

RECENT EXECUTIVE ORDER

EXECUTIVE POWER — FOREIGN INVESTMENT CONTROLS — EXECUTIVE ORDER RESTRICTS U.S. OUTBOUND INVESTMENT INTO SENSITIVE TECHNOLOGY SECTORS IN CHINA. — Exec. Order No. 14,105, 88 Fed. Reg. 54867 (Aug. 11, 2023).

Money is power, both at home and abroad. For years, members of Congress have attempted to restrict U.S. outbound investment into China,¹ citing risks that American dollars are being used to accelerate the military development of a strategic adversary.² Though the idea of outbound investment review has been percolating in Washington since 2018, Congress has struggled to translate it into statute. The United States's first outbound screening regime ultimately arrived via presidential action. On August 9, 2023, President Joe Biden signed Executive Order 14,105 on Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern³ (the EO), representing yet another stride in the United States's turn against China taken through executive, rather than legislative, action. This political buildup exposes a trade-off in congressional efforts to restrict the same statutorily delegated executive powers from which the EO drew authority: if Congress wants to tie the President's hands, it must be capable of effectively legislating to fill the policy void. But, amid continuing legislative gridlock, executive emergency authorities are necessary tools for responding to mounting geopolitical concerns.

Outbound investment review has had a long, failed history in Congress. The mechanism was first conceived during 2018 revisions to the Foreign Investment Risk Review and Modernization Act, the statutory authority for the Committee on Foreign Investment in the United States (CFIUS), which reviews certain inbound investments that create national security risk.⁴ A “reverse CFIUS” outbound screening mechanism was again proposed in the 2021 National Critical Capabilities

¹ See, e.g., Inu Manak, *Outbound Investment Screening Waits in the Wings*, COUNCIL ON FOREIGN RELS. (Aug. 15, 2022, 9:41 AM), <https://www.cfr.org/blog/outbound-investment-screening-waits-wings> [<https://perma.cc/BQ2C-AR4T>] (discussing the outbound investment screening mechanism proposed as part of the CHIPS Act); Thibault Denamiel et al., *Insight into the Senate's Outbound Investment Mechanism*, CTR. FOR STRATEGIC & INT'L STUD. (Aug. 2, 2023), <https://www.csis.org/analysis/insight-senates-outbound-investment-mechanism> [<https://perma.cc/2GGA-9M5H>] (discussing the outbound investment amendment to the 2023 National Defense Authorization Act).

² See, e.g., Letter from Mike Gallagher, Chairman of the House Select Comm. on the Chinese Communist Party, to Joe Biden, President of the U.S. (Aug. 3, 2023), <https://selectcommitteeontheccp.house.gov/media/letters/letter-president-biden-restrictions-us-investments-china> [<https://perma.cc/ER93-UXRS>] (“For too long, America has funded the [Chinese Communist Party’s (CCP)] military buildup, technological ambitions, and human rights abuses and allowed the CCP unconstrained access to our capital markets and the dynamism and efficient capital allocation that they enable.”).

³ 88 Fed. Reg. 54867 (Aug. 11, 2023).

⁴ Denamiel et al., *supra* note 1.

Defense Act (NCCDA) but removed from consideration after opposition from business and industry.⁵ The CHIPS Act of 2022⁶ also included a version that was ultimately scrapped.⁷ Most recently, the Senate version of the 2024 National Defense Authorization Act (NDAA) included a provision requiring mandatory notification for certain investments in China that was ultimately dropped from the final version.⁸

In light of these mired congressional efforts, those anticipating outbound review turned their attention toward the Biden Administration, which had articulated support for and collaborated on related legislative efforts since 2021.⁹ And, indeed, the mechanism ultimately landed by executive order.¹⁰ EO 14,105 restricts select outbound U.S. investment in semiconductors and microelectronics, quantum information technologies, and AI systems.¹¹ Though the EO is framed as applying broadly to outbound investments directed toward “countries of concern,” its annex identifies the People’s Republic of China, including Hong Kong and Macau, as the sole country in this category.¹²

President Biden issued EO 14,105 under the authority of the International Emergency Economic Powers Act¹³ (IEEPA), the National

⁵ Senators Bob Casey and John Cornyn have attempted to include outbound screening in various pieces of legislation since 2021. They first proposed the mechanism in the 2021 NCCDA. S. 1854, 117th Cong. (2021). It was then incorporated into America COMPETES, passed by the House in February 2022, which was targeted at bolstering competition with China. H.R. 4521, 117th Cong. (2022). Following objections from the business community, *see, e.g.*, Gavin Bade, “We’re in an Economic War:” *White House, Congress Weigh New Oversight of U.S. Investments in China*, POLITICO (Feb. 19, 2022, 7:00 AM), <https://www.politico.com/news/2022/02/19/china-investments-economy-us-congress-00008745> [<https://perma.cc/B3Y7-SH8E>] (outlining business group opposition), it was ultimately excluded from the U.S. Innovation and Competition Act, S. 1260, 117th Cong. (2021), when it passed the Senate in 2021, *see id.*

⁶ Pub. L. No. 117-167, div. A., 136 Stat. 1372 (codified in scattered sections of the U.S. Code).

⁷ *See* Manak, *supra* note 1.

⁸ *Compare* S. 2226, 118th Cong. § 1085 (2023), with National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, 137 Stat. 136 (2023) (codified in scattered sections of the U.S. Code).

⁹ *See* Press Release, Jake Sullivan, Nat’l Sec. Advisor, Remarks at the National Security Commission on Artificial Intelligence Global Emerging Technology Summit (July 13, 2021), www.whitehouse.gov/nsc/briefing-room/2021/07/13/remarks-by-national-security-advisor-jake-sullivan-at-the-national-security-commission-on-artificial-intelligence-global-emerging-technology-summit [<https://perma.cc/Z5K5-GYP8>] (signaling potential support for outbound review); Ellen Nakashima, *White House Wants Transparency on American Investment in China*, WASH. POST (July 13, 2022, 7:27 PM), <https://www.washingtonpost.com/national-security/2022/07/13/china-investment-transparency/> [<https://perma.cc/H4S8-BXW9>] (noting collaboration with Congress).

¹⁰ *Executive Order on Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern*, WHITE HOUSE (Aug. 9, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/08/09/executive-order-on-addressing-united-states-investments-in-certain-national-security-technologies-and-products-in-countries-of-concern/> [<https://perma.cc/6EYK-6QW2>].

¹¹ Exec. Order No. 14,105 § 9(c), 88 Fed. Reg. at 54870.

¹² *Id.* § 9(a), 88 Fed. Reg. at 54869; *id.* annex, 88 Fed. Reg. at 54872. This comment will subsequently refer to China in lieu of “countries of concern,” though it is important to note that this definition allows future administrations to include additional countries in this regime.

¹³ 50 U.S.C. §§ 1701–1706.

Emergencies Act¹⁴ (NEA), and 3 U.S.C. § 301.¹⁵ In accordance with this statutory framework, the EO states that the development of sensitive technologies by China constitutes an “unusual and extraordinary threat” to U.S. national security pursuant to IEEPA and declares a “national emergency” in response to this threat pursuant to the NEA.¹⁶ The threat stems from the “comprehensive, long-term strategies” used by China to “achiev[e] military dominance,”¹⁷ including developing dual-use technologies¹⁸ and exploiting intangible benefits of U.S. investment.¹⁹ The national security risks created justify outbound capital controls despite the United States’s overall commitment to open cross-border investment.²⁰

The EO outlines the broad strokes of the outbound restrictions and directs the Treasury Secretary to issue detailed, binding regulations giving effect to its requirements.²¹ Operationally, the program will (1) require U.S. persons to notify the government of a broader set of transactions involving foreign persons connected to China related to a covered technology or product (“notifiable transactions”) and (2) ban U.S. persons from engaging in a narrower set of transactions of the same nature (“prohibited transactions”).²² Concurrently with the release of the EO, the Treasury Department issued an Advance Notice of Proposed Rulemaking that kicked off a forty-five-day public comment period on the definitions, scope, and procedures of the final restrictions.²³

Though the final Treasury regulations will define precisely which outbound investments are restricted, the language of the EO already makes clear that this program is more narrowly scoped than many had expected. The EO had been widely anticipated and described as “reverse CFIUS.”²⁴ However, unlike CFIUS, which conducts resource intensive, case-by-case reviews of select inbound investments of security concern, EO 14,105’s outbound regime does not involve preclearance

¹⁴ Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601–1651).

¹⁵ Exec. Order No. 14,105, 88 Fed. Reg. at 54867.

¹⁶ *Id.*; see also 50 U.S.C. § 1621(a)–(b).

¹⁷ Exec. Order No. 14,105, 88 Fed. Reg. at 54867.

¹⁸ See *id.* The Chinese Communist Party’s “military-civil fusion” policy prioritizes the development of dual-use technologies through systematic coordination between the private and defense sectors. See generally Audrey Fritz, *China’s Evolving Conception of Civil-Military Collaboration*, CTR. FOR STRATEGIC & INT’L STUD. (Aug. 2, 2019), <https://www.csis.org/blogs/trustee-china-hand/chinas-evolving-conception-civil-military-collaboration> [<https://perma.cc/5G4Z-NHG3>].

¹⁹ Exec. Order No. 14,105, 88 Fed. Reg. at 54867.

²⁰ *Id.*

²¹ The Treasury Department is instructed to consult with the Commerce Department and other relevant departments in issuing its final rules. *Id.* § 1, 88 Fed. Reg. at 54868.

²² *Id.*

²³ Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 88 Fed. Reg. 54961, 54964–72 (proposed Aug. 14, 2023).

²⁴ See, e.g., Emily Benson & Margot Putnam, Commentary, *The United States Prepares to Screen Outbound Investment*, CTR. FOR STRATEGIC & INT’L STUD. (Apr. 27, 2023), <https://www.csis.org/analysis/united-states-prepares-screen-outbound-investment> [<https://perma.cc/QTF9-BSRF>].

or individual reviews. Instead, the EO reflects what the Biden Administration has called a “small yard, high fence” strategy²⁵ to protect critical U.S. technologies, targeting a narrow set of products with more restrictive controls. Given the United States’s desire to avoid full “decoupling” from China²⁶ and the unknown costs of further escalation, the EO represents a measured step in countering legitimate security concerns amidst mounting geopolitical tension.²⁷

The political history of EO 14,105 highlights a distinct area of separation of powers interplay. Despite bipartisan antagonism toward China, efforts to pass hawkish legislation have been mired by division within Congress.²⁸ As a result, recent economic policy toward China has largely been driven by presidents exercising statutorily delegated emergency economic powers.²⁹ The road to outbound review demonstrates how efforts in Congress to restrain executive emergency authorities, including the same powers invoked in EO 14,105, would create a lawmaking gap during periods of sustained legislative gridlock. A strong congressional hand in crafting the nation’s policy vis-à-vis China, especially when those policies are principally economic, can accurately effectuate legislative intent while restraining presidential authority. But, when legislative inaction renders Congress’s hand weak, the exercise of

²⁵ Jake Sullivan, Nat’l Sec. Advisor, Remarks on the Biden-Harris Administration’s National Security Strategy (Oct. 12, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/10/13/remarks-by-national-security-advisor-jake-sullivan-on-the-biden-harris-administrations-national-security-strategy> [https://perma.cc/3BVB-3MYJ].

²⁶ Decoupling broadly refers to an effort by the United States to reduce economic, technological, financial, and industrial ties with China. The term is contentious. See Maxwell Bessler, *The Debate to Decouple*, CTR. FOR STRATEGIC & INT’L. STUD. (Nov. 16, 2022), <https://www.csis.org/blogs/new-perspectives-asia/debate-decouple> [https://perma.cc/A64W-K87A]. The Biden Administration has avoided framing its China policy as one of full decoupling, as evidenced by Commerce Secretary Gina Raimondo’s visit to China to ease concerns of American business stakeholders shortly after the announcement of the EO. See Michelle Toh, *Warm Words but Little “Real Action” as US Commerce Secretary Ends China Visit*, CNN (Aug. 30, 2023, 8:56 AM), <https://www.cnn.com/2023/08/30/business/us-commerce-secretary-china-visit-uninvestable-intl-hnk/index.html> [https://perma.cc/BKD5-DGBK].

²⁷ The EO has drawn a range of reactions. For a survey, see Luke Patey, *Out of Bounds*, WIRE CHINA (Oct. 1, 2023), <https://www.thewirechina.com/2023/10/01/out-of-bounds-outbound-investment-china> [https://perma.cc/WVX9-XCFR].

²⁸ The sources of congressional antagonism toward China are numerous and complex — from fear of China as a military threat, to its non-market economy, to geopolitical tensions over Taiwan, to human rights issues. But the prioritization of these concerns diverges within Congress, perhaps contributing to legislative inaction. The activities of the House Select Committee on Strategic Competition Between the United States and the Chinese Communist Party, formed in January 2023, help illustrate these divisions: to paint with an overly broad brush, Republicans tend to focus on China as a threat to the United States’s global military and economic dominance, while Democrats tend to focus on impacts of China’s economic rise on domestic labor, industry, and innovation. See Phelim Kine, *What It Looks Like When Congress Takes on China*, POLITICO (Mar. 2, 2023, 8:30 AM), <https://www.politico.com/newsletters/politico-china-watcher/2023/03/02/what-it-looks-like-when-congress-takes-on-china-00085100> [https://perma.cc/5CPM-85XE].

²⁹ See *Timeline of Executive Actions on China (2017–2021)*, U.S.-CHINA ECON. & SEC. REV. COMM’N (Apr. 1, 2021), <https://www.uscc.gov/research/timeline-executive-actions-china-2017-2021> [https://perma.cc/CV3S-XKJY] (describing the series of executive orders imposed against China).

delegated executive powers is critical to driving foreign policy in a world where geopolitics evolve at an independent velocity.

Despite a bipartisan “race to be tough on China,”³⁰ the relative lack of targeted legislation passed by Congress points to underlying disagreements over *how* to counter China.³¹ Consider the CHIPS Act, perhaps the most notable legislative effort in this area. The Act was stripped of what many viewed as stricter anti-China provisions, including restrictions on research funding and immigration,³² to pass both chambers.³³ Investment screening has frequently divided pro-business and pro-security factions.³⁴ And partisan standoffs over domestic issues add to the gridlock. For example, a review mechanism in the revised 2022 NCCDA was caught in the crossfire of Senate debate over climate change and health care provisions in the Build Back Better Act.³⁵ And again, despite the investment screening amendment to the 2024 NDAA passing ninety-one to six in the Senate,³⁶ it was ultimately not included in the final bill after Congress remained gridlocked over defense spending, transgender healthcare, and abortion-related provisions for much of 2023.³⁷ Efforts to expand the CHIPS Act are likely to meet the same

³⁰ See Ted Galen Carpenter, Commentary, *The Bipartisan Race to Be Tough on China*, CATO INST. (Nov. 9, 2022), <https://www.cato.org/commentary/bipartisan-race-be-tough-china> [https://perma.cc/YY2S-Z3R4].

³¹ See *supra* note 28 for discussion of why these divisions may exist.

³² An amendment to the CHIPS Act would have restricted certain types of funding and allowed the State Department to deny foreign researcher visas to prevent China from “exploit[ing] American research, intellectual property and open collaboration, often US taxpayer-funded, for its own economic and military gain at [the United States’s] expense.” *On Senate Floor, Portman Urges Colleagues to Include Bipartisan Safeguarding American Innovation Act in CHIPS Plus Package*, U.S. SENATE COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS. (July 21, 2022), <https://www.hsgac.senate.gov/media/rep/portman-urges-colleagues-to-include-bipartisan-safeguarding-american-innovation-act-in-chips-plus-package> [https://perma.cc/6CKA-RCXJ]. The provision was included in the CHIPS package passed by the Senate but was dropped from the House version after lobbying by universities. Caitlin Oprysko et al., *AAPI Groups Mobilize to Block Research Security Amendment from CHIPS Package*, POLITICO (July 26, 2022, 6:31 PM), <https://www.politico.com/newsletters/politico-influence/2022/07/26/aapi-groups-mobilize-to-block-research-security-amendment-from-chips-package-00048021> [https://perma.cc/NH7Y-FU9Q].

³³ See Marianne Levine et al., *Divided Government Threatens to Clip Wings of Congress’ China Hawks*, POLITICO (Feb. 15, 2023, 1:45 PM) <https://www.politico.com/news/2023/02/15/china-bill-senate-hawks-00082955> [https://perma.cc/Y6RN-J5E9] (discussing compromises made during the year-long bicameral debate).

³⁴ See Gavin Bade, *China Investment Rules Pit Pro-Business Republicans Against China Hawks*, POLITICO (July 22, 2023, 7:00 AM), <https://www.politico.com/news/2023/07/22/china-investment-rules-republicans-00107533> [https://perma.cc/NVY9-THXV].

³⁵ See Nakashima, *supra* note 9.

³⁶ See Denamiel et al., *supra* note 1.

³⁷ See Patricia Zengerle, *Congress Passes \$886 Billion Defense Policy Bill, Biden to Sign into Law*, REUTERS (Dec. 14, 2023, 5:09 PM), <https://www.reuters.com/world/us/congress-passes-886-billion-defense-policy-bill-biden-sign-into-law-2023-12-14> [https://perma.cc/QF79-FFPF]; National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, 137 Stat. 136 (2023) (codified in scattered sections of the U.S. Code).

fate, given Republican concerns over the spending authorized by the original package.³⁸

In the face of conflicting congressional priorities, it is perhaps unsurprising that the United States's China policy has been largely driven by the Executive. The Trump and Biden Administrations have taken dozens of executive actions on issues “[c]ritical to the U.S.-China [r]elationship” since 2017,³⁹ from President Trump’s prohibition of transactions in publicly traded securities issued by “Communist Chinese military companies” (CCMCs),⁴⁰ to President Biden’s order expanding the number of CCMCs,⁴¹ to the semiconductor export controls issued in October 2022.⁴² The expansion of CFIUS through statutory updates in 2018⁴³ was a brief legislative interlude in a pattern of continued executive action against China, of which EO 14,105 is the latest iteration.

These executive actions against China, including EO 14,105, are enabled by a sweeping reading of presidential authority under emergency economic statutes, the most notable of which is IEEPA. Though originally enacted to curb what was viewed as an “unlimited grant of authority for the President to exercise . . . broad powers in both the domestic and international economic arena, without congressional review,”⁴⁴ IEEPA has, in practice, reauthorized broad executive power in this realm.⁴⁵ In a series of decisions, including *Dames & Moore v. Regan*,⁴⁶ federal courts interpreted presidential IEEPA powers broadly and deferentially.⁴⁷ The executive branch has also long read IEEPA

³⁸ Patricia Zengerle & David Shepardson, *US Senate Democrats Launch Renewed Effort to Counter China*, REUTERS (May 3, 2023, 1:47 PM), <https://www.reuters.com/world/us/us-senate-draft-new-legislation-counter-china-2023-05-03> [<https://perma.cc/578W-CPF5>].

³⁹ *Timeline of Executive Actions on China (2017–2021)*, *supra* note 29.

⁴⁰ Exec. Order No. 13,959, 85 Fed. Reg. 73185 (Nov. 17, 2020).

⁴¹ Exec. Order No. 14,032, 86 Fed. Reg. 30145 (June 7, 2021).

⁴² Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification, 87 Fed. Reg. 62186 (Oct. 13, 2022) (to be codified in scattered parts of 15 C.F.R.).

⁴³ See Foreign Investment Risk Review and Modernization Act of 2018, Pub. L. No. 115-232, tit. XVII, subtit. A, 132 Stat. 2174.

⁴⁴ David W. Opderbeck, *Huawei, Internet Governance, and IEEPA Reform*, 47 OHIO N.U. L. REV. 165, 182 (2021) (quoting H.R. REP. NO. 95-459, at 1 (1977)) (detailing Congressman Jonathan B. Bingham’s criticism of the Trading with the Enemy Act (TWEA), the statute replaced by IEEPA).

⁴⁵ See CHRISTOPHER A. CASEY ET AL., CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 16–22 (2022) (tracing presidential invocations of IEEPA to exercise economic powers justified by national security).

⁴⁶ 453 U.S. 654 (1981).

⁴⁷ See *id.* at 684–88 (upholding executive orders suspending claims of American nationals against Iran under IEEPA in part because the Court could not “ignore the general tenor of Congress’ legislation in this area” and because the enactment of legislation like IEEPA “evinces legislative intent to accord the President broad discretion,” *id.* at 678); *Regan v. Wald*, 468 U.S. 222, 232–34 (1984) (construing TWEA and IEEPA broadly to authorize controls over property and travel-related economic transactions of “any interest” to the United States); see also Patricia L.

broadly to cover situations that appear usual and ordinary, historically without much congressional objection.⁴⁸ As a result, IEEPA has been operationalized to authorize sweeping presidential authority in foreign affairs and related domestic economic policymaking, as long as the actions are defined in terms of protecting national security.⁴⁹

Despite the continued use of authorities like IEEPA for lawmaking vis-à-vis China, members of Congress seem concerned about these powers running amok: President Trump's invocations of IEEPA authority, including to issue tariffs on Mexican imports over the border crisis, fueled congressional concerns over abuses of statutory authority.⁵⁰ Since 2018, bipartisan groups of lawmakers have introduced a slew of legislation to curb executive economic authorities, including IEEPA,⁵¹ by increasing congressional involvement or narrowing the scope of justified "national security" concerns.⁵² These efforts parallel arguments to restore the proper separation of powers in other domains, where executive action in the face of congressional inaction has been criticized as an improper extension of presidential lawmaking authority.⁵³

There is an ostensible incongruity between congressional efforts to curb presidential emergency powers on one hand and acquiescence to the use of such powers against China on the other. Certainly, there are separation of powers risks to presidents continuously crafting economic,

Bellia, *Executive Power in Youngstown's Shadows*, 19 CONST. COMMENT. 87, 148 (2002) (describing judicial reluctance to define the scope of presidential foreign affairs power more generally); cf. *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 580–84 (C.C.P.A. 1975) (upholding the constitutionality of TWEA's broad delegation of authority to the President to regulate imports and impose tariffs).

⁴⁸ See Opperbeck, *supra* note 44, at 186 ("Congress has never acted to contravene any . . . agency's regulations issued pursuant to IEEPA."); see also Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VA. L. REV. 395, 405–06 (2020) (noting that "Congress rarely deploys all the power it clearly holds, let alone tries to push the envelope," *id.* at 406, in determining the proper allocation of foreign affairs powers between it and the President).

⁴⁹ See Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 583 (2019) (discussing how trade law has shifted from being considered "domestic economic policy . . . within the province of Congress," to "fundamentally about America's relationship with foreign countries . . . [under] the province of the President").

⁵⁰ See Scott R. Anderson & Kathleen Claussen, *The Legal Authority Behind Trump's New Tariffs on Mexico*, LAWFARE (June 3, 2019, 4:19 PM), <https://www.lawfaremedia.org/article/legal-authority-behind-trumps-new-tariffs-mexico> [<https://perma.cc/C8TX-2RWZ>].

⁵¹ See, e.g., Trade Certainty Act of 2019, S. 2413, 116th Cong. (2019) (clarifying that the President has no authority to enact import duties under IEEPA); Congressional Oversight of Sanctions Act, H.R. 5879, 116th Cong. (2020) (requiring congressional approval for national emergency declarations under IEEPA lasting more than sixty days).

⁵² Other efforts target presidential authority over related trade powers that can be invoked for national security purposes. See, e.g., Bicameral Congressional Trade Authority Act, S. 287, 116th Cong. (2019) (amending Section 232 authority by redefining "national security" to exclude "the general welfare of the United States"); Trade Security Act, S. 746, 117th Cong. (2021) (amending Section 232 authority by mandating congressional consultation for trade policy decisions).

⁵³ See, e.g., Josh Blackman, *The Supreme Court, 2015 Term — Comment: Gridlock*, 130 HARV. L. REV. 241, 302 (2016) ("Gridlock does not license the expansion of the Executive's power. . . . In the absence of [legislative] consensus, the status quo remains.").

trade, and investment policy using the justification of national security.⁵⁴ But the political history of outbound investment screening demonstrates that attempts to restrict these executive powers lack a crucial functional antecedent: the ability for Congress to effectively articulate a China policy and legislate accordingly. When it comes to China, messy sets of commercial and geopolitical interests create uniquely stark divisions within Congress over what our economic and security approach should be. But in order to make compelling the call for lawmaking vis-à-vis China to be done “through legislation, rather than executive fiat,”⁵⁵ Congress must demonstrate a cohesive vision for countering China, or, at the very least, the ability to arrive at a compromised consensus.

Executive lawmaking like EO 14,105 allows Congress to both criticize the EO as simultaneously too broad and too narrow, too harmful to U.S. innovation⁵⁶ and too weak on national security,⁵⁷ without having to overcome gridlock internally or formulate an actual set of compromises on legitimate, but competing, policy priorities. However, rising concerns over “the China question” domestically and mounting tensions abroad necessitate governmental action on the issue.⁵⁸ Thus, EO 14,105 underscores a tradeoff in efforts to restrict executive emergency power that members of Congress may well recognize — even if dominant executive economic and security powers may entrench presidential power, they are a necessary tool during periods of legislative inaction in order to meet our national foreign policy imperatives.

⁵⁴ See Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097, 1097 (2020) (“Congress . . . abandoned controls on the exceptional, security-driven authorities, empowering the executive to handle U.S. trade interests in an unbridled way that our nation’s Founders feared.”).

⁵⁵ Press Release, Reps. Patrick McHenry, Chairman of the House Fin. Servs. Comm., and Blaine Luetkemeyer, Chairman of the Subcommittee on Nat’l Sec., Illicit Fin. & Int’l Fin. Insts., McHenry, Luetkemeyer Statement on Biden Administration’s Outbound Investment Executive Order (Aug. 9, 2023), <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=408946> [<https://perma.cc/CJ69-PFW7>].

⁵⁶ See, e.g., Press Release, Sen. Pat Toomey, Ranking Member of the Senate Banking Comm., Toomey Warns Against Establishing a Flawed Outbound Investment Regime (Sept. 29, 2022) <https://www.banking.senate.gov/newsroom/minority/toomey-warns-against-establishing-a-flawed-outbound-investment-regime> [<https://perma.cc/4CWV-N776>].

⁵⁷ See, e.g., Ellen Nakashima & David J. Lynch, *Biden Order Proposes New Restrictions on China Tech Investment*, WASH. POST (Aug. 9, 2023, 5:56 PM), <https://www.washingtonpost.com/national-security/2023/08/09/china-ban-technology-biden-military> [<https://perma.cc/R355-WMJ2>] (quoting Representative Michael McCaul as stating “[t]he administration . . . continues the trend of appeasing industry at the cost of national security”).

⁵⁸ See Megan Brenan, *Record-Low 15% of Americans View China Favorably*, GALLUP (Mar. 7, 2023), <https://news.gallup.com/poll/471551/record-low-americans-view-china-favorably.aspx> [<https://perma.cc/99VZ-PDTW>]; see also Alan Rappeport et al., *Yellen's China Visit Aims to Ease Tensions amid Deep Divisions*, N.Y. TIMES (July 7, 2023), <https://www.nytimes.com/2023/07/04/business/economy/janet-yellen-china.html> [<https://perma.cc/7QZ9-CR6P>] (“[M]any of the economic policy concerns that have been festering between the United States and China remain — or have even intensified — despite the Biden administration’s less antagonistic tone.”).