

Note

TRUST THE PROCESS? RETHINKING PROCEDURAL DUE PROCESS AND THE PRESIDENT’S EMERGENCY POWERS OVER THE DIGITAL ECONOMY

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ABSTRACT

To protect U.S. user data from foreign threats, presidents have wielded their emergency power to ban transactions with certain technology companies. This emergency power, if unchecked, threatens both the procedural rights of some technology companies and U.S. constitutional structure.

Concerning procedural rights, this Note evaluates existing procedural due process jurisprudence to identify the scope of these protections in the data security context, which remains unexplored in scholarship and judicial opinions. For guidance, this Note looks to cases involving counterterrorist financing and national security reviews of foreign investment, and it concludes that procedural due process protects many technology companies that collect personally identifiable information. In particular, due process requires the government to provide these companies with meaningful notice and an opportunity to respond before the president wields emergency powers that slash these companies’ economic interests. These predeprivation procedural rights significantly safeguard affected companies by giving them time to respond.

However, due process alone will not prevent the emergency executive from running roughshod over the Constitution’s system of checks and balances. This Note argues, as have many commentators, that Congress should recalibrate the balance: Congress should amend

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[†] Duke University School of Law, J.D. expected 2022; Yale University, B.A. 2017. Thanks to Major General Charles Dunlap and Professor Shane Stansbury for encouraging and advising this Note. Thanks also to the *Duke Law Journal* for the feedback and fresh perspectives. Finally, thanks to my family—to my parents for their enduring support, to my older siblings for their inspiring examples, and to my younger brother for teaching me to respect the process.

IEEPA to include a sunset provision that would limit the duration of any national emergency until Congress affirmatively votes to extend it through a fast-track process. Ultimately, procedural due process and political process must work hand in hand to protect both constitutional rights and structures.

INTRODUCTION

Technology connects us, but data divide us. Millions of individuals across the United States express themselves in cyberspace, leaving their data behind like fingerprints. Their digital dealings offer troves of information to not only researchers and retailers but also foreign and domestic intelligence officers and cyberterrorists. The specter of espionage has galvanized the federal government to act. To protect U.S. user data from foreign threats, the government has deployed various regulatory tools, including the International Emergency Economic Powers Act (“IEEPA”).¹ When presidents declare national emergencies related to “unusual and extraordinary” threats,² IEEPA empowers them to terminate transactions, freeze assets, and otherwise wage economic warfare to combat those threats.³ However, this emergency power, if unchecked, threatens the procedural rights of some technology companies and could overturn the delicate separation of powers upon which the federal government teeters.

To meet the threats of a digitally connected world, measures under IEEPA have taken several forms. IEEPA has historically been used to freeze assets of terrorists and criminals.⁴ As economic and social

1. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1706. Numerous executive orders have invoked IEEPA to protect U.S. technology infrastructure. *See, e.g.*, Exec. Order No. 13,694, 3 C.F.R. 297 (2016) (titled “Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities” (emphasis omitted)); Exec. Order No. 13,873, 3 C.F.R. 317, 317 (2020) (banning transactions in order to safeguard “vulnerabilities in information and communications technology and services”); Exec. Order No. 13,942, 85 Fed. Reg. 48,637, 48,637–38 (Aug. 6, 2020) (blocking transactions with TikTok in order to secure U.S. user data). Beyond IEEPA, Congress in 2018 extended the scope of foreign investment review to transactions that may compromise sensitive U.S. user data. *See infra* notes 149–51 and accompanying text.

2. 50 U.S.C. § 1701(b).

3. *See id.* § 1702(a)(1)(B) (authorizing the president to “investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit” any transaction involving foreign interests or property subject to U.S. jurisdiction). *See infra* Part I for a more detailed discussion of IEEPA.

4. *See generally* CHRISTOPHER A. CASEY, IAN F. FERGUSSON, DIANNE E. RENNACK & JENNIFER K. ELSEA, CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY

interactions have shifted online, the United States has adapted to monitor the flow of sensitive user data to the nation's adversaries.⁵ For instance, U.S. policymakers worry the Chinese government exploits China's commercial relationships to spy on individuals across the United States.⁶ To protect U.S. individuals from such data security threats, the president may pivot from traditional asset freezes to targeted transaction prohibitions.⁷ These transaction bans under IEEPA resemble divestment orders that sometimes follow national security reviews of foreign investment undertaken by the Committee on Foreign Investment in the United States ("CFIUS"), which operates under a different legal framework.⁸ Rather than locking up assets in the United States, both bans deliberately expel enterprises from the U.S. economy.

But using IEEPA to restrict technology companies' economic presence in the United States may backfire. As a policy matter, asset freezes and transaction bans could constrict foreign investment.⁹ As a constitutional matter, broad concessions of emergency power threaten

ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE (2020) (discussing trends in IEEPA applications).

5. See Jonathan Wakely & Andrew Indorf, *Managing National Security Risk in an Open Economy: Reforming the Committee on Foreign Investment in the United States*, 9 HARV. NAT'L SEC. J. 1, 4 (2018) (discussing the unprecedented volume of interaction between the United States and China); U.S. DEP'T OF HOMELAND SEC., EMERGING TECHNOLOGY AND NATIONAL SECURITY 3-4 (2018), https://www.dhs.gov/sites/default/files/publications/2018_AEP_Emerging_Technology_and_National_Security.pdf [<https://perma.cc/9GV3-HBAE>] (discussing the influence of emerging technologies on national security).

6. Wakely & Indorf, *supra* note 5, at 26. According to one report, Chinese firms target and invest in "early-stage start-up firms that . . . have high growth potential, in order to transfer leading-edge technologies from new U.S. start-up firms to China." JAMES K. JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 36 (2018).

7. See David R. Allman, *Scalpel or Sledgehammer? Blocking Predatory Foreign Investment with CFIUS or IEEPA*, 10 AM. U. NAT'L SEC. L. BRIEF 267, 331-33 (2020) (distinguishing between asset-freezing and transaction-banning sanctions under IEEPA).

8. See *infra* Part II.B. For an overview of the framework governing national security review of foreign investment, see generally JACKSON, *supra* note 6.

9. See R. Colgate Selden, *The Executive Protection: Freezing the Financial Assets of Alleged Terrorists, the Constitution, and Foreign Participation in U.S. Financial Markets*, 8 FORDHAM J. CORP. & FIN. L. 491, 511 (2003) ("The efficient free flow of investment within U.S. markets will be difficult to maintain if the government's latitude to freeze assets is not balanced by increased consideration of the constitutionality of such actions."). In 2017, about \$7.8 trillion worth of foreign direct investment flowed into the United States. JACKSON, *supra* note 6, at 3.

the institutional balance of power and individual rights.¹⁰ Courts have proven reluctant to question the allocation of emergency powers between Congress and the president.¹¹ Targeted technology companies may instead seek refuge in the Due Process Clause of the Fifth Amendment.¹²

The Fifth Amendment mandates, “No person shall . . . be deprived of life, liberty, or property, without due process of law”¹³ When the president freezes assets or prohibits transactions with a company, the president deprives that entity of its property rights by effectively shuttering its business.¹⁴ In such situations, the Due Process Clause requires the government to provide the company with notice and the opportunity to respond “at a meaningful time and in a meaningful manner.”¹⁵ The dictates of due process depend on the nature of the threat and the executive’s response.¹⁶ Presidents have deployed IEEPA differently to respond to a broad array of threats,

10. See Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 705 (2006) (arguing emergency powers undermine the rule of law). See generally BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010) (discussing institutional dynamics that have aggrandized the presidency); OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* (2006) (describing various models of emergency regimes in democratic societies).

11. See *infra* Part I.C.

12. See *infra* Part II.

13. U.S. CONST. amend. V.

14. See *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 316 (D.C. Cir. 2014) (holding the company’s “state-law property rights fully vested upon the completion of the transaction, meaning due process protections necessarily attached”); *Al Haramain Islamic Found. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 979–80 (9th Cir. 2012) (“By design, a [terrorist designation] completely shuts all domestic operations of an entity. All assets are frozen. No person or organization may conduct any business whatsoever with the entity”); *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 904 (N.D. Ohio 2009) (describing an asset freeze that indefinitely shut down an organization and jeopardized its corporate existence). However, the Supreme Court held contingent interests do not sustain Fifth Amendment claims. *Dames & Moore v. Regan*, 453 U.S. 654, 672–74 (1981) (concluding the attachment of Iranian property did not support a Fifth Amendment takings claim because regulations explicitly stated such attachments were void unless licensed and such licenses could be revoked). The court in *Ralls* distinguished contingent attachments from fully vested state property rights and explained the federal government cannot evade the Due Process Clause by simply announcing the possibility of future property deprivations. *Ralls*, 758 F.3d at 316. To hold otherwise would neuter due process rights.

15. *Mathews v. Eldridge*, 424 U.S. 319, 333, 348 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

16. See *infra* Part II.

from entities funding terrorist activities to Chinese-owned technology companies, thereby triggering distinct due process obligations.

TikTok provides a recent example. TikTok is a social media platform, on which users create and share short videos augmented with editing tools.¹⁷ TikTok deploys a proprietary algorithm to cater content to individual user preferences, making the app wildly popular and addictive.¹⁸ In June 2020, the app served 91,937,040 monthly active users in the United States.¹⁹ TikTok is incorporated and headquartered in the United States, but it is owned by ByteDance Ltd., a Chinese company.²⁰ In an August 6, 2020, executive order, President Donald Trump prospectively banned TikTok from the United States.²¹ Relying on IIEPA and citing data security concerns, the executive order prohibited “any transaction by any person, or with respect to any property, subject to the jurisdiction of the United States” with ByteDance or any of its subsidiaries.²² After a few weeks, TikTok sued the U.S. government, arguing the ban was unlawful and unconstitutional.²³ Among its many claims, TikTok asserted the government violated its procedural due process rights.²⁴ Particularly, the company complained that the transaction ban de facto shut down its application, depriving TikTok of its property.²⁵ Before the August 6 order, TikTok alleged, the government provided neither notice nor an opportunity to respond.²⁶ The Biden administration paused the litigation in February 2021 when it filed unopposed motions to hold ongoing appeals in abeyance as the administration pondered the future

17. Complaint for Injunctive and Declaratory Relief at 7, *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73 (D.D.C. Sept. 18, 2020) (No. 20-cv-2658), 2020 WL 5628983 [hereinafter *TikTok Complaint*]; *Our Mission*, TIKTOK, <https://www.tiktok.com/about?> [<https://perma.cc/NV2R-RH5F>].

18. Louise Matsakis, *TikTok Finally Explains How the ‘For You’ Algorithm Works*, WIRED (June 18, 2020, 1:00 PM), <https://www.wired.com/story/tiktok-finally-explains-for-you-algorithm-works> [<https://perma.cc/XA9B-VTG2>].

19. *TikTok Complaint*, *supra* note 17, at 8.

20. *Id.* at 6; Nicolas Chu, *What You Should Know About ByteDance, the Company Behind TikTok*, LINKEDIN (Oct. 5, 2020), <https://www.linkedin.com/pulse/what-you-should-know-bytedance-company-behind-tiktok-nicolas-chu> [<https://perma.cc/L9X2-6BB5>].

21. Exec. Order No. 13,942, 85 Fed. Reg. 48,637, 48,637–38 (Aug. 6, 2020).

22. *Id.*

23. *TikTok Complaint*, *supra* note 17, at 4–5.

24. *Id.* at 4.

25. *Id.* at 36.

26. *Id.*

of the prior president's restrictions.²⁷ In June 2021, President Joe Biden revoked President Trump's order and replaced it with a broader framework for reviewing foreign-owned applications for national security concerns.²⁸ This evolving controversy illustrates longstanding questions about the relationship between emergency powers and procedural rights in a new context—the digital economy.

This Note wades into these unexplored digital depths by applying existing due process jurisprudence—as developed in the contexts of counterterrorist financing and national security reviews of foreign investment—to the relatively untouched data security domain. This Note argues that procedural due process²⁹ protects many technology companies that collect personally identifiable information. In particular, due process requires the government to provide these companies with meaningful notice and an opportunity to respond *before* the president wields emergency powers that eliminate these companies' economic interests.³⁰ This notice must include at least the government's unclassified reasons for acting.³¹ These predeprivation procedural rights significantly safeguard affected companies by giving them time to respond, but due process will not prevent the emergency executive from running roughshod over the Constitution's system of checks and balances.³² To recalibrate this balance, Congress should amend IEEPA to include a sunset provision that would limit the duration of any national emergency until Congress affirmatively votes to extend it through a fast-track process.³³

Part I introduces IEEPA, its implementation, and its record in the courts. Turning to due process, Part II assesses what and when process is due in the new context of data security, guided by the existing case

27. Joint Status Report at 1–2, *TikTok Inc. v. Biden*, No. 20-cv-2658 (D.D.C. Apr. 12, 2021).

28. Paul Ziobro, *Biden Seeks Review of Foreign-Owned Apps Beyond TikTok, WeChat. Here's What You Need to Know.*, WALL ST. J. (June 10, 2021, 4:19 PM), <https://www.wsj.com/articles/biden-seeks-review-of-foreign-owned-apps-beyond-tiktok-wechat-heres-what-you-need-to-know-11623356392> [<https://perma.cc/C2ZZ-6ZYT>]. Instead of singling out TikTok, President Biden's executive order tasked executive officials with assessing threats arising from selling, transferring, or accessing U.S. individuals' "sensitive data" or from accessing "large data repositories by persons owned or controlled by, or subject to the jurisdiction or direction of, a foreign adversary." Exec. Order No. 14,034, 86 Fed. Reg. 31,423, 31,424 (June 9, 2021).

29. To clarify, this Note focuses on procedural due process rather than substantive due process. Throughout this Note, "due process" refers to procedural due process.

30. *See infra* Part II.C.

31. *See infra* Part II.C.

32. *See infra* Part III.B.

33. *See infra* Part IV.

law in the counterterrorist financing and foreign investment settings. Part III acknowledges both threshold and remedial limitations of these procedural rights, but it concludes that these rights meaningfully protect technology companies that hold U.S. individuals' data. Recognizing that procedural rights will not sufficiently maintain constitutional structure, Part IV endorses an existing legislative proposal that would curb executive emergency power by adding a sunset provision to IEEPA.

Political checks must meet procedural safeguards to circumscribe the president's emergency economic powers and protect individuals and enterprises from potential executive overreach. To be clear, this Note does not purport to judge the tactical or strategic wisdom of targeting one entity or another. Instead, it argues that when the executive branch acts to isolate certain companies from the U.S. economy, it must honor these enterprises' procedural rights.

I. FRAMEWORK OF IEEPA

IEEPA delegates power to the president to control economic transactions during emergencies. To invoke IEEPA, the president must find the existence of an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."³⁴ Next, the president must formally declare a national emergency in accordance with the National Emergencies Act ("NEA").³⁵ Once invoked, IEEPA authorizes the president to "nullify, void, prevent or prohibit" any transaction involving foreign interests or property subject to U.S. jurisdiction.³⁶ Though Congress intended

34. 50 U.S.C. § 1701(a).

35. *Id.* § 1701(b); see H.R. REP. NO. 95-459, at 2 (1977) (describing presidential authority conferred by IEEPA as "subject to various procedural limitations, including those of the National Emergencies Act").

36. 50 U.S.C. § 1702(a)(1)(B). In the wake of the attacks of September 11, 2001, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act"). USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272. The USA PATRIOT Act expanded IEEPA. First, it permits the president to act "during the pendency of an investigation." 50 U.S.C. § 1702(a)(1)(B). Second, it authorizes courts to review classified information *ex parte* and *in camera*, thereby allowing the government to present classified evidence to the court without disclosure to the targeted party or its attorney. *Id.* § 1702(c); Nicole Nice-Petersen, Note, *Justice for the "Designated": The Process That Is Due to Alleged U.S. Financiers of Terrorism*, 93 GEO. L.J. 1387, 1390 (2005). Thus, the USA PATRIOT Act amendments authorize the executive to freeze an entity's assets before

IEEPA to rein in presidential emergency powers, the statute's limits have withered. Over time, national emergencies have increased in scope, frequency, and duration.³⁷ Meanwhile, the courts have deferred to the president.³⁸ This Part tracks the development of IEEPA: its enactment by Congress, its subsequent execution, and its interpretation by the federal judiciary.

A. *Enacting IEEPA*

Congress enacted IEEPA in the second half of the twentieth century to curb presidential emergency powers, but its limits have decayed. IEEPA's predecessor statute, the Trading with the Enemy Act ("TWEA"),³⁹ was enacted during World War I and enabled the president to regulate U.S. transactions with foreign nations during congressionally declared wars.⁴⁰ As the country battled the Great Depression, Congress expanded TWEA to reach domestic transactions and applied it to national emergencies in peacetime.⁴¹ Presidents flexed their newfound power, blurring the purported line between economics and national security.⁴² One congressman remarked TWEA all but conferred "dictatorial powers that [the president] could have used

concluding the target transgressed and permit the government to rely on "secret evidence" never disclosed to the party against which it is used. Nice-Petersen, *supra*.

37. CASEY ET AL., *supra* note 4, at 17–23; see David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2588 (2003) ("[E]mergency powers have a way of surviving long after the emergency has passed, and emergencies themselves may last decades.").

38. See *infra* Part I.C.

39. Trading with the Enemy Act of 1917, Pub. L. No. 65-91, 40 Stat. 411 (codified as amended at 50 U.S.C. §§ 4301–4341).

40. *Revision of Trading with the Enemy Act: Markup Before the H. Comm. on Int'l Relations*, 95th Cong. 8 (1977) [hereinafter *TWEA Markup*] (statement of Hon. Jonathan B. Bingham, Chairman, Subcomm. on Int'l Econ. Pol'y and Trade).

41. *Id.* (discussing the expansion of TWEA and describing it as a "grab-bag of authorities which Presidents have been able to use to do virtually anything for which they could find no specific authority").

42. For example, President Franklin Roosevelt utilized TWEA to institute a banking holiday. Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT'L LAW. 715, 743 (1992). Under TWEA, President Harry Truman seized property to fuel the Korean war effort. See *id.* (describing Truman's seizing of property and commodities during the Korean war). President Richard Nixon wielded TWEA to regulate U.S. monetary reserves and to maintain trade balances, finding that "our trade and international competitive position is seriously threatened and, as a result, our continued ability to assure our security could be impaired." *Id.* (quoting Proclamation No. 4074, 85 Stat. 926 (1971)).

without any restraint by the Congress.”⁴³ Eventually, the Vietnam War and Watergate galvanized Congress to act.⁴⁴ First, in 1976, Congress enacted NEA,⁴⁵ which prescribed new limits and procedures for declaring national emergencies.⁴⁶ Next, Congress limited TWEA to apply only in wartime.⁴⁷ Finally, Congress passed IEEPA in 1977 to govern peacetime emergency powers.⁴⁸ IEEPA primarily imposed two limits. Both have weakened.

First, IEEPA, as initially enacted, empowered Congress to terminate any declared national emergency—the precondition of IEEPA action—by passing a concurrent resolution.⁴⁹ This provision lost its bite, however, when the Supreme Court invalidated such legislative vetoes in *INS v. Chadha*.⁵⁰ Consequently, Congress may only terminate a national emergency by joint, not concurrent, resolution.⁵¹

43. *TWEA Markup*, *supra* note 40, at 5 (statement of Hon. Jonathan B. Bingham).

44. *CASEY ET AL.*, *supra* note 4, at 6; Koh & Yoo, *supra* note 42, at 743 (“In the wake of Watergate and Vietnam Congress moved in the mid-1970s to control executive abuse of the TWEA.”).

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

46. *See* *CASEY ET AL.*, *supra* note 4, at 8 (describing key NEA provisions).

47. *See* Amendments to the Trading with the Enemy Act, Pub. L. No. 95-223, tit. I, 91 Stat. 1625, 1625 (1977) (“Section 5(b)(1) of the Trading With the Enemy Act is amended by striking out ‘or during any other period of national emergency declared by the President’ in the text preceding subparagraph (A).”); H.R. REP. NO. 95-459, at 2 (1977).

48. International Emergency Economic Powers Act, Pub. L. No. 95-223, tit. II, 91 Stat. 1625, 1626 (1977) (codified at 50 U.S.C. §§ 1701–1706); *CASEY ET AL.*, *supra* note 4, at 9.

49. *CASEY ET AL.*, *supra* note 4, at 46.

50. *See* *INS v. Chadha*, 462 U.S. 919, 958–59, 958 n.23 (1983) (invalidating legislative provisions that do not follow the Article I process, including presentment to the president). Legislative vetoes are congressional oversight mechanisms—such as one-house or two-house vetoes—that enable Congress to respond to executive actions without running the gauntlet of the full legislative process, which requires Congress to submit the potential legislation to the president for their signature or veto. LOUIS FISHER, CONG. RSCH. SERV., RS22132, LEGISLATIVE VETOES AFTER *CHADHA* 1 (2005). In *Chadha*, the Court held Congress must follow the legislative process, subject to both bicameralism and presentment requirements, when Congress acts with “the purpose and effect of altering the legal rights, duties, and relations of persons, including . . . Executive Branch officials.” *Chadha*, 462 U.S. at 952. Both joint and concurrent resolutions require approval from both houses, satisfying the bicameralism requirement. *Types of Legislation*, U.S. SENATE, https://www.senate.gov/legislative/common/briefing/leg_laws_acts.htm [<https://perma.cc/6JGC-X58P>]. Unlike concurrent resolutions, however, joint resolutions require the president’s signature to become law. *Id.* Therefore, joint resolutions are not unconstitutional legislative vetoes.

51. BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME 204–05 (1988); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1080 (2004).

Because the president can veto joint resolutions, Congress now must cobble together a two-thirds majority in both houses to terminate a national emergency in the face of presidential resistance.⁵² In divisive times, this task is herculean at best and impossible in practice.

Second, together with NEA, IEEPA contemplates consulting and reporting requirements. IEEPA requires the president to consult with Congress before acting under IEEPA “in every possible instance.”⁵³ After acting, the president must periodically report to Congress.⁵⁴ However, “the statute’s weak consultation and reporting procedures have been largely diluted or ignored.”⁵⁵ Meanwhile, NEA requires Congress to meet every six months to consider whether to terminate any existing emergencies.⁵⁶ NEA further requires the president to renew any declared national emergencies each year to prevent them from lapsing.⁵⁷ But the statute does not limit renewals. Presidents have nominally complied with procedural and reporting requirements by submitting pro forma reports every six months, but Congress has never attempted to terminate a national emergency declared pursuant to NEA to authorize action under IEEPA.⁵⁸ When push comes to shove, Congress cannot muster the political will to check the president.⁵⁹ As meaningful checks on emergency executive power have disintegrated,⁶⁰ the president has obtained through IEEPA free rein to prohibit transactions and freeze assets.

52. CARTER, *supra* note 51, at 205; Ackerman, *supra* note 51, at 1080.

53. 50 U.S.C. § 1703(a).

54. *Id.* § 1703(b)–(c).

55. Ackerman, *supra* note 51, at 1079; *see also* Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1159, 1234–35 (1987) (“In practice, however, [consulting and reporting requirements] create few roadblocks to presidential action.”).

56. 50 U.S.C. § 1622(b).

57. *Id.* § 1622(d).

58. CASEY ET AL., *supra* note 4, at 44; *see also* Koh & Yoo, *supra* note 42, at 745 (“Although the executive has perfunctorily reported on the status of emergencies, Congress has neither reviewed nor considered terminating them.”).

59. *See* Koh & Yoo, *supra* note 42, at 744 (“Presidents have regularly sidestepped congressional restrictions, gaining access to IEEPA’s broad grants of authority with almost no congressional opposition.”); *see also supra* notes 49–52 and accompanying text.

60. *See* Koh & Yoo, *supra* note 42, at 746–47; Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1258 (1988) (discussing “executive initiative, congressional acquiescence, and judicial tolerance” in foreign affairs).

B. Executing IEEPA

As threats proliferate, the president's emergency powers propagate. IEEPA's drafters hoped to circumscribe these powers, saving them for "rare and brief" emergencies.⁶¹ Over IEEPA's lifespan, however, presidentially declared national emergencies have increased in scope, frequency, and duration.⁶² As of July 2020, presidents had declared sixty-seven emergencies under NEA.⁶³ Fifty-nine of them invoked IEEPA, and thirty-three of these remained in effect as of that date.⁶⁴ On average, emergencies have retained their "declared" status for about a decade.⁶⁵ Some emergencies have remained "declared" considerably longer. For instance, the first national emergency invoking IEEPA, declared by President Jimmy Carter during the 1979 Iranian hostage crisis, remains in effect as of this writing.⁶⁶

Ever since, the United States has come to rely heavily on economic emergency powers and IEEPA in order to further various policy objectives from combatting nuclear proliferation to countering terrorism, cybercrime to election interference.⁶⁷ Initially, many executive orders under IEEPA were limited to a particular country or government, but presidents have pivoted from targeting state actors to

61. See H.R. REP. NO. 95-459, at 10–11 (1977) (“[E]mergencies are by their nature rare and brief, and are not to be equated with normal, ongoing problems. . . . A state of national emergency should not be a normal state of affairs.”).

62. See CASEY ET AL., *supra* note 4, at 17–23 (discussing broadening emergency declarations); Cole, *supra* note 37, at 2588 (“[E]mergency powers have a way of surviving long after the emergency has passed, and emergencies themselves may last decades.”); see also Ackerman, *supra* note 51, at 1030 (“Unless careful precautions are taken, emergency measures have a habit of continuing well beyond their time of necessity. Governments should not be permitted to run wild even during the emergency . . .”).

63. CASEY ET AL., *supra* note 4, at 17–18.

64. *Id.*

65. *Id.* at 17.

66. *Id.* at 18–19.

67. See Kathy Gilsinan, *A Boom Time for U.S. Sanctions*, ATLANTIC (May 3, 2019), <https://www.theatlantic.com/politics/archive/2019/05/why-united-states-uses-sanctions-so-much/588625> [<https://perma.cc/3ZU3-RXW9>] (describing increasing sanctions use by the United States). See generally JUAN ZARATE, *TREASURY'S WAR: THE UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE* (2013) (discussing the United States' development and use of economic strategies to combat its adversaries). The current U.S. sanctions regime primarily rests on IEEPA. Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1094 (2020); Jonathan Masters, *What Are Economic Sanctions?*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/background/what-are-economic-sanctions/> [<https://perma.cc/3YQD-JO96>] (last updated Aug. 12, 2019).

declaring broader emergencies stemming from transnational threats.⁶⁸ In recent years, President Barack Obama declared an emergency in view of “[p]ersons [e]ngaging in [s]ignificant [m]alicious [c]yber-[e]nabled [a]ctivities.”⁶⁹ He then blocked their “property” subject to U.S. jurisdiction by prohibiting it from being “transferred, paid, exported, withdrawn, or otherwise dealt in.”⁷⁰ President Trump declared an emergency arising from “foreign adversaries . . . creating and exploiting vulnerabilities in information and communications technology and services.”⁷¹ He then prohibited the “acquisition, importation, transfer, installation, dealing in, or use” of certain information and communications technology or services flagged by the Secretary of Commerce.⁷² As presidents continue to wield IEEPA, wide-ranging emergencies have come to pervade U.S. politics “unchecked, unreviewed, and perfunctorily reported.”⁷³ This expansion of executive power has met little resistance from federal courts.

C. *Interpreting IEEPA*

The judiciary has deferred to the president and expansively interpreted IEEPA.⁷⁴ Courts often yield to the executive branch on

68. Chachko, *supra* note 67, at 1094–95; *see also* Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 13–14 (2005) (noting President Bill Clinton “broke new ground under IEEPA by ordering sanctions targeting not a state and its citizens but, instead, terrorist organizations and their members”). As Professor James Savage explains, IEEPA was originally “used against nations and national corporations,” but “[n]ow our national interests have necessitated that the IEEPA evolve further, so that it can be used to block transactions, freeze and seize assets of terrorists who are basically stateless and can move with relative freedom around the globe.” James J. Savage, *Executive Use of the International Emergency Economic Powers Act – Evolution Through the Terrorist and Taliban Sanctions*, 10 CURRENTS 28, 37 (2001).

69. Exec. Order No. 13,694, 3 C.F.R. 297 (2016) (emphasis omitted).

70. *Id.*

71. Exec. Order No. 13,873, 3 C.F.R. 317, 317 (2020).

72. *Id.*

73. Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1416 (1989).

74. *See, e.g.*, *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 734 (D.C. Cir. 2007) (“[O]ur review—in an area at the intersection of national security, foreign policy, and administrative law—is extremely deferential.”); *Kadi v. Geithner*, 42 F. Supp. 3d 1, 10 (D.D.C. 2012) (“Courts are particularly mindful that their review is highly deferential when matters of foreign policy and national security are concerned.” (citing *Islamic Am. Relief Agency*, 477 F.3d at 734)); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 84 (D.D.C. 2002) (“Blocking orders are an important component of U.S. foreign policy, and the President’s choice

matters of foreign affairs and national security, which require the executive's expertise, secrecy, and political accountability.⁷⁵ Executive emergency power has been a creature of statute since *Youngstown Sheet & Tube Co. v. Sawyer*.⁷⁶ Justice Robert H. Jackson, in his iconic concurrence,⁷⁷ distinguished among three categories of presidential power. In the first category, the president acts with express or implied congressional authorization; when backed by a statute, presidential action is "supported by the strongest of presumptions and the widest latitude of judicial interpretation."⁷⁸ In contrast, when the president acts contrary to the will of Congress, "his power is at its lowest ebb."⁷⁹ In between lies Justice Jackson's "zone of twilight," where Congress has neither authorized nor prohibited presidential action.⁸⁰ Judicial deference fluctuates based on the interplay of the political branches, so broad statutes make for broad executive power.

As the Court made clear in *Dames & Moore v. Regan*,⁸¹ IEEPA is a broad statute. In *Regan*, President Carter, relying on IEEPA, nullified judicial attachments and suspended private claims against Iran as part of an accord to end the Iranian hostage crisis.⁸² The Court held IEEPA implicitly authorized the president's measures, noting that "Congress cannot anticipate and legislate with regard to every possible

of this tool to combat terrorism is entitled to particular deference."), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003).

75. See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) ("The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch." (quoting S. REP. NO. 24-406, at 24 (1836))); see also Chachko, *supra* note 67, at 1136 (summarizing the "conventional wisdom" that courts lack the institutional capacity to decide matters of national security).

76. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

77. Jackson's concurrence has, over time, eclipsed the majority's opinion. See, e.g., Louis Henkin, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 94 (2d ed. 1996) (labeling Jackson's opinion "a starting point for constitutional discussion of concurrent powers"); Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1257 (2018) (characterizing Jackson's framework as "canonical"); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2314 (2006) (describing Jackson's concurrence as "the most celebrated judicial opinion of the separation-of-powers canon").

78. *Youngstown*, 343 U.S. at 636–37 (Jackson, J., concurring).

79. *Id.* at 637.

80. *Id.*

81. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

82. *Id.* at 660.

action the President may find [necessary].”⁸³ According to the Court, Congress intended to broaden presidential emergency powers when it passed IEEPA.⁸⁴ As previously discussed, the statute’s legislative history muddies this conclusion.⁸⁵ Nevertheless, structural challenges in IEEPA cases typically fail due to judicial deference.⁸⁶

In particular, the political question doctrine has allowed judges to avoid hearing these cases. Theoretically, the political question doctrine preserves the separation of powers by excluding policy-driven controversies from judicial review.⁸⁷ The doctrine bars courts from hearing claims that the Constitution assigns to a different branch or that lack “judicially discoverable and manageable standards.”⁸⁸ National security cases raise quintessential political questions,⁸⁹ and courts will not second guess the president’s decision to declare or continue a national emergency.⁹⁰ However, some cases touching upon national security or foreign relations may not lie “beyond judicial cognizance.”⁹¹

The political question pumpkin transforms into a justiciable carriage once the president wields emergency powers to the detriment of individual rights.⁹² As Part II discusses, courts have repeatedly

83. *Id.* at 678.

84. *See id.* at 678–79 (basing its divination of Congress’s intent on Congress’s practical constraints and “a history of congressional acquiescence in conduct of the sort engaged in by the President”).

85. *See supra* Part I.A.

86. *See* CarrieLyn Donigan Guymon, *The Best Tool for the Job: The U.S. Campaign To Freeze Assets of Proliferators and Their Supporters*, 49 VA. J. INT’L L. 849, 861 (2009) (“U.S. courts typically decline to question the executive’s invocation of IEEPA”); Koh, *supra* note 60, at 1305–17 (discussing judicial deference to the executive in matters of foreign affairs, through both affirmative rulings on the merits and refusal to hear a challenge on justiciability grounds).

87. *See* *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 840 (D.C. Cir. 2010) (en banc) (describing the political question doctrine as an outgrowth of the separation of powers).

88. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

89. *See* *Haig v. Agee*, 453 U.S. 280, 292 (1981) (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”).

90. *See* *United States v. Spawr Optical Rsch., Inc.*, 685 F.2d 1076, 1080 (9th Cir. 1982) (characterizing declaration and continuation of national emergencies as “essentially political questions” (quoting *United States v. Yoshida Int’l, Inc.*, 526 F.2d 560, 579 (C.C.P.A. 1975))); *Beacon Prods. Corp. v. Reagan*, 633 F. Supp. 1191, 1194–95 (D. Mass. 1986) (holding whether an emergency was properly declared is a political question), *aff’d*, 814 F.2d 1 (1st Cir. 1987).

91. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 313 (D.C. Cir. 2014) (quoting *Baker*, 369 U.S. at 211).

92. *See* Chachko, *supra* note 67, at 1136 (“Once individuals are directly affected, the issues before courts transform from abstract policy problems . . . to narrowly tailored questions of

adjudicated procedural due process disputes arising from executive action pursuant to IEEPA or other transaction-blocking authorities. For instance, in the foreign investment context, the D.C. Circuit has explicitly held a due process challenge to a presidential divestment order does not pose a political question.⁹³ The court explained that a due process claim neither challenges the president's determination as to what constitutes a national threat nor attacks the president's selected response.⁹⁴ Instead, a due process challenge fits squarely within the judicial role: interpreting the Constitution.⁹⁵ The judiciary may intercede when the political branches threaten individual constitutional rights, such as the procedural due process rights to meaningful notice and the opportunity to respond.⁹⁶ But, for pure structural threats, the judiciary has been reluctant to restrain presidential emergency powers.

In sum, separation of powers jurisprudence does little to rein in the emergency executive. As interpreted, IEEPA broadly empowers the president, so challenges to presidential authority will continue to fail as Congress and the courts pass the buck back and forth. Cast under IEEPA's long shadow, presidential transaction bans are unlikely *ultra vires*, but the president still cannot wield emergency powers to subvert constitutional rights. External limits, such as procedural due process, provide more meaningful constraints on executive power and sound bases for judicial review.

administrative law and procedural due process—the type of questions that courts decide regularly.”); Alexander F. Cohen & Joseph Ravitch, Comment, *Economic Sanctions, Domestic Deprivations, and the Just Compensation Clause: Enforcing the Fifth Amendment in the Foreign Affairs Context*, 13 YALE J. INT'L L. 146, 148 (1988) (“To succeed against economic sanctions in federal court, a litigant must rely on the Bill of Rights, demonstrating that some aspect of the program violates a right guaranteed by the Constitution.”).

93. See *Ralls*, 758 F.3d at 314 (“We think it clear, then, that *Ralls*'s due process claim does not encroach on the prerogative of the political branches, does not require the exercise of non-judicial discretion and is susceptible to judicially manageable standards.”).

94. *Id.*

95. *Landon v. Plasencia*, 459 U.S. 21, 34–35 (1982) (clarifying courts may assess whether procedures “meet the essential standard of fairness under the Due Process Clause,” even regarding issues “largely within the control of the Executive and the Legislature”). Similarly, the Supreme Court has held the political question doctrine does not bar a takings claim ensuing from an economic sanctions program. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

96. See *Mathews v. Eldridge*, 424 U.S. 319, 333, 348 (1976) (confirming that due process requires the government to offer notice and the opportunity to respond “at a meaningful time and in a meaningful manner” (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))).

II. DICTATES OF DUE PROCESS

At its core, due process entails two essential components: notice and the opportunity to respond “at a meaningful time and in a meaningful manner.”⁹⁷ To respond meaningfully, the aggrieved party must have access to the factual and legal bases for the government’s action.⁹⁸ But limits exist. When acting pursuant to IEEPA, the executive branch need not provide procedures equivalent to a full-blown judicial trial.⁹⁹ The Ninth Circuit has clarified: “[T]he Constitution certainly does not require that the government take actions that would endanger national security But the Constitution does require that the government take *reasonable measures* to enforce basic fairness”¹⁰⁰ Reasonableness is situational.¹⁰¹

In *Mathews v. Eldridge*,¹⁰² the Supreme Court laid out a flexible balancing test to determine the process due in a given context.¹⁰³ Courts must consider: (1) the private interest affected by government action; (2) the risk of “erroneous deprivation” of this interest through the procedures used and the probable value of additional or substitute procedural safeguards; and (3) the government’s interest, including the extent to which additional process would burden the government.¹⁰⁴ The weight attributed to these factors depends on context.

As for timing, due process generally requires the government to provide “notice and a meaningful opportunity to be heard *before*

97. *Id.* at 333 (quoting *Armstrong*, 380 U.S. at 552).

98. *Ralls*, 758 F.3d at 318 (“Both the Supreme Court and this Court have recognized that the right to know the factual basis for the action and the opportunity to rebut the evidence supporting that action are essential components of due process.” (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959))).

99. For instance, the D.C. Circuit determined that a designated charity had no due process right to cross-examine witnesses. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003).

100. *Al Haramain Islamic Found. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 980 (9th Cir. 2012) (emphasis added).

101. *See, e.g., Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972))). Due process requires notice “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

102. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

103. *Id.* at 334–35.

104. *Id.*

depriving a person of certain property interests.”¹⁰⁵ In “extraordinary” situations, however, postdeprivation process suffices.¹⁰⁶ Under the Supreme Court’s test in *Calero-Toledo v. Pearson Yacht Leasing Co.*,¹⁰⁷ to demonstrate an “extraordinary” situation, the government must show: (1) “an important governmental interest” required the deprivation; (2) there was “a special need for very prompt action”; and (3) a government official initiated the deprivation acting “under the standards of a narrowly drawn statute.”¹⁰⁸ As with the extent of due process, timing depends on the situation’s particular circumstances.

Because courts have developed a situational due process jurisprudence, the extent and timing of the process due depend on the nature of the threat and the executive response. As such, due process requires distinct procedures for entities that fund terrorism and businesses that gather U.S. consumers’ data even though both frameworks predominantly rest on IEEPA. Courts have largely developed due process requirements in the former context, but they have not yet determined what process is due when the president employs IEEPA to blacklist entities posing information-based national security threats. Instead, the due process rights of such technology companies may mimic those protecting foreign investors subject to presidential divestment orders, which arise under different legal authority but raise similar policy choices. Accordingly, this Part looks to the existing cases under IEEPA’s terrorist designation scheme and those involving foreign investment, analogizing these cases to the data security context.

In assessing the scope of procedural due process in these varying contexts, this Part analyzes two interlinking questions: First, what processes are required by the Fifth Amendment? Second, must the government make these processes available to the private target before or after the property deprivation? As to the former question, the

105. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 76 (D.D.C. 2002) (emphasis added) (citing *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 62 (1993)), *aff’d*, 333 F.3d 156 (D.C. Cir. 2003).

106. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678–80 (1974).

107. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

108. *Holy Land*, 219 F. Supp. at 76 (citing *Calero-Toledo*, 416 U.S. at 678). In full, the third requirement mandates “the party initiating the deprivation was a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.” *Id.* This language focuses on the decisionmaker rather than the substantive decision. After all, courts hesitate to second guess the policy merits of executive officials’ national security decisions. *See supra* Part I.C.

government must at least provide an adequate statement of reasons for its action based on the unclassified record, and it must offer the targeted entity an opportunity to respond. As to the latter, technology companies blacklisted for data security reasons are entitled to *predeprivation* process.

A. *Counterterrorist Financing*

The U.S. counterterrorist financing regime relies largely on IEEPA.¹⁰⁹ On September 23, 2001, less than two weeks after the September 11 terrorist attacks, President George W. Bush declared a national emergency with respect to global terrorism, invoking IEEPA, and authorized the Treasury Department to block “all property and interests in property” of entities or individuals designated as Specially Designated Global Terrorists (“SDGTs”).¹¹⁰ The emergency remains in effect,¹¹¹ and, by one estimate, the Treasury’s Office of Foreign Assets Control (“OFAC”) had designated 6,763 such persons as of November 2018.¹¹² As discussed in this Section, some designated groups and individuals have challenged their designations, providing rich case law on the extent and timing of procedural due process rights when the executive branch wields IEEPA.

1. “*What*”: *Extent of Process*. When the executive branch relies on IEEPA to blacklist terrorist organizations, due process requires the government to provide at least the unclassified factual basis for its action. Courts have sought to balance procedural rights and national security concerns. In *Al Haramain Islamic Foundation v. U.S. Department of Treasury*,¹¹³ the scales tipped in favor of procedural rights.¹¹⁴

109. Chachko, *supra* note 67, at 1094.

110. Exec. Order No. 13,224, 3 C.F.R. 786, 787 (2002); Laura K. Donohue, *Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime*, 43 WAKE FOREST L. REV. 643, 650–51 (2008).

111. CASEY ET AL., *supra* note 4, at 49.

112. Chachko, *supra* note 67, at 1095.

113. *Al Haramain Islamic Found. v. U.S. Dep’t of Treasury*, 686 F.3d 965 (9th Cir. 2012).

114. *See id.* at 988 (“We hold that OFAC violated [Al Haramain’s] due process rights by failing to provide an adequate statement of reasons for its investigation.”); *see also* KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner, 647 F. Supp. 2d 857, 864–67, 904–06 (N.D. Ohio 2009) (holding OFAC failed to provide adequate notice to a nonprofit after OFAC neglected to provide a copy of the administrative record to the nonprofit’s attorney).

In *Al Haramain*, a Ninth Circuit panel concluded procedural due process requires OFAC to state adequately the reasons for its determinations.¹¹⁵ OFAC provisionally blocked Al Haramain's assets in February 2004 without explanation.¹¹⁶ When OFAC designated the foundation as an SDGT seven months later, OFAC publicly acknowledged only one of its three reasons for designating Al Haramain.¹¹⁷ Beginning in early 2005, the foundation requested administrative reconsideration, denying any connection to terrorism, and "repeatedly sought both an explanation for the designation and a final determination of its request for administrative reconsideration."¹¹⁸ By August 2007, the organization had still received no response from OFAC, so it sued.¹¹⁹

Applying *Mathews*, the panel held OFAC failed to provide adequate notice.¹²⁰ Under the first factor—the private interest affected by government action—the foundation's interest was substantial because OFAC prevented the foundation from using "any funds whatsoever, for any purpose," effectively shuttering its business.¹²¹ In other words, "designation is not a mere inconvenience or burden on certain property interests; designation indefinitely renders a domestic organization financially defunct."¹²² The second factor—risk of erroneous deprivation—also proved significant because the foundation could only guess at OFAC's reasons for acting.¹²³ The third *Mathews* factor—the government's interest and burden of providing additional procedural safeguards—also favored the foundation because OFAC

115. *Al Haramain*, 686 F.3d at 988.

116. *Id.* at 973, 985.

117. *Id.* at 973–74, 986. In September 2004, OFAC issued a press release stating that it had designated the foundation. *Id.* at 973–74. The court rejected OFAC's argument that this press release amounted to sufficient notice. *Id.* at 986. According to the court, "the press release states with some clarity that [the foundation] supported Chechen terrorists," but it did not apprise the foundation of OFAC's concern regarding two individuals' control of the foundation. *Id.* The court concluded, "OFAC provided notice concerning only one of three reasons for its investigation and designation, and that notice occurred seven months after it froze [the foundation's] assets. Such a significantly untimely and incomplete notice does not meet the requirements of due process." *Id.*

118. *Id.* at 974.

119. *Id.*

120. *Id.* at 986 ("Such a significantly untimely and incomplete notice does not meet the requirements of due process.").

121. *Id.* at 985–86.

122. *Id.* at 980.

123. *Id.* at 986–87 ("[T]he opportunity to guess at the factual and legal bases for a government action does not substitute for actual notice of the government's intentions.").

failed to explain to the court why its scant process promoted national security.¹²⁴

Al Haramain also addressed the question of secret evidence—that is, evidence not disclosed to the blacklisted entity.¹²⁵ The Due Process Clause typically does not require the government to divulge classified information.¹²⁶ The government possesses a legitimate interest in safeguarding sensitive information, especially when disclosure might compromise national security, such as by unveiling intelligence sources or methods.¹²⁷ As the Seventh Circuit stated, “The Constitution would indeed be a suicide pact if the only way to curtail enemies’ access to assets were to reveal information that might cost lives.”¹²⁸ Nevertheless, the government must reasonably try to mitigate secret evidence’s unfairness when the potential value to the designated entity outweighs the burden of mitigation.¹²⁹ Failure to disclose information,

124. *Id.* at 986.

125. For a discussion of “secret evidence” and the shortcomings of approaches towards mitigating its unfairness to parties kept in the dark, see generally David Cole & Stephen I. Vladeck, *Navigating the Shoals of Secrecy: A Comparative Analysis of the Use of Secret Evidence and ‘Cleared Counsel’ in the United States, the United Kingdom, and Canada*, in REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT 161 (Liora Lazarus, Christopher McCrudden & Nigel Bowles eds., 2014).

126. See *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (noting due process demands disclosure of “only the unclassified portions of the administrative record” (quoting *People’s Mojahedin Org. of Iran v. Dep’t of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003))); *Kadi v. Geithner*, 42 F. Supp. 3d 1, 29 (D.D.C. 2012) (noting there is “no automatic right to access classified evidence”).

127. Nice-Petersen, *supra* note 36, at 1410.

128. *Glob. Relief Found. v. O’Neill*, 315 F.3d 748, 754 (7th Cir. 2002) (citation omitted).

129. *Al Haramain*, 686 F.3d at 982–84. Mitigation procedures must “address the tension between fundamental fairness and secrecy.” Cole & Vladeck, *supra* note 125, at 162. Courts have balanced these concerns through various approaches. For instance, the D.C. Circuit has suggested that, in certain limited circumstances, the government must provide unclassified summaries of classified evidence. See *Fares v. Smith*, 901 F.3d 315, 324 (D.C. Cir. 2018) (countenancing the use of unclassified summaries when it would not compromise intelligence sources or national security). Sometimes, however, the government cannot safely declassify or summarize sensitive information otherwise required to provide constitutionally adequate notice.

Alternatively, another approach permits lawyers, but not their affected clients, to see the classified evidence. Cole & Vladeck, *supra* note 125, at 162. Under this approach, the lawyer must first obtain a security clearance and is prohibited from revealing the classified evidence to their client. *Id.* This elaborate strategy was embraced by a federal district judge in *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, 710 F. Supp. 2d 637, 660 (N.D. Ohio 2010) (proposing a multistep remedial procedure to determine the extent to which secret evidence could and should be declassified, summarized, or presented to counsel with security clearance). While creative, the security-cleared-counsel approach will not suffice. Sharing the classified information with a lawyer with a security clearance does not level the playing field because the

classified or otherwise, raises the risk of erroneous and unjust deprivation because it undermines the adversarial process.¹³⁰ So the use of secret evidence remains highly suspect under the *Mathews* balancing test.¹³¹ According to the Ninth Circuit, “Only the most extraordinary circumstances could support [such] one-sided process.”¹³² But such extraordinary circumstances often permeate the national security space, so the government need not make the information available if it demonstrates why declassification, or some other mitigation strategy, would threaten national security.¹³³

Altogether, in the counterterrorist financing context, the government must at a minimum provide the unclassified record, but it must also reasonably try to mitigate any reliance on classified evidence.

2. “*When*”: *Timing of Process*. As the Ninth Circuit observed in *Al Haramain*, many courts have permitted postdeprivation process when the executive branch wields IEEPA to block terrorist financing.¹³⁴ In counterterrorist financing cases, the government must

lawyer cannot discuss the information with their client. See Cole & Vladeck, *supra* note 125, at 163–66 (explaining the limits imposed on cleared counsel in communicating with their Guantanamo Bay detainees). Instead of fighting blind, the lawyer must now fight one-handed.

130. See *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995) (“[T]he very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error.”); Nice-Petersen, *supra* note 36, at 1407 (“When a blocked entity has been told little or nothing about the kind of evidence the government has accumulated against it, or what this evidence is specifically alleging, mounting a defense is akin to shooting in the dark.”).

131. Applying *Mathews*, a Ninth Circuit panel declared the “use of undisclosed information in adjudications should be presumptively unconstitutional” and upheld a permanent injunction barring the use of undisclosed classified information in an alien legalization proceeding. *Am.-Arab Anti-Discrimination Comm.*, 70 F.3d at 1070–71. The panel further provided,

We cannot in good conscience find that the President’s broad generalization regarding a distant foreign policy concern and a related national security threat suffices to support a process that is inherently unfair because of the enormous risk of error and the substantial personal interests involved. “[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.”

Id. at 1070 (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)). At least in the immigration context, courts may scrutinize the government’s reasons for keeping others in the dark.

132. *Id.*

133. See *Al Haramain*, 686 F.3d at 982–83 (recognizing disclosure will not be possible when it would implicate national security).

134. See *id.* at 985 (citing *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 163–64 (D.C. Cir. 2003)) (allowing the executive branch to forego predeprivation process when wielding IEEPA to block terrorist financing); see also *Glob. Relief Found. v. O’Neill*, 315 F.3d 748, 754 (7th Cir. 2002) (determining preseizure hearing was not constitutionally required as it

act swiftly and decisively to prevent the organization from spiriting assets beyond the reach of U.S. authorities.¹³⁵ The Seventh Circuit has clarified that “[a]lthough pre-seizure hearing is the constitutional norm, postponement is acceptable in emergencies.”¹³⁶ The *Calero-Toledo* test helps identify such “extraordinary situations.”¹³⁷

The U.S. District Court for the District of Columbia applied this test in *Holy Land Foundation for Relief & Development v. Ashcroft*.¹³⁸ There, OFAC designated a foundation as a terrorist organization and blocked its assets without providing notice or a hearing beforehand.¹³⁹ The court determined the first *Calero-Toledo* requirement—“an important governmental interest”—was satisfied by the government’s interest in curtailing terrorist financing.¹⁴⁰ As the court observed, OFAC designated the foundation less than three months after the September 11, 2001, attacks and President Bush’s ensuing executive order, which declared a national emergency to combat terrorist financing.¹⁴¹ The second requirement—“a special need for very prompt action”—also had been satisfied: “Money is fungible, and any delay or pre-blocking notice would afford a designated entity the opportunity to transfer, spend, or conceal its assets, thereby making the IEEPA sanctions program virtually meaningless.”¹⁴² The final *Calero-Toledo* requirement—whether the deprivation had been carried out by an

“would allow any enemy to spirit assets out of the United States”); *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 50 (D.D.C. 2005) (holding the designated entity was “not entitled to pre-deprivation notice and a hearing”), *aff’d on other grounds sub nom.* *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728 (D.C. Cir. 2007).

135. See *Al Haramain*, 686 F.3d at 985 (“[T]he potential for ‘asset flight’ almost certainly justifies OFAC’s decision not to provide notice before freezing the assets.”); *Glob. Relief*, 315 F.3d at 754 (determining a pre-seizure hearing was not constitutionally required as it “would allow any enemy to spirit assets out of the United States”); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 76–77 (D.D.C. 2002) (“[P]rompt action by the Government was necessary to protect against the transfer of assets subject to the blocking order.”), *aff’d*, 333 F.3d 156 (D.C. Cir. 2003).

136. *Glob. Relief*, 315 F.3d at 754.

137. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678–80 (1974).

138. *Holy Land*, 219 F. Supp. 2d at 76–77.

139. *Id.* at 62, 76.

140. *Id.* at 76; see also *Haig v. Agee*, 453 U.S. 280, 307 (1981) (“[N]o governmental interest is more compelling than the security of the Nation.”).

141. *Holy Land*, 219 F. Supp. 2d at 76–77.

142. *Id.*

authorized government entity—gave the court no pause.¹⁴³ OFAC, acting pursuant to IEEPA and corresponding executive orders, carried out the designation and asset freeze.¹⁴⁴ Concluding *Calero-Toledo*'s three requirements had been satisfied, the district court held OFAC had not defaulted on due process.¹⁴⁵ Without revisiting the *Calero-Toledo* analysis, the D.C. Circuit agreed.¹⁴⁶

In sum, when OFAC deploys IEEPA to freeze terrorist assets, postdeprivation process satisfies the Due Process Clause. This process requires notice including, at a minimum, the unclassified basis for the government's action. The terrorist designation cases inform due process in other IEEPA contexts, such as data security, yet designated terrorists differ from data-gathering companies. National security review of foreign investment—admittedly governed by a different legal framework—operates in a more similar fashion to data security matters.

B. Foreign Investment

CFIUS is an executive branch committee that “monitor[s] the impact of foreign investment in the United States.”¹⁴⁷ In general, CFIUS reviews transactions that might implicate national security, and, if concerns remain unmitigated, CFIUS may submit a negative determination to the president, who may then choose to block the transaction.¹⁴⁸ Recent CFIUS trends reveal growing concerns about foreign, especially Chinese, control of U.S. technology and data.¹⁴⁹ Apprehensive about foreign investment in U.S. technology companies, Congress enacted the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”).¹⁵⁰ FIRRMA expressly expanded CFIUS's purview to transactions that may compromise “sensitive personal data

143. *See id.* at 77 (“[G]overnment officials, and not private parties, initiated the blocking action. OFAC did so pursuant to the IEEPA and two Executive Orders that specifically authorize such action in limited circumstances.”).

144. *Id.*

145. *Id.*

146. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 163–64 (D.C. Cir. 2003).

147. Exec. Order No. 11,858, 3 C.F.R. 990, 991 (1975).

148. JACKSON, *supra* note 6, at 22–23.

149. *See, e.g., id.* at 11 (“During the 115th Congress, many Members expressed concerns over China's growing investment in the United States, particularly in the technology sector.”).

150. Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, 132 Stat. 2174 (codified at 50 U.S.C. § 4565); *see* JACKSON, *supra* note 6, at 11 (discussing the enactment of FIRRMA).

of United States citizens that may be exploited in a manner that threatens national security.”¹⁵¹ As of February 2020, only five transactions had been blocked by presidents through the CFIUS framework.¹⁵² Four involved Chinese companies or nationals.¹⁵³ The president’s substantive determination is not subject to judicial review, but courts can and have reviewed these presidential bans to ensure due process.¹⁵⁴

IEEPA and CFIUS intertwine, but they are not identical. On one hand, CFIUS divestment orders resemble IEEPA transaction bans designed to secure data. Each of the frameworks involves economic powers wielded by the executive to deprive private parties of property.¹⁵⁵ CFIUS review may culminate in a presidential order nullifying investments, much like an IEEPA order may prohibit transactions.¹⁵⁶ On the other hand, IEEPA-based sanctions flow from “[p]residentially declared national emergenc[ies],”¹⁵⁷ while CFIUS jurisdiction does not depend on declared emergencies.¹⁵⁸

Though salient, this distinction has lost force as checks on the president’s emergency powers have eroded.¹⁵⁹ The ease with which

151. 50 U.S.C. § 4565(a)(4)(B)(iii)(III).

152. JACKSON, *supra* note 6, at 23.

153. *See id.* summary (describing presidentially blocked transactions following CFIUS review).

154. *Id.* at 23–24.

155. *See generally* Allman, *supra* note 7 (comparing and contrasting presidential action under CFIUS and IEEPA and arguing CFIUS provides the more appropriate framework for monitoring foreign investment in the United States).

156. The TikTok controversy illustrates the overlap between IEEPA and CFIUS. On August 6, 2020, President Trump issued an executive order invoking IEEPA to ban all transactions with TikTok and its Chinese parent company, ByteDance. Robert Chesney, *Will TikTok Win Its Lawsuit Against Trump?*, LAWFARE (Aug. 25, 2020, 9:17 PM), <https://www.lawfareblog.com/will-tiktok-win-its-lawsuit-against-trump> [<https://perma.cc/P3ZX-FSE3>]. On August 14, 2020, President Trump ordered ByteDance to divest TikTok from its business. *Id.* This second order followed on the heels of a CFIUS review, initiated in June 2020, of ByteDance’s prior acquisition of the company that it rebranded as TikTok. TikTok Complaint, *supra* note 17, at 14–17, 22.

157. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 76 (D.D.C. 2002), *aff’d*, 333 F.3d 156 (D.C. Cir. 2003). Some courts have distinguished the process due under IEEPA from other asset-freezing statutes on the basis that IEEPA-based sanctions require a presidentially declared national emergency. *E.g., id.*; *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 49 (D.D.C. 2005), *aff’d on other grounds sub nom.*, *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728 (D.C. Cir. 2007).

158. *See* JACKSON, *supra* note 6, at 8 (observing that Congress shaped CFIUS, in part, to enable the president to conduct “foreign investment policy” without needing to declare first a national emergency).

159. *See supra* Part I.

presidents now declare national emergencies dilutes the meaning of these so-called emergencies.¹⁶⁰ Suppose entities indeed possess weaker due process rights when the president acts pursuant to IEEPA rather than a CFIUS review. The president could evade the stronger protections of the latter by declaring a pro forma emergency. Constitutional rights ought not turn on such formalist sleights of hand. Instead, the existing jurisprudence considers context, which invariably varies across emergencies. Accordingly, like the terrorist designation cases, CFIUS cases provide helpful data points by which to interpolate the scope of the process due when the president invokes IEEPA in the name of data security.

1. “*What*”: *Extent of Process*. In the foreign investment setting, as in the counterterrorist financing context, due process at least requires access to the unclassified evidence. In *Ralls Corp. v. Committee on Foreign Investment in the United States*,¹⁶¹ the D.C. Circuit evaluated whether the president violated the Due Process Clause by ordering Ralls, a U.S. company owned by Chinese nationals, to divest from a windfarm project located in Oregon.¹⁶² Specifically, Ralls had purchased four U.S. companies to develop windfarms near a Navy installation, raising national security concerns.¹⁶³ After the deal had been completed, CFIUS reviewed the transaction and concluded that it threatened national security.¹⁶⁴ CFIUS referred the matter to the president, who agreed and ordered Ralls to divest.¹⁶⁵ Both CFIUS and the president failed to give Ralls notice and an opportunity to rebut the evidence on which they had based their determinations.¹⁶⁶ Ralls sued, challenging the presidential order on due process grounds.¹⁶⁷

The D.C. Circuit pointed to *Mathews* as the seminal case for determining the “specific dictates of due process.”¹⁶⁸ However, instead of applying the *Mathews* factors one by one, the court referred to its

160. See *supra* Part I.B and accompanying text for a discussion of presidents’ broadening IEEPA usage and the concomitant explosion of national emergency declarations.

161. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296 (D.C. Cir. 2014).

162. *Id.* at 301–02.

163. *Id.* at 304–05.

164. *Id.* at 301.

165. *Id.* at 301–02.

166. *Id.* at 306.

167. *Id.* at 302.

168. *Id.* at 317 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1975)).

precedent in non-IEEPA terrorist designation cases.¹⁶⁹ The court noted, as in the terrorist designation cases, “a substantial interest in national security supports withholding only the *classified* information but does not excuse the failure to provide notice of, and access to, the unclassified information used to prohibit the transaction.”¹⁷⁰ According to the court, the presidential order deprived Ralls of due process by failing to provide any of these procedural touchstones.¹⁷¹ In dicta, the D.C. Circuit suggested adequate process during CFIUS review could theoretically also satisfy the president’s due process obligations; however, the chance “to submit written arguments, meet with CFIUS officials in person, answer follow-up questions and receive advance notice of the [government’s] intended action” will not suffice.¹⁷² Rather, the sanctioned party must receive “the opportunity to tailor its submission to the [government’s] concerns or rebut the factual premises underlying the President’s action.”¹⁷³ Therefore, the government must give its reasons, at least the unclassified ones.

2. “*When*”: *Timing of Process*. Despite tolerating postdeprivation process alone in terrorism cases,¹⁷⁴ courts have also required *predeprivation* process in the foreign investment context. In addition to exploring the basic contours of due process, the *Ralls* case addresses when such process comes due. The court stated that the company “must receive the procedural protections [the court has] spelled out *before* the Presidential Order prohibits the transaction.”¹⁷⁵ The court

169. See *id.* at 320 (“Under our [foreign terrorist organization] precedent, this lack of process constitutes a clear constitutional violation, notwithstanding the [government’s] substantial interest in national security and despite our uncertainty that more process would have led to a different presidential decision.” (first citing *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 613 F.3d 220, 228 (D.C. Cir. 2010) (per curiam); and then citing *Nat’l Council of Resistance of Iran v. U.S. Dep’t of State*, 251 F.3d 192, 208–09 (D.C. Cir. 2001))). The terrorist designation scheme referenced arises under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104-132, § 302(a), 110 Stat. 1214, 1248 (1996) (codified as amended in scattered sections of 18, 21, 28, and 42 U.S.C.), which does not require a national emergency declaration. 8 U.S.C. § 1189(a)(1). For a discussion of AEDPA and associated due process concerns, see generally Justin S. Daniel, Comment, *Blacklisting Foreign Terrorist Organizations: Classified Information, National Security, and Due Process*, 166 U. PA. L. REV. 213 (2017).

170. *Ralls*, 758 F.3d at 320 (citing *Nat’l Council of Resistance of Iran*, 251 F.3d at 208–09).

171. *Id.* at 319–20.

172. *Id.* at 319.

173. *Id.* at 320 (first citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959); and then citing *Nat’l Council of Resistance of Iran*, 251 F.3d at 205).

174. See *supra* Part II.A.2.

175. *Ralls*, 758 F.3d at 320 (emphasis added).

held for Ralls because neither CFIUS nor the president had provided adequate predeprivation process.¹⁷⁶ The opinion does not mention *Calero-Toledo* but instead relies on the D.C. Circuit's non-IEEPA terrorist designation cases.¹⁷⁷ These other terrorism cases establish that the government may not forego predeprivation process unless the government demonstrates such timing would jeopardize national security.¹⁷⁸ So too with foreign investment.¹⁷⁹ As the discussion in Part II.A.2 illustrates, the government has repeatedly established such a pressing need when it wields IEEPA to freeze terrorists' assets, thereby enabling the government to delay process in that setting. But, at least in *Ralls*, the government failed to justify postponed process in the foreign investment context.¹⁸⁰

C. Data Security

When the president invokes IEEPA to ostracize foreign technology companies, due process is owed to a similar extent but likely comes due at an earlier time. The distinctive natures of the national security threat and government response influence the process due—both its extent and timing—under the *Mathews* and *Calero-Toledo* tests. This Section applies these tests to data security, comparing and contrasting data security to counterterrorist financing and foreign investment. This Section argues that data security likely parallels foreign investment more closely than it does counterterrorist financing. As in the counterterrorism and foreign investment contexts, the government must at least provide its reasons for blacklisting the targeted entity based on the unclassified record, and it must offer the targeted entity an opportunity to respond. However, unlike designated terrorist organizations, technology companies blacklisted for data security reasons, like foreign investors, are entitled to predeprivation process.

176. *Id.* at 321; *see supra* Part II.B.1.

177. *See Ralls*, 758 F.3d at 318–20 (discussing precedents involving terrorist designations under AEDPA and finding them “precisely on point”).

178. *See Nat'l Council of Resistance of Iran*, 251 F.3d at 208 (holding due process must be provided “prior to the deprivation worked”); *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 613 F.3d 220, 228 (D.C. Cir. 2010) (“[W]e have held due process requires that the [putative foreign terrorist organization] be notified of the unclassified material on which the Secretary [of State] proposes to rely and an opportunity to respond to that material *before* its redesignation . . .”).

179. *Ralls*, 758 F.3d at 320.

180. *Id.* at 321.

1. “*What*”: *Extent of Process*. On a categorical level, companies that allegedly pose informational threats to U.S. national security merit due process protections that are co-extensive with those arising in the contexts of counterterrorist financing and foreign investment. As applied to data security, the *Mathews* test suggests that the government must at least provide technology companies with its reasons for acting based on the unclassified record.

The first *Mathews* factor—the affected private interest—cuts in favor of significant due process. A presidential transaction ban strangles the targeted corporation’s domestic business, much like an OFAC asset freeze starves a designated entity. Expulsion from U.S. markets could spell ruin for many technology companies. As *Al Haramain* demonstrates, this existential private interest merits robust procedural safeguards.¹⁸¹ Additionally, an IEEPA-authorized transaction ban parallels a divestment order following CFIUS review.¹⁸² As in *Ralls*, the targeted company is entitled to due process to protect its “substantial property interests.”¹⁸³

As to the second factor—the risk of erroneous deprivation—errors grow more likely when the government makes the blacklisted party guess at governmental concerns. Secret evidence further obfuscates the government’s rationale and blinds the targeted company. The company can neither alleviate the government’s concerns when it does not know why the government has acted nor correct factual errors without access to the government’s record. Asymmetric information undermines the adversarial process assumed by the Due Process Clause.¹⁸⁴ Future courts will need to delineate how much information makes notice adequate. Still, *Al Haramain* and *Ralls* indicate that the government must provide more than a general statement; rather, adequate notice requires specific reasons and evidence.¹⁸⁵ Hinting at data security will not fit the bill, and the government will need to delineate why the targeted company’s data collection and retention methods threaten national security. To minimize the risk of erroneous deprivation, the government must at

181. *See supra* Part II.A.1.

182. *See supra* Part II.B.

183. *Ralls*, 758 F.3d at 321.

184. *See supra* notes 125–133 and accompanying text.

185. *See supra* Parts II.A.1, II.B.1.

least share its reasons, unless doing so would undermine national security.

The third *Mathews* factor—the governmental interest and burden of providing additional procedural safeguards—will depend on the government’s ability and willingness to articulate why more robust procedures would jeopardize national security. Securing U.S. user data supplies a compelling governmental interest, and courts defer to the political branches on such matters of national security policy.¹⁸⁶ Nevertheless, *Al Haramain* and *Ralls* confirm that the government cannot merely wave national security as a talisman and ward off due process challenges.¹⁸⁷ The government must make its case, which will vary with context. Sometimes national security will require procedural shortcuts, but only when the government has explained why such shortcuts are necessary to safeguard U.S. blood, treasure, and data.

In the context of data security, the government must explain why providing a blacklisted technology company with additional information would expose sensitive U.S. user data or otherwise harm national security interests. However, without access to the government’s classified information, it is unclear whether the government’s ability to justify cutting procedural corners categorically differs between counterterrorist financing, foreign investment, and data security. Despite their differences, the former two categories have fallen under the same fundamental rule: the government must provide financial actors with at least its reasons for acting based on the unclassified record. Technology companies are entitled to this same foundational process. However, due process diverges as to the timing of these protections depending on the category at hand.

2. “When”: *Timing of Process*. When the president invokes IEEPA to respond to a putative data security threat, the targeted entity should receive predeprivation process. Under existing law, the government must justify its failure to provide predeprivation notice.¹⁸⁸ According to the Supreme Court, “It is by now well established that . . . [d]ue process is flexible and calls for such procedural

186. See *supra* Part I.C.

187. See *supra* Parts II.A, II.B.

188. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679–80 (1974) (permitting postponement of process only when the government has shown “extraordinary” circumstances exist).

protections as the particular situation demands.”¹⁸⁹ The distinct threat of aggregated data and the nature of a prospective transaction ban probably do not justify departing from the predeprivation default.

Applying *Calero-Toledo*'s test, the Due Process Clause more likely requires predeprivation process for companies that collect data as opposed to entities that fund terror, which receive only postdeprivation process. Like combatting terrorism, data security almost certainly qualifies as an “important governmental interest,” satisfying the first *Calero-Toledo* requirement.¹⁹⁰ After all, even the Supreme Court acknowledges that “no governmental interest is more compelling than the security of the Nation.”¹⁹¹ The third *Calero-Toledo* requirement also poses no obstacle to postdeprivation process. The president plainly qualifies as a “government official” acting under statutory authority.¹⁹² But, the second requirement complicates the analysis.

Under *Calero-Toledo*, the government may provide postdeprivation process only if it has demonstrated “a special need for very prompt action.”¹⁹³ Courts have recognized such a need when OFAC freezes assets of designated terrorists pursuant to IEEPA to prevent asset flight.¹⁹⁴ Any preblocking process would enable the designated entity to hide, spend, or scramble the money, thereby evading sanctions.¹⁹⁵ However, this special need evaporates when the

189. *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

190. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 76 (D.D.C. 2002) (citing *Calero-Toledo*, 416 U.S. at 678), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003).

191. *Haig v. Agee*, 453 U.S. 280, 307 (1981); *see also Holy Land*, 219 F. Supp. 2d at 76–77 (describing “combating terrorism by cutting off its funding” as an “important government interest”).

192. *Holy Land*, 219 F. Supp. 2d at 76 (citing *Calero-Toledo*, 416 U.S. at 678).

193. *Id.*

194. *See, e.g., Al Haramain Islamic Found. v. U.S. Dep't of Treasury*, 686 F.3d 965, 985 (9th Cir. 2012) (“[T]he potential for ‘asset flight’ almost certainly justifies OFAC’s decision not to provide notice before freezing the assets.”); *Glob. Relief Found. v. O’Neill*, 315 F.3d 748, 754 (7th Cir. 2002) (determining a preseizure hearing was not constitutionally required as it “would allow any enemy to spirit assets out of the United States”); *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 50 (D.D.C. 2005) (holding a designated entity was “not entitled to pre-deprivation notice and a hearing”), *aff'd on other grounds sub nom.*, *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728 (D.C. Cir. 2007); *Holy Land*, 219 F. Supp. 2d at 76–77 (“[P]rompt action by the Government was necessary to protect against the transfer of assets subject to the blocking order.”).

195. *See, e.g., cases cited supra* note 194.

president prospectively excommunicates a technology company to protect personally identifiable information. Rather than tying down assets in the United States, the government prohibits transactions with a problematic company to expel it from the U.S. market. Asset flight is not the fear but the policy. The government action would prove all the more effective if predeprivation notice were to drive the data collecting company more quickly away from vulnerable U.S. users. Thus, under the *Calero-Toledo* test, the Due Process Clause demands predeprivation notice when the executive subjects a technology company to a transaction ban citing data security concerns.

The argument for predeprivation process suffers one primary flaw—the IEEPA transaction ban only issues following a declared national emergency. Perhaps these labeled exigencies provide an “extraordinary circumstance” that excuses belated process, but the government may not simply cry “national emergency” and skirt constitutional rights. Not all emergencies are created equal.¹⁹⁶ Due process depends on the nature of the threat and the government response.¹⁹⁷ On its face, an executive order may rely on IEEPA when prohibiting transactions with a company to control the flow of user data. However, this presidential action de facto resembles a presidential ban following CFIUS review.

Take *Ralls* for example. Upon CFIUS’s recommendation, President Obama ordered a U.S. company owned by Chinese nationals to divest from a windfarm project, citing espionage concerns.¹⁹⁸ The D.C. Circuit held the presidential order violated the Due Process Clause because the government had not provided *Ralls* with notice or the opportunity to respond beforehand.¹⁹⁹

In comparison, President Trump’s TikTok August 6 order prospectively blocked transactions with a U.S. company owned by a Chinese company, indicating data security concerns.²⁰⁰ The executive order covered “any transaction by any person, or with respect to any property, subject to the jurisdiction of the United States” with

196. See, e.g., Selden, *supra* note 9, at 528 (arguing courts should balance “the degree of the national emergency against the types of constitutional freedoms abridged”).

197. See *supra* notes 97–108 and accompanying text.

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

199. *Id.* at 321.

200. Exec. Order No. 13,942, 85 Fed. Reg. 48,637 (Aug. 6, 2020); TikTok Complaint, *supra* note 17, at 2–3, 6.

TikTok.²⁰¹ Citing IEEPA as the source of presidential authority, the executive order articulated the threat:

TikTok automatically captures vast swaths of information from its users, including internet and other network activity information such as location data and browsing and search histories. This data collection threatens to allow the Chinese Communist Party access to Americans' personal and proprietary information—potentially allowing China to track the locations of Federal employees and contractors, build dossiers of personal information for blackmail, and conduct corporate espionage.²⁰²

With both *Ralls* and TikTok, the intended effect was the same: to banish a U.S. company with Chinese ties to protect sensitive information. Perhaps these concerns justify the presidents' bans. Perhaps not. Regardless, the functional equivalence of the bans suggests that the Due Process Clause requires *prior* notice and the opportunity to respond in both situations, even when IEEPA is nominally invoked as an alternative to the CFIUS process.²⁰³

Taken together, the existing cases under IEEPA and other deal-cancelling frameworks suggest that the president must offer due process before outlawing transactions with companies that allegedly threaten data security. Postdeprivation process is permissible to enable OFAC to wage war on terrorists' wallets.²⁰⁴ Predeprivation process is required when ordering foreign companies to divest from U.S. ventures due to espionage concerns.²⁰⁵ In the counterterrorism context, the government wishes to secure the money to keep terrorists away from U.S. individuals. In the divestment order context, the government wishes to keep foreign money away to secure U.S. information. Data security more closely resembles this second setting, so it likely calls for similar procedural safeguards—predeprivation process in particular. As such, the Due Process Clause significantly protects entities targeted under IEEPA for informational threats. It buys them time and chances to state their cases. However, procedural rights do not assure substantive victory.

201. Exec. Order No. 13,942, 85 Fed. Reg. at 48,637–38.

202. *Id.*

203. See Allman, *supra* note 7, at 312 (arguing *Ralls* provides a “compelling due process argument” against an IEEPA ban having the same effect).

204. See *supra* Part II.A.2.

205. See *supra* Part II.B.2.

III. LIMITS OF DUE PROCESS

The bundle of due process rights forms a humble raft, by which some technology companies might hope to remain afloat, but the vessel leaks from both ends. At the threshold, some foreign companies lack due process rights altogether. At the back end, remedies remain restricted. This Part addresses both limitations in turn.

A. *Front-end Limitations: Availability of Due Process*

Procedural due process rights protect many, but not all, technology companies subject to executive emergency powers. Corporations and individuals alike are entitled to due process when the government deprives them of life, liberty, or property.²⁰⁶ However, due process rights do not extend to all; rather, foreign entities must establish “substantial connections” with the United States to secure due process protections.²⁰⁷ Some due process challenges to IEEPA-authorized actions have faltered at this threshold.²⁰⁸

In applying the “substantial connections” test, the D.C. Circuit seemingly requires some degree of physical presence in the United States.²⁰⁹ For instance, in one case, the D.C. Circuit held two Iranian

206. *See* N. Sec. Co. v. United States, 24 S. Ct. 436, 444 (1904) (“Corporations are persons within the meaning of the constitutional provision forbidding the deprivation of property without due process of law . . .”).

207. The Court has stated that “aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264–66, 271 (1990) (suggesting Fourth Amendment rights inure to the benefit of only those with “substantial connections” with the United States). The “substantial connections” test has also been applied to the Fifth Amendment. *See* *Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1182–83 (D.C. Cir. 2004) (noting, to receive Fifth Amendment protections, aliens must have “substantial connections” to the United States (quoting *Verdugo-Urquidez*, 494 U.S. at 271)).

208. *See, e.g.,* *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1347 (M.D. Fla. 2004) (determining an entity lacked due process rights because it had “no substantial connection to the United States”); *Fulmen Co. v. Off. of Foreign Assets Control*, No. 1:18-cv-02949, 2020 WL 1536341, at *5 (D.D.C. Mar. 31, 2020) (“Because Fulmen’s own pleadings demonstrate no property or presence in the United States, it cannot establish the ‘substantial connections’ necessary to potentially entitle it to constitutional protections as a non-resident alien.”).

209. *See* *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) (“A foreign entity without property or presence in the United States has no constitutional rights, under the Due Process Clause or otherwise.”); *see also* *FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 327–28 (D.D.C. 2016) (noting the substantial connections test “suggests at least some degree of physical presence”); *Rakhimov v. Gacki*, No. 1:19-cv-02554, 2020 WL 1911561, at *5 (D.D.C. Apr. 20, 2020) (concluding the plaintiff could not bring a Fifth Amendment challenge

organizations were entitled to due process because they had alleged substantial connections in the form of a U.S. office space and bank account.²¹⁰ Yet, in another instance, a post office box and U.S. bank account did not suffice.²¹¹ The difference—the physical office—suggests possessing property in the United States brings an entity within the ambit of the Due Process Clause.²¹²

Many companies that gather personally identifiable information hold property within the United States, thereby exhibiting the necessary connections to avail themselves of due process. Many technology companies have based their U.S. operations out of U.S. offices.²¹³ Consider TikTok. TikTok’s principal place of business is in California.²¹⁴ Many of TikTok’s key personnel, including its interim CEO and General Counsel, work from the United States.²¹⁵ In fact, TikTok, incorporated in the United States, is not even a foreign entity.²¹⁶ Because TikTok has literally rooted itself in the United States, it may avail itself of U.S. constitutional rights. More broadly, as technology companies set up shop in the United States, they come closer to U.S. consumers, data, and constitutional rights.

However, other data-gathering technology companies may not exert such a robust U.S. presence particularly because the digital economy transcends geographic boundaries. Many data-producing

where the plaintiff failed to allege physical presence), *dismissing appeal* No. 20-5121, 2020 WL 4107145 (D.C. Cir. July 1, 2020).

210. Nat’l Council of Resistance of Iran v. U.S. Dep’t of State, 251 F.3d 192, 201–02 (D.C. Cir. 2001).

211. 32 Cnty. Sovereignty Comm. v. Dep’t of State, 292 F.3d 797, 799 (D.C. Cir. 2002).

212. See *Kadi v. Geithner*, 42 F. Supp. 3d 1, 26 (D.D.C. 2012) (“Taken together, then, these cases at least imply that a foreign national with property in the United States has a sufficient connection to the United States to raise at least *some* constitutional claims.”).

213. The United States is home to “far more [large tech companies] than any other country.” Jonathan Ponciano, *The World’s Largest Technology Companies in 2021: Apple’s Lead Widens as Coinbase, DoorDash Storm into Ranks*, FORBES (May 13, 2021, 6:00 AM), <https://www.forbes.com/sites/jonathanponciano/2021/05/13/worlds-largest-tech-companies-2021/> [<https://perma.cc/E8XT-P7HM>]; see also François Candelon, Martin Reeves & Daniel Wu, *18 of the Top 20 Tech Companies Are in the Western U.S. and Eastern China. Can Anywhere Else Catch Up?*, HARV. BUS. REV. (May 3, 2018), <https://hbr.org/2018/05/18-of-the-top-20-tech-companies-are-in-the-western-u-s-and-eastern-china-can-anywhere-else-catch-up> [<https://perma.cc/634H-Q67H>] (“Today’s digital world is organized around two centers of gravity: the U.S. West Coast and the east coast of China. . . . The leading companies in online search, social media, and e-commerce are all based in one or the other of these two regions.”).

214. TikTok Complaint, *supra* note 17, at 6.

215. *Id.* at 14.

216. *Id.* at 6, 8.

transactions transpire on the internet rather than U.S. soil. As the digital economy develops, operations may completely untether from the physical market that businesses, and particularly technology companies, wish to reach.²¹⁷ In fact, many technology companies are “born global,” meaning they can connect “with international customers, suppliers, capital, and mentors from day one.”²¹⁸ As a result, many foreign entities serving U.S. consumers do not maintain any physical presence in the United States. While integrating the global economy, this unbundling could increase the number of companies serving U.S. consumers without carrying on such a U.S. presence so as to entitle these companies to due process rights.

As the information age advances, the law may reimagine “substantial connections” to transcend physical presence. If virtual presence were to suffice, many companies would pass through the “substantial connections” filter, especially those that pose informational threats to national security. After all, these technology companies gather data by virtually interacting with U.S. users. Some companies, like TikTok, bolster their virtual presence with a physical presence by storing U.S. user data on servers in the United States.²¹⁹ Such behavior strengthens a company’s ties to the United States and claim to due process rights. Whether the law will come to redefine “substantial connections” in the digital age remains an open question. Regardless, under existing law and economic trends, many data-gathering entities pass the “substantial connections” test. Assuming they do, and assuming they prevail on the merits, these entities still may win only restricted relief.

217. McKinsey & Company has observed, “[Companies] that deliver digital goods and services can enter new international markets without establishing a physical presence at all.” JAMES MANYIKA, SUSAN LUND, JACQUES BUGHIN, JONATHAN WOETZEL, KALIN STAMENOV & DHARUV DHINGRA, MCKINSEY GLOB. INST., DIGITAL GLOBALIZATION: THE NEW ERA OF GLOBAL FLOWS 15 (2016), <https://www.mckinsey.com/~media/McKinsey/Business%20Functions/McKinsey%20Digital/Our%20Insights/Digital%20globalization%20The%20new%20era%20of%20global%20flows/MGI-Digital-globalization-Full-report.ashx> [<https://perma.cc/U6J5-AB5Z>].

218. *Id.* at 46.

219. TikTok Complaint, *supra* note 17, at 10–11.

B. Back-end Limitations: Procedural Remedies

Procedural rights offer only procedural remedies. National security's high stakes counsel judicial restraint.²²⁰ In both counterterrorist financing and foreign investment cases, courts hesitate to vacate executive branch decisions to avoid speculating as to how affording due process might affect the determination; instead, courts remand with procedural instructions.²²¹ Furthermore, classified evidence limits procedural redress because many blacklisted entities will never see the classified information used against them.²²² Data security cases share these limits just as presidential tech-targeting transaction bans share common statutory and functional settings with OFAC asset freezes and post-CFIUS divestment orders, respectively. So, even when presidents invoke data security—rather than terrorism—as the basis for their orders, and even when presidents strive to cause—rather than avoid—asset flight, courts choose from a limited menu of remedies in deference to the executive's national security policy judgments.

Nevertheless, even these limited procedural remedies carry significant value to technology companies sitting on troves of U.S. data because timing is everything. Like companies subject to post-CFIUS divestment orders, technology companies subject to IEEPA-authorized executive orders are entitled to due process *before* the deprivation has occurred, that is before the company is expelled from U.S. markets.²²³ So, not only does the Due Process Clause give such companies a chance to contest the government's decision, but the clause also gives them the gift of time: time to argue and time to stall—perhaps even long enough to endure until a new administration with different enforcement priorities takes control. TikTok, for instance, illustrates the ticking clock. President Trump issued the executive

220. *See, e.g.*, *Nat'l Council of Resistance of Iran v. U.S. Dep't of State*, 251 F.3d 192, 209 (D.C. Cir. 2001) (remanding without vacating because of “the realities of the foreign policy and national security concerns”).

221. *See* *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 658 (N.D. Ohio 2010) (“[T]he proper remedy for a notice violation in the context of designation proceedings is to remand to OFAC, without vacatur . . . , with instructions as to what additional notice is required.”); *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 320–21 (D.C. Cir. 2014) (preserving a presidential order to divest despite its violating company's procedural due process rights).

222. *See supra* notes 125–133 and accompanying text.

223. *See supra* Part II.C.2.

order to prospectively excommunicate TikTok on August 6, 2020.²²⁴ TikTok fought the ban in court.²²⁵ By February 2021, the Biden administration paused the litigation and permitted TikTok to operate unscathed as the new president pondered his predecessor's policy, thereby allowing TikTok to evade a fire sale to Oracle and Walmart.²²⁶ At the end of the day, the company may not change the government's mind even when given the process due. But due process makes that day much longer.

In sum, the Due Process Clause significantly protects many data-gathering technology companies that fall prey to the president's emergency economic powers. Due process does so notwithstanding the front-end limits on procedural rights' availability to foreign entities and the back-end limits on procedural remedies. The predeprivation process available to such companies promises time, making due process particularly valuable in the data security setting.

But due process is no panacea. It safeguards constitutional rights but not constitutional structure. Specifically, the Due Process Clause alone will not control the president's vast emergency powers and preserve the balance of power within the federal government because "only Congress itself can prevent power from slipping through its fingers."²²⁷

IV. AMENDING IEEPA

Congress should amend IEEPA to restore the balance of power between the branches of the federal government. Any amendment must reckon with the unpredictability of future emergencies and the practical reasons motivating Congress to delegate emergency powers to the president in the first place.²²⁸ Acknowledging this uncertainty, many commentators have clamored for a sunset provision, under which

224. Exec. Order No. 13,942, 85 Fed. Reg. 48,637, 48,637–38 (Aug. 6, 2020).

225. TikTok Complaint, *supra* note 17, at 4–5.

226. John D. McKinnon & Alex Leary, *TikTok Sale to Oracle, Walmart Is Shelved as Biden Reviews Security*, WALL ST. J. (Feb. 10, 2021, 5:40 PM), <https://www.wsj.com/articles/tiktok-sale-to-oracle-walmart-is-shelved-as-biden-reviews-security-11612958401> [<https://perma.cc/38WA-XR9K>].

227. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

228. As Alexander Hamilton wrote, "[I]t is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them." THE FEDERALIST NO. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

presidentially declared emergencies would automatically terminate unless extended by Congress.²²⁹ This Note endorses this reform. Congress should amend IEEPA so that presidentially declared emergencies sunset unless Congress extends them through a fast-track review process. This Part begins by revisiting the need for IEEPA reform and details the suggested amendment. Next, it considers potential objections and concludes that IEEPA reform would dovetail with due process and sustain constitutional structure.

As discussed in Part I.A, IEEPA provides little supervision as it is currently used. IEEPA confers broad emergency powers on the president, including the power to declare when such powers are activated.²³⁰ The president may easily renew declared emergencies by notifying Congress and publishing renewals in the Federal Register.²³¹ Originally, NEA and IEEPA relied on a legislative veto to check presidential power, providing that Congress could terminate a declared emergency by concurrent resolution.²³² In striking down legislative vetoes, the Supreme Court eliminated this safeguard, so now Congress must amass a veto-proof supermajority to terminate a national emergency over presidential opposition.²³³ Even if Congress were to work this miracle, the president could still unilaterally proclaim a new emergency.²³⁴ Today, Congress cannot second guess presidents' emergency declarations, permitting presidents to make their own laws,

229. See, e.g., Ackerman, *supra* note 51, at 1047, 1060–61 (proposing amendment so that emergencies would terminate after two or three months, requiring renewal by escalating congressional supermajorities); Carter, *supra* note 55, at 1259–60 (advocating a sunset provision to “stimulate a greater discussion of the issues and [to] require Congress to take a position”); Koh, *supra* note 60, at 1321 n.314 (suggesting emergency orders automatically expire unless extended by Congress through fast-track approval mechanisms); Jason Luong, Note, *Forcing Constraint: The Case for Amending the International Emergency Economic Powers Act*, 78 TEX. L. REV. 1181, 1211–12 (2000) (suggesting a sunset provision); Peter Harrell, *The Right Way To Reform the U.S. President's International Emergency Powers*, JUST SEC. (Mar. 26, 2020), <https://www.justsecurity.org/69388/the-right-way-to-reform-the-u-s-presidents-international-emergency-powers> [<https://perma.cc/58UE-DTE4>] (advocating for amending IEEPA to require congressional approval to extend emergencies beyond six months or a year).

230. See 50 U.S.C. § 1701(a)–(b) (allowing the president to trigger emergency powers by declaring a national emergency).

231. See *id.* § 1622(d) (requiring the president to renew declared national emergencies each year by publishing a renewal in the Federal Register and transmitting notice to Congress).

232. CASEY ET AL., *supra* note 4, at 46.

233. *Id.* For a deeper discussion of legislative vetoes and IEEPA, see *supra* notes 49–52 and accompanying text.

234. Ackerman, *supra* note 51, at 1080–81.

at least during nominal emergencies. Congress has de facto abdicated its power to check presidents when they wield IEEPA.

To reclaim its supervisory role, Congress should amend NEA and IEEPA to include a sunset provision, as suggested by numerous commentators.²³⁵ With a sunset provision, a national emergency would automatically terminate after a specified period unless Congress were to vote affirmatively to extend the emergency. Under the amended framework, a presidential emergency declaration would trigger a fast-track process for Congress to extend the declared emergency.²³⁶ Unlike IEEPA's existing reporting requirements, this amendment would force Congress to consider the policy merits of declared emergencies, holding both Congress and the president politically accountable.

This amendment might stoke fears that congressional gridlock will doom some so-called "national emergencies." Legislators might seek to leverage emergency renewal votes to achieve unrelated political ends. This amendment might replace executive initiative with congressional stalemate. However, numerous factors assuage these concerns. First, fast-track provisions would expedite the legislative process and minimize procedural saber-rattling. For instance, such procedures could prohibit certain amendments or motions and include privileged access to the Senate and House floors.²³⁷ Congress has already employed similar fast-track provisions to review the use of military force under the War Powers Act.²³⁸ Second, the president would remain free to respond to a crisis before the emergency sunsets, perhaps after a few months. Instead of cabining the president,²³⁹ this amendment would help keep emergencies "rare and brief" as envisioned by IEEPA's drafters, comporting with the intuition that true emergencies are immediate crises rather than extended

235. See sources cited *supra* note 229.

236. For instance, Professor Harold Koh has similarly suggested that IEEPA reform could deploy a fast-track process "to ensure express congressional approval or disapproval of the President's emergency actions before the emergency expired." Koh, *supra* note 60, at 1321 n.314.

237. CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., RS20234, EXPEDITED OR "FAST-TRACK" LEGISLATIVE PROCEDURES 1 (2015).

238. *Id.*

239. See Luong, *supra* note 229, at 1212 ("[A sunset provision] would not compromise the president's functional superiority in responding to external threats while still adhering to Congress's primary legislative authority, including its express power to regulate foreign commerce.").

conflicts.²⁴⁰ Congressional approval, not executive fiat, better indicates whether a national emergency ought to extend beyond the immediate crisis. Third, the president may continue to utilize other tools, such as the CFIUS framework, to block transactions that threaten U.S. security. Whatever risk of legislative gamesmanship remains unmitigated is but a small price to pay for the protection of U.S. institutions and rights.

The proposed structural safeguards would harmonize with the existing due process jurisprudence. Procedural due process rights protect private interests, but congressional oversight supplements these safeguards by more generally protecting individual rights from executive overreach.²⁴¹ But not all statutory reforms equally accord with due process. Unlike a procedural checklist mandated by statute, the ex post congressional oversight proposed in this Part better accords with the flexible due process jurisprudence. Under existing law, the rigor of due process depends on the situation, giving legal effect to a gut sense that different emergencies beget different responses. Congress should not dress this practical instinct in a procedural straitjacket, which would command procedures too robust in some circumstances and too weak in others given IEEPA's wide-ranging uses. Furthermore, statutory safeguards would almost certainly not solve the prickly problem of secret evidence. Instead of freezing due process by statutorily defining it, Congress should restore political process.

A sunset provision paired with fast-track approval would help Congress claw back its role in checking executive power. Like the Due Process Clause, these political checks would protect individuals and enterprises, but they would also limit potential executive abuse of emergency powers. In doing so, this approach would neither prevent the president from responding to immediate threats nor reduce due process to a rigid checklist. From combatting terrorism to protecting sensitive user data, the United States must respond to a broad array of threats. Accordingly, the statute should allow for short-term executive discretion subject to meaningful review by both courts and Congress.

240. H.R. REP. NO. 95-459, at 10 (1977) (“[E]mergencies are by their nature rare and brief, and are not equated with normal, ongoing problems. . . . A state of national emergency should not be a normal state of affairs.”).

241. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Burton, J., concurring) (“With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.”).

CONCLUSION

Procedural due process shields many technology companies targeted for their troves of U.S. user data. The precise contours of this shield have yet to be measured in judicial opinions and scholarship. This Note extrapolates due process's dimensions from the examples of counterterrorist financing and foreign investment. When the president uses IEEPA to expel data-collecting companies from the U.S. economy, the government must provide meaningful notice and an opportunity to respond before a presidential transaction ban takes effect. This notice must at least include the government's unclassified reasons for acting. However, due process cannot cure all. Companies without substantial ties to the United States lack due process rights altogether, and procedural rights beget only procedural remedies. Even so, predeprivation process affords many private actors the gift of time, safeguarding constitutional rights.

As for constitutional structure, due process alone will not buoy the interbranch balance of power in the face of unchecked emergency executive power. Congress should add a sunset provision to IEEPA, as many scholars have suggested. Congressional oversight of emergency declarations would supplement individual procedural rights with a structural check on executive overreach.

By ensuring due process and reviewing emergency declarations, the courts and Congress must engage to manage otherwise unfettered presidential power. From counterterrorist financing and foreign investment to data security, due process and political process must work in tandem to protect both constitutional rights and structures. Only then should we trust the process.