional-measures-iran-v-us-nuclear-sanctions-case>.

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sanctions against Iran, likely determining the applicability of the national security exception of article XX(1) of the Treaty of Amity.<sup>107</sup>

**VI. Expansion of CFIUS's Jurisdiction and Authority under FIRRMA**

On August 13, 2018, President Trump signed the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) into law.<sup>108</sup> FIRRMA<sup>109</sup> strengthens and modernizes the process by which the Committee on Foreign Investment in the United States (CFIUS) reviews foreign investments in U.S. businesses to assess such investments' impacts on U.S. national security. On November 10, 2018, provisions of FIRRMA relating to certain investments in U.S. critical technology companies became effective through the release of a pilot program, which requires that CFIUS be notified of some foreign investments in U.S. businesses in advance of closing.<sup>110</sup> This requirement represents a foundational change to the CFIUS process, which has historically been voluntary.<sup>111</sup> Once fully implemented, FIRRMA will significantly affect timing, certainty, feasibility, and costs of cross-border transactions across diverse sectors.<sup>112</sup>

Established in 1975, CFIUS is an interagency regulatory body initially authorized to review "control" transactions involving a "foreign person" and any U.S. business engaged in interstate commerce.<sup>113</sup> CFIUS has long interpreted "control" very broadly, such that a foreign investor's possession of a single board seat is typically deemed to confer control even if the investor cannot control, in a traditional sense, a board's decisions.<sup>114</sup>

In recent years, U.S. government stakeholders have expressed concern that CFIUS lacked sufficient legal authority and resources to review and address national security risks arising from, among other things, minority, "non-controlling" investments in U.S. companies and joint ventures established outside the United States.<sup>115</sup> In parallel, the scope of CFIUS's

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107. *Id.*

108. Press Release, U.S. Dep't of Treasury, Treasury Secretary Mnuchin Statement on Signing of FIRRMA to Strengthen CFIUS (Aug.13, 2018), <https://home.treasury.gov/news/press-releases/sm457>.

109. See Foreign Investment Risk Review Modernization Act of 2018, H.R. 5515, 115th Cong. § 1701 (2018).

110. Mandatory Declarations Under the Pilot Program, 31 C.F.R. § 801.401(a) (2018).

111. Alejandro Fiuza & Harrison Freeman, *Foreign Investment into U.S. Now Subject to Broader National Security Reviews*, BROWN RUDNICK (Nov. 28, 2018), <http://www.brownrudnick.com/alert/foreign-investment-u-s-now-subject-broader-national-security-reviews/>.

112. See Mario Mancuso et al., *New Bipartisan CFIUS Reform Begins to Take Shape*, LAW360 (Nov. 13, 2017, 6:14 PM), <https://www.law360.com/articles/983836/new-bipartisan-cfius-reform-begins-to-take-shape>.

113. See, e.g., Judith Allison Lee et al., *An Update on CFIUS Reform*, LAW 360 (June 6, 2018, 1:55 PM), <https://www.law360.com/articles/1050928/an-update-on-cfius-reform>.

114. See MARIO MANCUSO, A DEALMAKER'S GUIDE TO CFIUS 30 (2017).

115. Mario Mancuso et al., *Dealmakers, Take Note: GAO to Study CFIUS at Congress' Urging*, KIRKLAND & ELLIS: KIRKLAND ALERT (Oct. 17, 2016), <https://www.kirkland.com/-/media/>



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national security analysis has become increasingly far-reaching: CFIUS has raised questions about transactions that historically have not been considered to have national security implications (e.g., in the healthcare sector), and a growing number of high-profile transactions have been blocked, abandoned, or delayed due to CFIUS's concerns.<sup>116</sup>

In November 2017, a bipartisan group of congressmen proposed new legislation to address these perceived inadequacies.<sup>117</sup> Following seven congressional hearings and intense debate, the final text of FIRRMA was agreed in July 2018.<sup>118</sup>

**A. CERTAIN KEY TAKEAWAYS REGARDING FIRRMA**

First, FIRRMA empowers CFIUS to review a broader universe of investments. Under FIRRMA, four types of transactions will be newly subject to CFIUS's jurisdiction:

1. A non-passive investment by a foreign person in "critical infrastructure" and "critical technology" companies, as well as companies that maintain or collect personal data of U.S. citizens.<sup>119</sup>
2. The purchase, lease, or concession by or to a foreign investor of real estate in "close proximity" to U.S. military sites or other sensitive facilities.<sup>120</sup>
3. Any change in a foreign investor's rights regarding a U.S. business.<sup>121</sup>
4. Any transaction or arrangement designed to circumvent or evade CFIUS's jurisdiction.<sup>122</sup>

Second, FIRRMA applies to all foreign investors, regardless of country. Initial drafts of FIRRMA would have required investors from specified "countries of concern" (e.g., China, Russia, and Venezuela) to notify CFIUS

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publications/alert/2016/10/dealmakers-take-note-gao-to-study-cfius-at-congres/dealmakers-takenotegaotostudycfiusatcongressurg.pdf.

116. See, e.g., Mario Mancuso et al., *CFIUS Weighs in on Broadcom/Qualcomm Fight*, KIRKLAND & ELLIS: KIRKLAND ALERT (Mar. 9, 2018), [https://www.kirkland.com/-/media/publications/alert/2018/03/cfius-weighs-in-on-broadcomqualcomm-fight/cfius\\_weights\\_in\\_on\\_broadcom\\_qualcomm\\_fight.pdf](https://www.kirkland.com/-/media/publications/alert/2018/03/cfius-weighs-in-on-broadcomqualcomm-fight/cfius_weights_in_on_broadcom_qualcomm_fight.pdf).

117. See Mancuso et al., *supra* note 112.

118. See Mario Mancuso & Lucille Hague, *Where CFIUS Reform Stands Now*, BLOOMBERG LAW (July 12, 2018), <https://www.bna.com/insight-cfius-reform-n73014477405/>.

119. See Foreign Investment Risk Review Modernization Act of 2018, H.R. 5515, 115th Cong. § 1703(a)(4) (2018). Provisions relating to non-passive investments in critical technology companies have been implemented on an interim basis through the pilot program; but the other provisions have not yet become effective. See, e.g., Kimberly Hope Caine et al., *President Trump Signs Into Law CFIUS Reform Bill*, NORTON ROSE FULBRIGHT (Aug. 16, 2018), <https://www.nortonrosefulbright.com/en-us/knowledge/publications/2405ee63/president-trump-signs-into-law-cfius-reform-bill>.

120. See H.R. 5515, 115th Cong. § 1703(a)(4).

121. See *id.*

122. See *id.*

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of their investments in U.S. businesses.<sup>123</sup> While much discussion around FIRRMA has focused on mitigating perceived threats arising from Chinese investments, FIRRMA is broadly drafted, empowering CFIUS to review transactions largely irrespective of an investor's country of origin.<sup>124</sup> But FIRRMA permits CFIUS to promulgate regulations exempting certain categories of foreign persons from notifying CFIUS of transactions that would otherwise be mandatory.<sup>125</sup>

Third, FIRRMA will increase information-sharing among the United States and its allies. FIRRMA authorizes CFIUS to share information important to its analysis or decisions with foreign allies and partners, subject to appropriate confidentiality and classification requirements, in furtherance of "national security purposes."<sup>126</sup> As Germany, Canada, and other countries continue to strengthen their own national security review regimes, it is increasingly likely that regulators will share information with one another.<sup>127</sup> As a result, transaction parties will need to carefully choreograph the substance and timing of disclosures to national security regulators.<sup>128</sup>

Fourth, non-notified transactions will be at heightened risk for independent scrutiny from CFIUS. Historically, CFIUS member agencies have taken different approaches to evaluating non-notified transactions, which has caused difficulties and delays in coordinating reviews of certain non-notified transactions. FIRRMA directs CFIUS to create a formal process to identify non-notified transactions and provides CFIUS with additional resources to implement this process.<sup>129</sup> Accordingly, parties can expect that transactions that are not voluntarily notified to CFIUS will be subject to greater risk of receiving requests to file from CFIUS and to heightened scrutiny in the review process.<sup>130</sup>

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123. See Mancuso & Hague, *supra* note 118.

124. 31 C.F.R. § pt. 801 (2018).

125. See H.R. 5515, 115th Cong. § 1706(v)(1)(C)(v)(IV)(bb)(CC).

126. *Id.* § 1713(c)(2)(C).

127. Mario Mancuso et al., *EU Poised to Enact a 'European CFIUS'—Four Considerations for Cross-Border M&A*, KIRKLAND & ELLIS, (Jan. 16, 2019), <https://www.kirkland.com/publications/article/2019/01/eu-poised-to-enact-a-european-cfius-four-considera>.

128. *Id.*

129. H.R. 5515, 115th Cong. § 1710(b)(1)(H).

130. See John P. Barker et al., *New Mandatory Submissions to CFIUS: Interim Regulations Under FIRRMA Take Effect November 10, 2018*, ARNOLD & PORTER (Oct. 16, 2018), <https://www.arnoldporter.com/en/perspectives/publications/2018/10/new-mandatory-submissions-to-cfius>.