U.S. Corporate Director Responsibilities to Oversee National Security Threats in an Era of Great Power Rivalry

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U.S. corporate directors' obligation to balance risk-taking and profits is complex in ordinary circumstances. But the issue is even more dynamic in the context of the China-U.S. power rivalry—directly intersecting with national security, the re-evaluation of corporate purpose, and enhanced oversight obligations particularly for mission critical corporate functions. This Article addresses the need for corporate directors to consider national security a "mission critical" issue under the expanded Caremark *doctrine developed over the last several years in Delaware courts. Given the importance of large and strategic corporations to the pillars of hegemonic power, the national security-corporate governance interface will constitute an increasingly significant issue going forward. The Article opines that the emerging China-U.S. dynamic potentially militates in favor of finding national security as a core critical mission for two reasons. First, mission critical can be understood as conduct that raises the specter of enforcement, fines, and penalties; endangering U.S. security clearly risks Federal prosecution to trigger mission-critical status. Two, the trend towards embracing enhanced-shareholder value governance and ESG similarly militates in favor of finding national security as a "mission critical" function as both the long-term profitability of the corporation as well as U.S. notions of "rights and values" may be at risk should China ultimately prevail in shaping global governance. Furthermore, director oversight is now firmly entrenched as a violation of the duty of loyalty—particularly for "mission critical" functions and therefore not protected by the business judgment rule or entitled to indemnification. Accordingly,* Caremark *oversight liability grounded on the failure of the board to monitor risks to U.S. national security conceptualized as mission critical may significantly impact corporate decision-making and the China-U.S. rivalry.*

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I. INTRODUCTION

China is "the only competitor with both the intent to reshape the international order and, increasingly, the economic, diplomatic, military, and technological power to do it."[1]

1. WHITE HOUSE, NATIONAL SECURITY STRATEGY 23 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf [https://perma.cc/99MA-922H] This Article acknowledges China's stated position that it does not seek to displace the U.S. as the dominant global power. *See, e.g.*, Xi Jinping, President of the People's Republic of China, Keynote Address at CPC and World Political Parties Summit (July 7, 2021), http://www.xinhuanet.com/english/2021-07/07/c_1310048196.htm [https://perma.cc/Z3DN-T693] ("China will never seek hegemony, expansion or sphere of influence."). However, world history and geo-strategic realism militate towards concluding that powerful sovereigns endeavor to leverage structural power, project dominance, and seek regional if not global hegemony. *See* Joel Slawotsky, *Crossing the Rubicon: Conceptualizing National Security to Vanquish Competition*, 2 LAW SCI. 69, 76–77 (2023) (outlining Chinese stratagems to project Chinese influence and exercise dominion including Party Secretary Xi Jinping's call to Persian Gulf oil producers to price their oil in Renminbi rather than the U.S. Dollar); Lutz-Christian Wolff, *Legal Responses to China's "Belt and Road" Initiative: Necessary, Possible or*

The era of great power rivalry between China and the United States has generated transformative impacts on global investment and trade policies attracting substantial academic interest.[2] While attention has been focused on international economic law, the hegemonic competition will increasingly extend into U.S. corporate boardrooms.[3] Corporations are intertwined with economic, technological, and ideological strength, i.e., the fulcrums of hegemonic power.[4] In practical terms, corporate economic, technological, and ideological leadership in the global context projects national power, and is crucial to fund innovation and establish new industries and sources of wealth, develop military weapons, and to set global technology standards.[5] Unquestionably, U.S. corporations are

Pointless Exercise?, 29 TRANSNAT'L L. & CONTEMP. PROBS. 249, 256 (2020) ("It would, in fact, be naïve to believe that China is not pursuing its own geopolitical BRI goals.").

2. *See, e.g.*, Ming Du, *Huawei Strikes Back: Challenging National Security Decisions Before Investment Arbitral Tribunals*, 37 EMORY INT'L L. REV. 1, 3–4 (2022) (discussing stricter investment screening mechanisms in Western countries in reaction to rising Chinese investments in sensitive industries and challenging such measures); Julien Chaisse & Debash Chakraborty, *The Future of International Trade Governance in a Protectionist World: Theorizing WTO Negotiating Perspectives*, 31 WASH. INT'L L.J. 1, 16–17 (2021) (discussing the "Made in China 2025" campaign's effect on U.S. foreign policy); Ru Ding, *Interface 2.0 in Rules on State-Owned Enterprises: A Comparative Institutional Approach*, 23 J. INT'L ECON. L. 637, 638 (2020) (discussing the "so-called 'trade war' between the USA and China" as "essentially a problem of the interface between China's economic model and the US economic model"); Chao Wang, *Invocation of National Security Exceptions under GATT Article XXI: Jurisdiction to Review and Standard of Review*, 18 CHINESE J. INT'L L. 710 (2019) (invocation of national security must be in good-faith); Joel Slawotsky, *The National Security Exception in US-China FDI and Trade: Lessons from Delaware Corporate Law*, 6 CHINESE J. COMPAR. L. 228, 233 (2018) (noting how the US competition with China has led to "anxieties over the true motivation for [Chinese] investment"). Intensified China-U.S. competition is unlikely to improve expeditiously and is intertwined with distress in the U.S.-led liberal global order. *See* PAUL B. STEPHAN, THE WORLD CRISIS AND INTERNATIONAL LAW 19 (2023) (explaining that existing liberal international order is at risk of fraying and deep fissures in the global governance architecture are increasingly visible).

3. *See, e.g.*, Joel Slawotsky, *The Weaponization of Human Rights in US-China Trade Policy: Impacts and Risks*, 56 J. WORLD TRADE 547, 565–67 (2022) (discussing pressures on businesses to balance human rights and economic interests); Joel Slawotsky, *The Impact of Geo-Economic Rivalry on U.S. Economic Governance*, 16 VA. L. & BUS. REV. 559, 569–72 (2022) [hereinafter Slawotsky, *Impact of Geo-Economic Rivalry*] (discussing how competitive pressures may lead to the U.S. incorporating aspects of state-centric governance potentially such as incentivizing the U.S. Government to become a shareholder in important corporations). Geo-economics is a term encompassing international economic competition, national security, and great power strategy. See Xinyue Li, *Quantum International Law Theories: Towards an Inclusive International Investment-Security Construct*, 25 J. WORLD INV. & TRADE 237 (2024).

4. Joel Slawotsky, *The Fusion of Ideology, Technology and Economic Power: Implications of the Emerging United States National Security Conceptualization*, 20 CHINESE J. INT'L L. 3, 32–37 (2021). Military might and the ability to project power extraterritorially is also underwritten by economic, technological, and ideological strength. *Id.* at 53.

5. Technology and advanced knowledge are particularly crucial for global supremacy. Indeed, technological leadership is essential for global hegemony. Former U.S. National Security Adviser Zbigniew Brzezinski wrote at the height of the former Soviet Union's power that U.S. global dominance had been substantially empowered by the U.S. lead in technology. ZBIGNIEW BRZEZINSKI, BETWEEN TWO AGES: AMERICA'S ROLE IN THE TECHNETRONIC ERA 24–32 (1970). Brzezinski correctly predicted that the United States would ultimately prevail over the Soviet Union based on U.S. dominance in the emerging technologies of that era and the Soviet lag in new technologies. *Id.* at 175–76. As the world moves from the technetronic to the digital age, the battle for technological dominance is vital and will likely crown the hegemonic winner. *See* STEPHAN, *supra* note 2, at 254 (discussing China's potential to wield competitive advantage from scaling knowledge-based innovation, even if it can't fully scale internationally); Anton Malkin, *The Made in China Challenge to US Structural Power: Industrial Policy, Intellectual Property and Multinational Corporations*, 29 REV. INT'L POL. ECON. 538, 557, 561 (2022) (China has already "effectively began using its market power to set the global rules

strategic and arguably quintessential national security assets in the context of China's challenge to U.S. global supremacy.[6]

Corroborating the relationship between corporations and national security, U.S. Presidential Executive Orders and recent Federal regulations demonstrate the inextricable link between corporations and national security.[7] Moreover, superlative U.S. financial institutions—i.e., the "Titans of Wall Street" as well as corporations such as Apple, Alphabet, Intel, Meta, Microsoft, and X (formerly Twitter)—all serve as exemplars of how large U.S. publicly-traded entities have been essential to empowering U.S. economic, technological, and ideological supremacy.[8] The March 2023 Congressional Hearings regarding TikTok and a possible Federal ban further exemplify the importance of corporations in the realms of culture and media that potentially influence ideology.[9]

As the China-U.S. rivalry intensifies, the Federal government is likely to increasingly prioritize a private sector commitment to prevent erosion to national security. Economic, technological, and ideological strength are often interrelated and a fusion of interests can comprise a complex national security threat.[10] Particularly with respect to emerging

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for competition along its own preferred lines," and "[o]ver the past half-century, technological standard setting was dominated by the US, the EU and Japan").

6. China is perceived as challenging U.S. dominance and seeking to dethrone the United States from being the dominant global power. U.S. Ambassador to China, Nicholas Burns specifically describes China not only as a competitor but an actual adversary seeking to replace the United States. *See* Lesley Stahl et al., *U.S. Ambassador on Why China Competition Must Be Managed While Keeping "the Peace"*, CBS NEWS: 60 MINUTES (Feb. 25, 2024), https://www.cbsnews.com/news/china-us-relationship-nicholas-burns-60-minutes/ [https://perma.cc/MX96-4DCU] ("'I think ultimately, they want to become and overtake the United States as the dominant country globally . . . . And we don't want that to happen. We don't want to live in a world where the Chinese are the dominant country.'" (quoting Nicholas Burns)).

7. *See, e.g.*, Exec. Order No. 14083, 3 C.F.R. 434, 435 (2023) (noting the importance of businesses and enhancing reviews of investments with respect to "ownership, rights, or control with respect to certain manufacturing capabilities, services, critical mineral resources, or technologies that are fundamental to national security"); *see also FACT SHEET: CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China*, THE WHITE HOUSE (Aug. 9, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sheet-chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china/ [https://perma.cc/DNH9-Z9Q9] (discussing the critical need for massive business innovation through investments in chips to secure dominance in emerging technologies); *infra* Part III.B (discussing additional examples).

8. Large U.S. financial institutions and the U.S. Dollar's exceptional role in global trade and finance similarly provide economic power (which enables a powerful military) as well as the ability to confer jurisdiction over overseas conduct violating U.S. laws. U.S. Dollar dominance also empowers the United States to impose economic and trade sanctions. *See e.g.*, Joel Slawotsky, *Digital Currencies: China as a Disseminator in the Digital Age*, 30 ASIA PAC. L. REV. 242, 254–56 (2022) (discussing the dominant role of the U.S. Dollar on the global economy).

9. *See* Kimberley Kao, *TikTok Faces U.S. Ban in New Draft Bill*, WALL ST. J. (Mar. 6, 2024), https://www.wsj.com/tech/tiktok-faces-u-s-ban-in-new-draft-bill-e9fd35fd (on file with the *Journal of Corporation Law*) (noting Congressional developments to ban TikTok unless it changes its ownership structure). For an analysis of the linkage between U.S. technological dominance and the interrelationship with U.S. hegemony, see Anton Malkin & Tian He, *The Geoeconomics of Global Semiconductor Value Chains: Extraterritoriality and the US-China Technology Rivalry*, 31 REV. INT'L POL. ECON. 674 ("US has developed its privileged position in the global semi-conductor industry, how this has led to inherent (or, passive) advantages for Washington's policy preferences, and how active tools like export controls can allow the US to exercise its preferences vis-à-vis competitor state actors and its private (and sometimes state-owned) transnational corporation (TNC) agents."); Slawotsky, *supra* note 8 (discussing the potential impact of China's CBDC on technology and ideology).

10. Slawotsky, *supra* note 4, at 53.

technologies, U.S. dominance is critical inasmuch as both developing and commercializing emerging technologies contributes to employment, economic growth, national wealth, potential applicability in the military context, and defends the U.S. industrial base as well as the manufacturing and technological capabilities of the defense industry.[11] Accordingly, the decline of U.S. supremacy in strategic sectors might constitute a threat to economic growth, innovation capacity, and national security.[12] National security threats might in fact be viewed as corporate conduct that degrades U.S. leadership within the realms of hegemonic power spheres.

U.S. corporate directors with business activities impacting on national economic, technological, and ideological power will be tasked with navigating an increasingly security conscious U.S. regulatory architecture.[13] Complex in ordinary circumstances,[14] balancing corporate profit-making and risk-taking is an even more dynamic issue in the context of national security. The *raison d'etre* for this difficult juggling act is the China-U.S. hegemonic contest which militates in favor of imposing restrictions on China's access to U.S. goods and services to defend U.S. national security interests. However, inherently, as part of U.S. market-capitalism, corporations—and their directors, officers, and shareholders—want profitable financial results and rewards.[15]

> I am hoping we can sort of separate intellectual property, human rights and other things from trade and continue to encourage a free trade environment between these two economic juggernauts . . . . We cannot afford to be locked out of that market. Our competitor will jump right in.[16]

Thus, national security interests potentially conflict with classic market-capitalism which encourages vigorous trade and business engagement. Indeed, economic interests of corporations and Wall Street potentially conflict with U.S. national security interests since pursuant to the market-capitalism model, U.S. corporations prioritize profits *uber alles*. For example, Nvidia has been criticized and threatened for endeavoring to evade artificial

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11. *Id.* at 44.

12. *Id.* at 45.

13. *Id.* at 3–4.

14. *See* Donald C. Langevoort, Commentary, Caremark *and Compliance: A Twenty-Year Lookback*, 90 TEMP. L. REV. 727, 731–32 (2018) (demonstrating that it is not easy to balance penalty risks of violating the law versus enormous potential benefit to the corporation).

15. Robert T. Miller, *Delaware Law Requires Directors to Manage the Corporation for the Benefit of Its Stockholders and the Absurdity of Denying It: Reflections on Professor Bainbridge's* Why We Should Keep Teaching Dodge v. Ford Motor Co., 48 J. CORP. L. DIGIT. 32 (2023) (U.S. shareholder-value governance is optimal and delivers superior benefits to society). Advocates for ESG claim businesses should embrace the importance of employees' interests as stakeholders in the long-term sustainable financial success of the business. *See generally* Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *EESG Strategy*, 106 IOWA L. REV. 1885 (2021). However, expanding *Caremark* into ESG is a slippery slope inasmuch as promoting social goals could morph into a more radical vision such as DEI and make directors' obligations loyalty-based. *See* Stephen M. Bainbridge, *Don't Compound the* Caremark *Mistake by Extending It to ESG Oversight*, 77 BUS. L. 651 (2022) (critiquing the expansion of oversight both the scope of claims from financial accounting to other areas as well as the basing of such claims on loyalty and noting adverse implications if the heightened oversight obligation is applied to ESG).

16. *See* Tim Hepher & David Shepardson, *Boeing Urges U.S. to Separate China Trade and Human Rights*, REUTERS (Mar. 31, 2021), https://www.reuters.com/article/idUSKBN2BN309/ [https://perma.cc/H362-TTRB] (quoting Dave Calhoun in a discussion with the U.S. Chamber of Commerce Aviation Summit).

intelligence (AI) chip bans to China.[17] Nvidia's CEO said he still hopes to supply high-end processors to China, days after U.S. Commerce Secretary Gina Raimondo warned U.S. companies against sales of AI-enabling chips to the country in the name of national security.[18]

Further illustrating the drive for profits, large U.S. corporations have apologized to China and refused to boycott regions in China notwithstanding U.S. government encouragement of corporations not to conduct business in certain Chinese regions.[19] Indeed, some U.S. corporate leaders and investment managers have expressed admiration for China's political-economic governance and have refused to heed calls not to meet with sanctioned individuals.[20]

How will U.S. directors respond to the conflict between profit-making and defending U.S. national security interests? How should directors oversee their corporations' business dealings in light of the China-U.S. rivalry? Does Delaware law potentially impact corporate decision-making in the context of balancing the conflict between business profits and U.S. national security?[21] Corporate directors' obligations to oversee the business, commonly referred to as "*Caremark* duties," essentially compel directors to establish a *bona fide* mechanism to monitor corporate compliance endeavoring to avoid corporate losses—for

17. Stephen Nellis & Jane Lee, U.S. Officials Order Nvidia to Halt Sales of Top AI *C*hips to China, Reuters (Sept. 1, 2022), https://www.reuters.com/technology/nvidia-says-us-has-imposed-new-license-requirement-future-exports-china-2022-08-31 (on file with the *Journal of Corporation Law*).

18. Liza Lin, *Nvidia's CEO Still Plans to Sell High-End Chips in China*, WALL ST. J. (Dec. 6, 2023), https://www.wsj.com/tech/nvidias-ceo-still-plans-to-sell-high-end-chips-in-china-300a8cb9 (on file with the *Journal of Corporation Law*).

19. *See* Liza Lin, *Intel Apologizes After Asking Suppliers to Avoid China's Xinjiang Region*, WALL ST. J. (Dec. 23, 2021), https://www.wsj.com/articles/intel-apologizes-after-asking-suppliers-to-avoid-chinas-xinjiang-region-11640261303 (on file with the *Journal of Corporation Law*) ("Intel Corp. apologized following a social-media backlash over a letter it sent suppliers asking them to avoid sourcing from the Chinese region of Xinjiang, where the Chinese government has conducted a campaign of forcible assimilation against religious minorities.").

20. *See* Elon Musk (@elonmusk), X (formerly Twitter) (June 30, 2021), https://x.com/elonmusk/status/1410413958805270533?s=20 [https://perma.cc/ZN6L-BCLZ] ("The economic prosperity that China has achieved is truly amazing, especially in infrastructure! I encourage people to visit and see for themselves."); Bei Hu, *Billionaire Ray Dalio Says U.S. Needs a Dose of China's Common Prosperity*, BLOOMBERG (Jan. 11, 2022), https://www.bloomberg.com/news/articles/2022-01-11/ray-dalio-says-u-s-needs-a-dose-of-china-s-common-prosperity [hppts://perma.cc/B6J6-CXDP] (applauding CCP Secretary Xi Jinping's call for "common prosperity" and urging the U.S. to embrace the ideology); Kiuyan Wong & Bei Hu, *Hong Kong Summit Surrounded by Drama Before It Even Begins*, BLOOMBERG (Nov. 1, 2022), https://www.bloomberg.com/news/articles/2022-10-31/global-bankers-fly-into-hong-kong-amid-growing-us-china-tensions [https://perma.cc/7RJH-BJYX] (notwithstanding criticisms over attendance, U.S. financial institutions participating in a conference with a sanctioned individual in Hong Kong); THE RUBICON REPORT: FULL REPORT, FUTURE UNION 5–6 (2024), https://nypost.com/wp-content/uploads/sites/2/2024/02/Future-Union_The-Rubicon-Report_Conflict-Capital-Full-Report-1-2.pdf [https://perma.cc/C4XS-RN75] (noting how "U.S. private equity and venture capital firms have been complicit in enabling the extraction of U.S. research and development by business in China in return for pecuniary gain" by dealing with Chinse investors who use capital as a "'trojan horse' for intellectual property theft").

21. Delaware courts' corporate law rulings have enormous influence within the United States and globally. *See* Bernard S. Sharfman, *Shareholder Wealth Maximization and Its Implementation Under Corporate Law*, 66 FLA. L. REV. 389, 393 (2014) ("Delaware is the state where the majority of the largest U.S. companies are incorporated, and its corporate law often serves as the authority that other U.S. states and countries look to when developing their own statutory and case law.").

example, financial damage caused by fines.[22] Corporate losses proximately caused by the lack of adequate director oversight can be "recovered" in plaintiff-shareholders' derivative lawsuits alleging a violation of *Caremark* oversight duties.[23] While *Caremark* claims have been notoriously difficult to pursue,[24] in the aftermath of the landmark decision of *Marchand v. Barnhill*,[25] oversight claims appear to be more difficult for directors to dismiss.[26]

In *Marchand*, the Delaware Supreme Court resolutely conceptualized *Caremark* obligations in the context of a duty of loyalty breach (as opposed to *Caremark*'s conceptualization of oversight as based on the duty of care) and, moreover, ruled the oversight role of directors is enhanced in the context of *mission critical corporate functions*.[27] The *Marchand* decision carries potentially wide-ranging implications

22. *In re* Caremark Int'l Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996). Post-*Caremark*, director obligations to oversee the business have been ensconced in the language of "*Caremark* duties" which itself was a transformational shift from a more restrictive view of director oversight duties. *See infra* Part II.

23. Claims against directors and officers generally "belong" to the corporation and pursuing such litigation lies within the obligations of the board which ostensibly determines whether filing a claim is in the best interests of the corporation. Of course, this presents a classic conflict of interest problem, and it is presumed that corporate directors will be reluctant to file suit against their own insiders to recoup losses. Therefore, courts permit derivative actions allowing shareholders to file a claim on behalf of the corporation. Depending upon the level of misconduct, courts may require plaintiffs to first demonstrate "futility" by filing a formal demand on the directors to pursue the claims. Alternatively, courts also permit plaintiffs to invoke "futility" to bypass the requirement. Demand is futile if a board cannot exercise an independent business judgment in considering whether to bring the claims. *See* JEFFREY D. BAUMAN, RUSSELL B. STEVENSON, JR. & ROBERT J. RHEE, BUSINESS ORGANIZATIONS LAW AND POLICY 681 (10th ed. 2022). Delaware recently simplified the requirements to demonstrate futility. *See* United Food & Com. Workers Union v. Zuckerberg, 262 A.3d 1034, 1058 (Del. 2021) (adopting a three-part test in determining whether demand should be excused as futile). Moreover, if the facts demonstrate violations of loyalty, good faith or constitute violations of law—the requirement may be irrelevant—demand may not be required. *See, e.g.*, Kandell v. Niv, 2017 WL 4334149 (Del. Ch. Sept. 29, 2017) (knowingly allowing a corporation to violate positive law is a breach of the duty of loyalty, which gives rise to personal liability).

24. *See In re Caremark Int'l*, 698 A.2d at 967 (describing such claims as "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment").

25. Marchand v Barnhill, 212 A.3d 805 (Del. 2019); *see also infra* Part II (discussing Marchand and subsequent cases).

26. Roy Shapira, *Max Oversight Duties: How* Boeing *Signifies a Shift in Corporate Law*, 48 J. CORP. L. 121, 128 & n.36 (noting how "*Marchand* opened the door to other successful Caremark claims" and citing to notable *Caremark* actions post-*Marchand*).

27. As will be discussed below, Delaware cases emphasize that the board must make an effort to be informed of improper conduct critical to the company's business operation and that the board has a responsibility to both establish *and to continuously effectively monitor the oversight systems*. *See infra* Part II. In addition, the Delaware oversight obligation is understood as emanating from the duty of loyalty. Significantly, the duty of loyalty in Delaware is broad and includes both an obligation to avoid conflicts of interest and improper gain from decisions as well as a more encompassing duty to make independent decisions based on what is best for the business even if no advantage will accrue to the director. As discussed below, the director decision must not be based on any other factor other than what is best for the business regardless of whether the director receives a personal benefit. In contrast, other jurisdictions understand loyalty in a more limited fashion and conceptualize loyalty as receiving a special benefit ordinary shareholders do not receive. For example, in China, the duty of loyalty is focused on self-dealing, taking corporate opportunity, etc., as opposed to also including within loyalty the obligation to act without any other interest in mind when making a business decision. *See* SHEN WEI, CORPORATE LAW IN CHINA: STRUCTURE, GOVERNANCE AND REGULATION 260–71 (2015) (explaining the loyalty obligation in China). Thus, the Chinese loyalty obligation does not encompass the Delaware understanding. *See also* Shuangge Wen & Jingchen Zhao, *Trends and Developments of the Directors' Duty of Loyalty in China: A Case Analysis*, 13 SUSTAINABILITY, no. 15, 2021, at 1, 17–18 (discussing duty of loyalty cases in China).

inasmuch as *Caremark* liability is now firmly understood as a violation of the duty of loyalty and thus not protected by the business judgment rule or entitled to the benefit of indemnification or an exculpatory provision under section 102(b)(7).[28]

Marchand thus has potentially significant implications on business decision-making in light of the China-U.S. hegemonic competition, which is likely to continue, if not further intensify.[29] Holding that national security is mission critical might transform corporate policies inasmuch as endangering U.S. national security might be viewed as violating directors' enhanced *Caremark* duties thereby elevating the oversight obligations and subjecting directors to potential personal liability.[30] Practical ramifications might include a reluctance to engage in commercial relations with Chinese entities—particularly businesses engaged in emerging technologies, data management, financial institutions, and other strategic business sectors—despite the potential for immense short-term profits. At a minimum, however, directors of these corporations will need to establish a comprehensive monitoring mechanism to constantly evaluate national security risks associated with the business conduct of the corporation. Furthermore, pursuant to the current conceptualization of U.S. national security which encompasses retention of U.S. supremacy, business deals which diminish U.S. dominance might also fall within the ambit of damaging U.S. national security.

Given the importance of large and strategic corporations to the pillars of hegemonic power, the national security to corporate governance interface will likely constitute an increasingly important issue going forward. The question whether national security constitutes a "mission critical" issue under the expanded *Caremark* doctrine as described in *Marchand* is thus significant. This Article contributes to the literature by exploring a novel question: is national security now a mission critical aspect of U.S. corporate director obligations? The Article opines directors of large or strategic corporations might have oversight liability based on the failure of the board to monitor corporate conduct engendering risks to U.S. national security. Two independent reasons exist for holding that national security is mission critical. One, corporate losses due to prosecution and fines for violating an increasingly comprehensive web of U.S. national security-driven laws is potentially "mission critical" inasmuch as financial penalties can cause severe corporate losses. Two, the promotion of certain ESG initiatives might also amount to mission critical

28. *See infra* Part II.

29. *See* Mark Feldman, The US-China Relationship in the 20s, at 2 (Oct. 21, 2020) (unpublished manuscript), https://ssrn.com/abstract=3716603 [https://perma.cc/3526-DPHR] ("I would note that my short-term view remains pessimistic regardless of the outcome of the upcoming presidential election in the United States. Although the United States currently is a deeply divided country, US politicians across the political spectrum have voiced little opposition to the Trump Administration's wide-ranging decoupling measures, which have included national security reviews, export controls, tariffs, sanctions and forced sales. Such enthusiasm—or, at a minimum, tolerance—for at least some degree of US-China decoupling has become entrenched in US politics; to dislodge that mindset, significant shifts will need to occur.").

30. *See* Homestore, Inc. v. Tafeen, 888 A.2d 204, 211–13 (Del. 2005) (indemnification available to directors for liability based on duty of care violations, but not for a breach of their duty of loyalty); Emerald Partners v. Berlin, 787 A.2d 85, 90 (Del. 2001) (shareholders can permit the corporation to "exculpate directors from any personal liability for the payment of monetary damages for breaches of their duty of care, but not for duty of loyalty violations, good faith violations and certain other conduct").

activities in the context of national security[31] as both long-term sustainable profitability and the promotion of U.S. notions of rights and freedoms might constitute mission critical corporate obligations.[32]

This Article proceeds as follows: Part II provides an overview of the director duty of oversight by tracing its development from a duty framed as one triggered only upon actual notice of misconduct to a more activist care-based duty to uncover potential misconduct. The monitoring obligation has also been re-conceptualized from a duty of care to one based upon loyalty, particularly for mission critical corporate functions. Part III discusses the importance of corporations to the spheres of hegemonic power, how national security has been conceptualized far beyond raw military power, and how corporations are now linked to the new understanding of national security. Part IV focuses on whether national security constitutes a core mission for U.S. corporations and argues that both risks of prosecution as well as promotion of ESG militate in favor of finding national security a mission critical for large and strategic corporations. Part V provides some suggestions in the context of boardroom dilemmas.

II. THE DUTY OF OVERSIGHT

This Part focuses on the duty of oversight and traces the development of the obligation in Delaware courts. Initially, the oversight duty was limited to directors' actual knowledge of illegal conduct and the failure to respond and remedy the misconduct.[33] Subsequently, the obligation was expanded to require directors to actively endeavor to avoid losses by establishing a monitoring system to detect potential misconduct.[34] Recently, the oversight obligation was significantly strengthened—corporate directors now have a loyalty-based fiduciary obligation to both oversee an *effective* monitoring system establishing an effective compliance program and to *continuously monitor that oversight mechanism to ensure the system remains effective*.[35] The following sub-sections provide the historical perspective of the development of this obligation highlighting the key cases leading to the current conceptualization of the oversight duty.

A. Historical and Legal Background

1. The "Triad" of Fiduciary Obligations

Publicly-traded corporations in the U.S. have a single board of directors vesting the directors simultaneously with both managerial as well as supervisory[36] fiduciary

31. *See* Gail Ridley, *National Security as a Corporate Social Responsibility: Critical Infrastructure Resilience*, 103 J. BUS. ETHICS 111, 113 (2011) ("It appears that risk to national and global security recently linked to the resilience of critical infrastructure may be another change to the social context that warrants examination of the relationships among stakeholders, as a CSR construct.").

32. *See id.* (arguing that national security has a social goals context as well); Aziz Z. Huq, *The Social Production of National Security*, 98 CORNELL L. REV. 637, 638 (2013) ("National security bears all the hallmarks of a quintessential public good.").

33. *See infra* Part II.B.1; Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125 (Del. 1963).

34. *See infra* Part II.B.2; *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

35. *Caremark*, 698 A.2d at 959 (Del. Ch. 1996).

36. *See* Lisa M. Fairfax, *Managing Expectations: Does the Directors' Duty to Monitor Promise More than It Can Deliver*, 10 U. ST. THOMAS L.J. 416, 420 (2012) ("A [U.S. corporate] director's role in the corporation

obligations to the corporation and its shareholders.[37] The fiduciary obligations encompass duties of care[38] and loyalty,[39] and the obligation to implement those duties in good faith.[40] The fiduciary obligations, known as "a triad,"[41] are applicable to corporate officers as well as directors since "the fiduciary duties of officers are the same as those of directors."[42]

Violating fiduciary obligations which proximately cause a financial loss to the corporation vests in the corporation, and/or the corporation's shareholders, the right to file a claim against the directors to recoup the corporation's losses.[43] As discussed below, directors' personal liability is controlled by whether the director violated the loyalty and good-faith responsibilities which removes the deferential review standard as well as rendering unavailable the benefits of exculpatory clauses and indemnification.

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encompasses both a monitoring responsibility as well as a managerial role in which directors make specific decisions regarding corporate affairs."). In contrast, European boards are generally two-tiered with separate managerial and supervisory boards. *See, e.g.*, Jens Dammann & Horst Eidenmüller, *Codetermination: A Poor Fit for U.S. Corporations*, 2020 COLUM. BUS. L. REV. 870, 880 (illustrating that many European countries either require two-tiered corporate boards or give the option for a corporation to be two-tiered).

37. Directors stand in a fiduciary relationship to the corporation and its shareholders. *See, e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 179 (Del. 1986) ("In discharging [responsibility for managing a corporation] the directors owe fiduciary duties of care and loyalty to the corporation and its shareholders."); Young v. Chiu, 853 N.Y.S.2d 575, 576 (N.Y. App. Div. 2008) (establishing that directors are fiduciaries to the corporation and owe unyielding obligations of loyalty of care, loyalty, and good faith to the corporation).

38. *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("[D]irectors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them.").

39. *See* Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939) ("A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his [or her] charge . . . ."); *see also* Schoon v. Smith, 953 A.2d 196, 206 (Del. 2008) ("[The court's] exposition of the duty of loyalty is traceable to *Guth v. Loft, Inc.*, where we held that '[c]orporate officers and directors are not permitted to use their position of trust and confidence to further their private interests' . . . ." (second alteration in original) (footnote omitted)).

40. *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 67 (Del. 2006) ("A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.").

41. *See* Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675, 681 (2009); Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006) ("[G]ood faith may be described colloquially as part of a 'triad' of fiduciary duties that includes the duties of care and loyalty . . . .").

42. Gantler v. Stephens, 965 A.2d 695, 708–09 (Del. 2009).

43. Delaware has a long history of derivative litigation in which the shareholders can directly pursue claims if the "futility" test is satisfied. *See Aronson*, 473 A.2d at 811 (Del. 1984), *abrogated by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000); Rales v. Blasband, 634 A.2d. 927 (Del. 1993). Delaware recently revamped the "futility test" and courts will generally allow shareholders to pursue such derivative claims to recover losses. *See* United Food & Com. Workers Union v. Zuckerberg, 262 A.3d 1034 (Del. 2021) (revamping the futility test). Other jurisdictions also permit derivative claims. For example, under New York law shareholders may sue individually "when the wrongdoer [corporate director] has breached a duty owing to the corporation wronged." *Anwar* v. Fairfield Greenwich Ltd., 728 F. Supp. 2d 372, 400–01, 415 (S.D.N.Y. 2010); Abrams v. Donati, 489 N.E.2d 751, 751–52 (N.Y. 1985). The same extends to other states. *E.g.*, Winer Fam. Tr. v. Queen, 503 F.3d 319, 338 (3d Cir. 2007) ("Under Pennsylvania law, corporate directors owe fiduciary duties . . . and [these duties] may be enforced directly by the corporation or may be enforced by a shareholder . . . ." (citing 15 PA. CONS. STAT. § 1717 (2007)).

2. The Business Judgment Rule and Other Review Standards

Similar to elected politicians in Western democracies who can govern in the context of domestic political governance, directors are elected by shareholders to govern the corporation.[44] In order to encourage both reasonable entrepreneurial risk-taking, and the ability to attract and retain qualified directors, Delaware directors are afforded discretion when making business decisions through the protection of the business judgment rule (BJR). Under the BJR, the rebuttable presumption is that director decisions were indeed made in good faith and in the best interests of the corporation which, from a practical standpoint, translates into a heavy burden on plaintiff shareholders to demonstrate facts overcoming the presumption. Accordingly, director conduct arising from the duty of care which caused corporate losses will ordinarily not be second-guessed unless shareholders can rebut the presumption by demonstrating either gross negligence on the part of directors or establish a lack of rationality drove the directors' decision.[45] Therefore, pursuant to the BJR, directors are vested with the freedom to oversee their corporations, and reasonable latitude is afforded to directors for merely negligent mistakes—i.e., but not for grossly negligent or irrational business decisions although directors can be indemnified and exculpated for such duty of care violations.[46] "[The BJR is the] laxest standard of review . . . compounded by procedural hurdles, indemnification provisions, and exculpatory statutes, all of which make it nearly impossible to bring claims against directors or to hold directors personally responsible for breaching their duties."[47] Clearly, the advantages to directors if shareholder derivative claims are reviewed under the BJR are superlative and minimize the risk of personal liability.

However, the duty of loyalty is *not evaluated* through the lens of the BJR—in the context of a loyalty violation, exculpatory clauses, indemnification, and insurance will not preclude directors from personal liability.[48] Significantly, while a lack of loyalty was once conceptualized only as a conflict of interest or self-dealing[49]—such as receiving a financial benefit above and beyond what ordinary public shareholders would receive—loyalty is now understood more extensively. Loyalty can be breached even if no special or unique benefit accrues to the directors and encompasses the requirement that directors exercise independent judgment.[50] In other words, the director's decision must not be based on any

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44. *See* Slawotsky, *supra* note 2, at 236.

45. Plaintiffs can defeat the presumption by establishing the directors acted with either gross negligence, see Smith v. Van Gorkom, 488 A.2d 858, 874 (Del. 1985), or with no rational basis, see Kahn v. M&F Worldwide Corp., 88 A.3d 635, 654 (Del. 2014).

46. Indemnification for duty of care violations arose in the aftermath of *Van Gorkom. See* Holland, *supra* note 41, at 691 ("The Delaware Supreme Court concluded that Trans Union's board was not entitled to the presumption of the business judgment rule because the board had failed to act on an informed basis. After finding that the Trans Union directors had breached their duty of care in approving the sale of the corporation, the Delaware Supreme Court took 'the unprecedented step' of holding all of Trans Union's directors jointly and severally liable for more than $23 million." (footnotes omitted)); *id.* ("In 1986, section 102(b)(7) of the Delaware General Corporation Law was enacted . . . in response to the Delaware Supreme Court's decision in *Van Gorkom* . . . .").

47. *See* Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1210 (2022).

48. *Id.*

49. Fairfax, *supra* note 36, at 419.

50. *Id.* at 429.

factors other than the best interests of the company.[51] Conceptualizing the oversight obligation within the rubric of loyalty will not permit directors to escape personal liability. Accordingly, the conceptual framework of the fiduciary obligation to monitor the business is critical.[52]

B. The Duty of Oversight

1. Graham

An integral aspect of director obligations is the responsibility to oversee the corporation, i.e., to monitor the business and have an awareness of what is transpiring within the corporation.[53] Initially, the contours of director liability for oversight were limited to actual notice of corporate misconduct and violations of law. Director failure to respond adequately to actual knowledge of the misconduct constituted a fiduciary breach of the oversight duty, but there was an absence of an affirmative obligation to actively monitor or find out about potential problems within the corporation.

For example, in *Graham v. Allis-Chalmers Mfg. Co*., the Delaware Chancery Court noted the "law clearly does not now require that directors in every instance establish an espionage system in order to protect themselves generally from the possibility of becoming liable for the misconduct of corporate employees."[54] *Graham* was a shareholders' derivative claim alleging that the fines paid for by the company for antitrust violations were the result of director oversight failures.[55] The Chancery Court dismissed the claim because the plaintiffs failed to establish the directors possessed actual knowledge of the antitrust violations and thus were not "on actual notice" about the employee misconduct. In *Graham*, the directors were held to be not liable in the absence of actual knowledge of the wrongdoing and a corresponding failure to remedy the situation.[56] In affirming, the Delaware Supreme Court noted that the "[p]laintiffs have wholly failed to establish either actual notice or imputed notice to the Board of Directors of facts which should have put them on guard and have caused them to take steps to prevent the future possibility of illegal

51. *Id.* at 419 ("Traditionally, the duty of loyalty addressed situations in which directors had a conflict of interest or there was potential self-dealing by a director. The duty of loyalty seeks to ensure that in those situations, directors do not place their own interests before the interests of the corporation and its shareholders." (footnote omitted)); *see also* Stephen M. Bainbridge, Star Lopez & Benjamin Oklan, *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 585 (2008) ("The duty of loyalty traditionally focused on cases in which the defendant fiduciary received an improper financial benefit. Accordingly, the traditional remedy was to strip that benefit away from the defendant. In related-party transactions whose terms are unfair to the corporation, for example, the transaction may be voided. Where a defendant usurps a corporate opportunity, the corporation gets a constructive trust on the opportunity. By subsuming good faith into the duty of loyalty, however, *Stone* extended the domain of the duty of loyalty to cases in which the defendant received no financial benefit. In such cases, the traditional remedy is inapt. There is neither a transaction to be voided nor a res to be seized." (footnotes omitted)).

52. *See* Fairfax, *supra* note 36, at 429–32 (oversight framed from duty of care towards loyalty removing benefits of BJR, exculpatory clauses).

53. *See id.* at 419 ("A director's oversight duty represents the duty to monitor and pay attention to corporate affairs.").

54. Graham v. Allis-Chalmers Mfg. Co., 182 A.2d 328, 332 (Del. Ch. 1962).

55. *Id.* at 328.

56. *Id.* at 330.

price fixing and bid rigging."[57] Therefore, pursuant to the classic notion of oversight responsibility, directors were not obligated to actively monitor for potential compliance problems.

However, Delaware courts have transformed the oversight obligation, and the case law now holds directors are indeed responsible to monitor and endeavor to prevent corporate wrongdoing. Furthermore, while initially conceptualized as stemming from the duty of care, courts now deem oversight failures as constituting a lack of loyalty thereby potentially exposing directors to personal liability.

2. Caremark

The landmark ruling which focused on the board's failure to exercise oversight was the *Caremark* decision.[58] Arising from large fines the defendant corporation was ordered to pay following a multi-year investigation and indictment over violations of Federal law, shareholders filed claims alleging the *Caremark* directors' oversight failure violated the directors' fiduciary obligation of due care demonstrable from the failure to detect and prevent the misconduct which proximately caused the corporate losses.

Caremark analyzed the oversight duty under a duty of care framework. Indeed, the complaint charged directors with a breach of their duty of care, characterizing the directors' inattention as a breach of the duty of care in the ongoing operations of the corporation's business.[59] The Delaware Court of Chancery analyzed monitoring as based on a duty of care noting that director liability could indeed exist if the facts established the directors failed to act under circumstances when board action would arguably have avoided the financial loss.[60]

> Obviously the level of detail that is appropriate for such an information system is a question of business judgment. And obviously too, no rationally designed information and reporting system will remove the possibility that the corporation will violate laws or regulations, or that senior officers or directors may nevertheless sometimes be misled or otherwise fail reasonably to detect acts material to the corporation's compliance with the law. But it is important that the board exercise a good faith judgment that the corporation's information and reporting system is in concept and design adequate to assure the board that appropriate information will come to its attention in a timely manner as a matter of ordinary operations, so that it may satisfy its responsibility.
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> . . . [The] director's obligation includes a duty to attempt in good faith to assure that a cor*porate information and reporting system, which the board concludes is adequate*, exists, and that failure to do so under some circumstances

57. *Id.* at 329.

58. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996). Corporate officers are also liable for violating Caremark duties. *See generally In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343 (Del. Ch. 2023) (denying motion to dismiss and holding non-director corporate officers also have a fiduciary duty of oversight).

59. *See* Fairfax, *supra* note 36, at 429. As explained below, the distinction between care and loyalty is significant, placing oversight claims under the duty of loyalty removes the protection of the business judgment rule and section 102(b)(7) exculpatory clauses.

60. *Caremark*, 698 A.2d at 967–69.

> may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.[61]

Thus, pursuant to *Caremark*, directors must establish and oversee *effective risk management and compliance controls*. Merely establishing a monitoring mechanism is insufficient; directors must establish a mechanism *that they, in good faith, believe is effective*.[62] Moreover, while potentially opening the door to such claims, *Caremark* also contained language that would simultaneously make it reasonably difficult for plaintiffs to file successful claims. To prove director misconduct, "only a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exits—will establish the lack of good faith that is a necessary condition to liability."[63] Subsequent years confirmed such claims were "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment"[64] as very few cases survived dismissal motions. However, irrespective of the cautionary language, ultimately, *Caremark* was a transformational case firmly ensconcing the obligation to establish an effective compliance system.[65]

3. Stone

A decade after *Caremark*, the oversight obligation expanded[66] and moved from a care duty to one conceptualized as implicating loyalty.[67] *Stone v. Ritter*[68] arose from substantial fines caused by the company's failure to comply with money-laundering laws. The Delaware Supreme Court dismissed the claims because the defendant had established procedures for director oversight of the compliance program. Relying on an independent auditor's report detailing the board's oversight attempts and the board's requests for regular reports, the court found the directors could not be liable if the employees failed to report the wrongdoing.

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61. *Id.* at 970 (emphasis added).

62. *Id.* at 968.

63. *Id.* at 971.

64. *Id.* at 967.

65. *See generally* Langevoort, *supra* note 14, at 727. Numerous jurisdictions have embraced *Caremark* duties. *See, e.g.*, *In re* Mundo Latino Mkt. Inc., 590 B.R. 610 (Bankr. S.D.N.Y. 2018) (New York law citing to *Caremark* duties); Belmont v. MB Inv. Partners, Inc., 708 F.3d 470, 489 (3d Cir. 2013) (applying Pennsylvania law and citing approvingly to the *Caremark* standard).

66. *See, e.g.*, Guttman v. Huang, 823 A.2d 492, 506 (Del. Ch. 2003); Stephen M. Bainbridge, *Is Caremark Evolving and, If So, to What?*, PROFESSORBAINBRIDGE.COM (Jan. 25, 2021), https://www.professorbainbridge.com/professorbainbridgecom/2021/01/is-caremark-evolving-and-if-so-to-what.html [https://perma.cc/CSQ2-V77Q] (predicting *Caremark* liability will become more routine, attributing the development to *Guttman* as shifting the breach from a duty of care to a duty of loyalty).

67. Some have opined that conceptualizing oversight as based on loyalty is a slippery slope and cautioned against overly expanding director liability. *See* Stephen M. Bainbridge, Caremark *and Enterprise Risk Management*, 34 J. CORP. L. 967, 990 (2009) ("Because risk management does differ in degree from [law compliance and accounting control] claims, however, particularly because it is inextricably intertwined with risk taking, the bar needs to be set particularly high with respect to such claims."); Bainbridge, Lopez & Oklan, *supra* note 51, at 591 ("Unfortunately, even under the *Disney* definition, good faith still threatens to expand the extent to which courts will review the substance of director decisions and, concomitantly, the liability exposure of corporate directors.").

68. Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362 (Del. 2006).

> We hold that *Caremark* articulates the necessary conditions predicate for director oversight liability: (a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations. Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.[69]

Therefore, while dismissing the claims against the directors, the *Stone* decision referenced a loyalty violation shifting oversight from being based on due care towards the failure to act loyally.[70] By placing *Caremark* claims within the ambit of the duty of loyalty, directors would not be protected against oversight claims by the business judgment rule or receive the benefits of an exculpatory provision.[71] *Stone*'s apparent conceptualization of oversight in terms of loyalty has been criticized.[72]

C. The Delaware Supreme Court's 2019 Marchand *Decision*

In *Marchand v. Barnhill*, the Chancery Court had dismissed a claim against directors over losses due to safety violations based upon the existence of a compliance program which the court held satisfied the *Caremark* standard.[73] The Delaware Supreme Court reversed noting that while indeed the corporation had a compliance program, the mere existence of a compliance program itself did not inherently constitute sufficient monitoring to satisfy the obligation.[74] Unequivocally conceptualizing the oversight obligation in terms of loyalty, *Marchand*, held the lack of continuous monitoring created an inference that the directors had breached their oversight obligation: "to satisfy their duty of loyalty, directors must make a good faith effort to implement an oversight system and then monitor it."[75] In finding potential director liability, the court noted the absence of an internal corporate mechanism for directors to become informed or to remedy violations of law.[76] "If *Caremark* means anything, it is that a corporate board must make a good faith effort to exercise its duty of care. A failure to make that effort constitutes a breach of the duty of loyalty."[77]

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69. *Id*. at 370 (footnotes omitted).

70. *Id.* at 373.

71. The court also corroborated the difficulty in pursuing such claims citing the cautionary language of *Caremark*, "a claim that directors are subject to personal liability for employee failures is 'possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.'" *Id*. at 372 (quoting *Caremark*, 698 A.2d at 967).

72. For a critique of *Stone*, see Bainbridge, Lopez & Oklan, *supra* note 51, at 595–604.

73. Marchand v. Barnhill, No. C.A. 2017-0586, 2018 WL 4657159, at *19 (Del. Ch. 2018).

74. Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019).

75. *Id.* at 821.

76. *Id.* at 809 (noting there was "no [board] committee overseeing food safety, no full board-level process to address food safety issues, and no protocol by which the board was expected to be advised of food safety reports and developments.").

77. *Id.* at 824.

Marchand emphasized that *Caremark* requires that directors make a good faith effort to implement and continuously monitor the oversight mechanism to ensure timely reporting of misconduct, and the failure to do so constitutes a violation of the duty of loyalty.[78] Secondarily, *Marchand* also emphasized that the oversight responsibility is particularly vital when dealing with mission critical operations of the corporation and noted for a business with a single product, "a monoline company" that product might constitute a "mission critical" function.[79] Finally, *Marchand* places the obligation on directors to be active monitors who must establish an effective compliance program and *effective procedures to ensure continuous monitoring of the compliance program*.[80] While the directors in *Marchand* dealt with food (a monoline operation), the same reasoning is applicable to other economic sectors, particularly aspects of corporate affairs that are highly-regulated and/or constitute critical corporate functions. The next sub-part highlights several post-*Marchand* rulings which confirm the enhanced oversight obligations set forth in *Marchand* are applicable in a variety of contexts.

D. Post-Marchand *Decisions*

Marchand's stricter oversight conceptualization and the apparent endorsement of such claims, particularly with respect to "mission critical" operations,[81] was corroborated in *Clovis Oncology, Inc. Derivative Litigation*[82]; *Hughes v Hu*[83]; and in *Boeing*.[84] Each of these post-*Marchand* rulings is discussed below.

1. Clovis

In *In re Clovis Oncology, Inc. Derivative Litigation*, the Delaware Court of Chancery refused to dismiss *Caremark* claims alleging corporate directors failed to adequately oversee clinical trials of a drug which enabled corporate misrepresentations regarding the effectiveness of the trials. The court stated "as fiduciaries, corporate managers must be informed of, and oversee compliance with, the regulatory environments in which their businesses operate."[85] The court added "[t]his is especially so when a monoline company operates in a highly regulated industry."[86]

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78. *Id.*

79. *Marchand*, 212 A.3d at 824 ("[F]ood safety was essential and mission critical. The complaint pled facts supporting a fair inference that no board-level system of monitoring or reporting on food safety existed."); *see also id.* ("As a monoline company that makes a single product," food safety was an "essential and mission critical" compliance risk). Of course, *Marchand* in no way limited "mission critical" to a company with a single product focus but implicitly highlighted the increased risks of a non-diversified business.

80. *Id.*

81. *But see infra* notes 78–80 and accompanying text (stating that "mission critical" is not referenced with regard to the enhanced oversight obligation).

82. *In re* Clovis Oncology, Inc. Derivative Litig., C.A. No. 2017-0222, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019) (emphasizing director oversight of compliance with law including regulatory mandates).

83. Hughes v. Hu, C.A. No. 2019-0112, 2020 WL 1987029 (Del. Ch. Apr. 27, 2020) (discussing duty to exercise oversight and monitor a corporation's operational viability, legal compliance, and financial performance and reporting).

84. *In re* Boeing Co. Derivative Litig., No. 2019-0907, 2021 WL 4059934 (Del. Ch. Sept. 7, 2021) (arguing with respect to safety oversight, a "mission-critical" issue for an aircraft company).

85. *In re Clovis Oncology*, 2019 WL 4850188 at *12.

86. *Id.* at *1.

> Directors must make a good faith effort to implement an oversight system and then monitor it. . . . *Marchand* . . . underscores the importance of the board's oversight function when the company is operating in the midst of a "mission critical" regulatory compliance risk. . . . [T]he board's oversight function must be more rigorously exercised.[87]

Specifically, the plaintiffs satisfied their pleading standards by alleging the directors "consciously ignored red flags that revealed a mission critical failure to comply," that "this failure of oversight caused monetary and reputational harm to the Company,"[88] and that the directors "ignored multiple warning signs that management was inaccurately reporting."[89] The court held that directors must demonstrate that not only were good -faith efforts made *to implement* the oversight system but that good -faith efforts were made *to monitor* the system—particularly since the corporation operated in an intensely regulated economic sector.

2. Hu

Similarly, the Delaware Court of Chancery allowed a *Caremark* claim to proceed in *Hughes v Hu*,[90] *which* involved a China-headquartered corporation with a history of material weaknesses in financial controls, including a series of improper related party transactions. Plaintiff shareholders alleged the directors failed to provide adequate financial oversight.[91] Denying the defendant's motion to dismiss, the court relied on evidence that the audit committee met infrequently, ignored "red flags," and failed to implement a system of oversight with adequate internal controls.[92] Interestingly, *Hu* did not refer to a "mission critical" function, thereby suggesting that enhanced oversight responsibilities are not limited to "critical missions" and in fact encompass corporate financial stability. One could argue that avoiding substantial economic losses logically constitutes a "core mission."[93]

3. Boeing

In *In re Boeing Co. Derivative Litigation*, plaintiff shareholders alleged the board's failure to actively monitor airplane safety—as well as the failure to remedy safety problems following its airplanes crashing—caused the substantial loss of market-capitalization of Boeing shares.[94] The Chancery Court refused to dismiss an oversight claim against Boeing's directors based on finding the board's failure to oversee safety which the court held constituted a "mission-critical" corporate function.[95] The court held there were issues

87. *Id.* at *1, *12–13.
88. *Id.* at *1, *15.
89. *Id.* at *2.
90. Hughes v. Hu, C.A. No. 2019-0112, 2020 WL 1987029 (Del. Ch. Apr. 27, 2020).
91. *Id.* at *1.
92. *Id*. at *16.
93. *But see* City of Detroit Police & Fire Ret. Sys. *ex rel.* NiSource, Inc. v. Hamrock, C.A. No. 2021-0370, 2022 WL 2387653, at *14–15 (citing *Boeing* and an apparent dichotomy between routine losses and loses engendered through failure to oversee "mission critical functions").
94. *In re* Boeing Co. Derivative Litig., C.A. No. 2019-0907, 2021 WL 4059934, at *1, *5–7, *12–16.
95. *See id.* at *33 (discussing the lack of oversight).

of fact regarding the claims that the directors "complete[ly] fail[ed] to establish a reporting system for airplane safety," "turn[ed] a blind eye to a red flag representing airplane safety problems" and "treated the [first] crash as an 'anomaly,' a public relations problem, and a litigation risk, rather than investigating the safety of the aircraft."[96] The court referred to airline safety as "mission critical" numerous times embracing the view that securing a safe transit for passengers required directors to perform oversight with extra rigor.[97]

Therefore, based on *Marchand* and subsequent cases, the directive of the Delaware courts is manifestly clear: directors must fulfill their monitoring obligation by establishing an effective oversight mechanism. That means directors must continuously ensure the system remains effective. The duty seems to be enhanced when focusing on mission critical operations although that has not been held as a specific requirement for holding directors to the enhanced obligation.[98] To be sure, *Caremark* liability will not be imposed for routine business mistakes leading to financial losses.[99]

Moreover, finding the alleged lack of oversight connected to "mission critical" operations does not automatically lead to the acceptance of *Caremark* oversight claims.[100] While the oversight obligation constitutes an important obligation of directors, the expansion in conceptualizing monitoring has been critiqued.[101]

III. THE IMPORTANCE OF CORPORATIONS TO U.S. NATIONAL SECURITY

This Part discusses the link between U.S. national security and U.S. corporations. Initially, Part III.A traces the China–U.S. rivalry providing a brief historical perspective. Part III.B then focuses on the re-conceptualization of national security from solely based upon military strength into a fusion of economic, technological, and ideological power spheres. Part III.C discusses how corporations are inherently connected to these power levers and thus to national security.

96. *Id*. at *1, *34.

97. *Id*. at *26 (comparing "mission critical" risks to "routine" *Caremark* claims involving financial losses—see Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362 (Del. 2006)—or accounting fraud—see Hughes v. Hu, C.A. No. 2019-0112, 2020 WL 1987029 (Del. Ch. Apr. 27, 2020)). Whether the Delaware Supreme Court would endorse this view is unknown. However, even assuming *arguendo* this interpretation was found correct by the Delaware Supreme Court, it would only mean that the directors have an "enhanced" level of responsibility, but the *Caremark* oversight obligation would remain, nevertheless.

98. *See* discussion *supra* Part II.D.2.

99. Segway Inc. v. Cai, C.A. No. 2022-1110, 2023 WL 8643017, at *5 (Del. Ch. Dec. 14, 2023) ("The *Caremark* doctrine is not a tool to hold fiduciaries liable for everyday business problems. Rather, it is intended to address the extraordinary case where fiduciaries' 'utter failure' to implement an effective compliance system or 'conscious disregard' of the law gives rise to a corporate trauma.").

100. *See, e.g.*, Constr. Indus. Laborers Pension Fund v. Bingle, C.A. No. 2021-0940, 2022 WL 4102492, at *11–12 (Del. Ch. Sept. 6, 2022) (holding that, while cybersecurity is "mission critical" for online service companies, there was a lack of specific facts alleged indicating director lability).

101. *See* Stephen M. Bainbridge, *A Critique of the American Law Institute's Draft Restatement of the Corporate Objective*, 2 U. CHI. BUS. L. REV. 1, 38–39 (2023) (noting *Stone*'s shift in conceptualizing oversight from care to loyalty, and in addition, critiquing not only *Stone* but *Caremark* as well, and calling for a return to the *Graham* standard).

A. The China–U.S. Rivalry

To better understand why corporations and national security intersect in the context of the China-U.S. geo-economic competition, a brief historical perspective of China–U.S. relations is vital. International relations and great power strategy is never fixed, reflecting ever-changing national self-interests. As a relevant exemplar of how international relations are far from fixed, the exemplar of China and the U.S. is illustrative. In 1969, at the height of hostilities between the two mammoth Communist powers—China and the Soviet Union—the U.S. was asked by the Soviets what the U.S. response would be to a Soviet nuclear first strike on China.[102] The intentions of the Soviets in asking these questions was—and remains—in dispute.[103] But despite the tension, or perhaps because the Sino-Soviet hostility gave the U.S. a stronger bargaining position, the U.S. worked towards fostering a stronger relationship with China.[104] Indeed, to sideline the Soviets, who were viewed as the primary threat to U.S. hegemony, the United States commenced relations with China seeking to build China into a counter-weight against the Soviets. Accordingly, U.S. policy toward China in the 1980s was to engage with China in a spirit of cooperation although clearly the U.S. did not want to build China into a peer-competitor.

After the Soviet Union fell, the only remaining potential rival, China, was integrated into the global trade order and, to a partial extent, global governance during the 1990s and 2000s. This strategy was based upon the expectation that global engagement would initiate domestic political-economic governance change[105] and therefore China would board the

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102. Memorandum of Conversation from the U.S. Dep't of State (Aug. 18, 1969), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB49/sino.sov.10.pdf [https://perma.cc/D3RE-42S] ("[A Soviet Secretary] asked point blank what the US would do if the Soviet Union attacked and destroyed China's nuclear installations."); Memorandum from Henry A. Kissinger to President Nixon 4–5 (Sept. 29, 1969), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB49/sino.sov.24.pdf [https://perma.cc/B495-4F39] (reporting on Soviet probings "var[ying] in character from point-blank questions of [America's] reaction to provocative musings by Soviets over what they might be forced to do against the Chinese, including the use of nuclear weapons").

103. *See* Memorandum from William P. Rogers, Sec'y of State, to President Nixon 2–3 (Sept. 10, 1969), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB49/sino.sov.19.pdf [https://perma.cc/MHQ6-P7DD] (arguing Soviet probings were intended to gauge "American attitudes on the China issue" and were "curiosities rather than signals"); Memorandum from George C. Denney, Jr., Deputy Dir., Bureau of Intel. & Rsch., to the Acting Sec'y of State 1 (Sept. 23, 1969), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB49/sino.sov.23.pdf [https://perma.cc/NU6H-KEEE] (noting the Australian Communist Party's alarm to "the present course of the Sino-Soviet dispute"); Andrew Osborn & Peter Foster, *USSR Planned Nuclear Attack on China in 1969*, TELEGRAPH (May 13, 2010), https://www.telegraph.co.uk/news/worldnews/asia/china/7720461/USSR-planned-nuclear-attack-on-China-in-1969.html [https://perma.cc/NP8D-JLBJ] (reporting that a Chinese scholar had published in a CCP approved publication that in 1969 the U.S. was in fact informed by the Soviets of its intention to launch a surprise nuclear strike on China in order to avoid American misinterpretation that might lead the U.S. to take a preemptory defensive first strike. Allegedly, in response, the U.S. told the Soviet leadership that if the Soviets launched a nuclear attack on China, the U.S. would not stand by but would in fact launch a retaliatory nuclear strike on the Soviet Union which indeed prevented the Soviet attack on China).

104. *E.g.*, Memorandum from Henry A. Kissinger On the US Role in Soviet Maneuvers Against China to President Nixon 3 (Sept. 10, 1969), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB49/sino.sov.20.pdf [https://perma.cc/QQ8T-ERUV] ("[W]hen the Soviets would like to keep the Chinese Communists out of the UN, we are making clear that our real interest is in keeping the Republic of China in.").

105. The dramatic conversion is exemplified by NSS documents. *Compare* GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), https://2009-2017.state.gov/documents/organization/63562.pdf [https://perma.cc/F3Q2-4XZX] ("In time, [China] will find

"inevitable ship of liberal democracy," folding into the U.S.-led Western global governance order.[106] This strategy was eminently sensible although in hindsight naive; U.S. elites presumed China's integration into the U.S.-led international order would result in continued acceptance of U.S. dominance and the removal of the China threat without war, and with enormous profits for U.S. businesses.

However, as China embarked on its own course of development—retaining its political-economic governance model and establishing alternative Chinese-led global governance initiatives—the U.S. perspective of China's rising influence and strength underwent a transformational shift. Important and inter-connected Chinese governance initiatives—such as the BRI, the AIIB, support for BRICS+, asking the Gulf nations to price energy in Renminbi, as well as technological achievements such as launching a hypersonic missile—have all demonstrated to the U.S. that China is a peer-competitor harboring regional if not global hegemonic ambitions.[107] China is also a trade superpower which traditionally is a marker of a global leader.[108]

Furthermore, as the 2020s unfold, Chinese policies are openly challenging the U.S.-led international order.[109] As an exemplar, China's open and increasing cooperation with Russia and other U.S. adversaries constitute a strategy shaped by geopolitical ambitions to

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that social and political freedom is the only source of national greatness."), *and* GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2006), https://nssarchive.us/national-security-strategy-2006/16/ [https://perma.cc/TSQ5-TRTW] ("China's leaders . . . cannot let their population increasingly experience the freedoms to buy, sell, and produce, while denying them the rights to assemble, speak, and worship."), *with* DONALD J. TRUMP, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 25 (2017) https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf [https://perma.cc/ZL2E-7UBP] ("China seeks to displace the United States in the Indo-Pacific region, expand the reaches of its state-driven economic model, and reorder the region in its favor."). The deterioration in relations was discernable towards the end of the Obama Presidency. *See* Julien Chaisse, *State Capitalism on the Ascent: Stress, Shock, and Adaptation of the International Law on Foreign Investment*, 27 MINN. J. INT'L L. 339, 353 (2018) ("China's revival threatens American power, especially in the Asia-Pacific region. This situation has been clear for some time, at least for observers who know what they are talking about.").

106. Another alternative view is that China's rise was tolerated—but up to a point. *See* Larry Catá Backer, *Encircling China or Embedding It?*, BLOGGER.COM (Nov. 8, 2010), https://lcbackerblog.blogspot.com/2010/11/encircling-china.html [https://perma.cc/LX7F-2UKK] ("[T]he Chinese suggest that American policy has been to engage China economically while creating an effective military encirclement that would enhance the American position in the event of conflict.").

107. *See* Slawotsky, *supra* note 4, at 26–29 (outlining several governance initiatives); *China Reaffirms Support for New Nations Joining BRICS as Argentina Signal Rejection*, REUTERS (Nov. 20, 2023), https://www.reuters.com/world/china-reaffirms-support-new-nations-joining-brics-argentina-signals-rejection-2023-11-20/ [https://perma.cc/7Y8Y-ZQWP]; Maha El Dahan & Aziz El Yaakoubi, *China's Xi Calls for Oil Trade in Yuan at Gulf Summit in Riyadh*, REUTERS (Dec. 10, 2022), https://www.reuters.com/world/saudi-arabia-gathers-chinas-xi-with-arab-leaders-new-era-ties-2022-12-09 [https://perma.cc/7Y8Y-ZQWP]; Demetri Sevastopulo & Kathrin Hille, *China Tests New Space Capability with Hypersonic Missile*, FIN. TIMES (Oct. 16, 2021), https://www.ft.com/content/ba0a3cde-719b-4040-93cb-a486e1f843fb (on file with the *Journal of Corporation Law*); *see generally* Wolff, *supra* note 1 (analyzing the BRI initiative).

108. *See* Leon Trakman, *China's Belt and Road: Where to Now?*, 55 INT'L LAW. 505, 506 (2022) ("China has nurtured its international treaty program to enable it to grow into the most important trade and investment pathway globally."); Keer Huang, *Between Old and New: Rethinking Modernization of China's IIA Regime*, 18 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 181 (2023) (detailing the extensive investment and trade agreements China has signed).

109. *See* Wolff *supra* note 1, at 256 ("It would, in fact, be naive to believe that China is not pursuing its own geopolitical . . . goals.").

remove the U.S. as the dominant power.[110] Illustrative, contrary to China's stated policy of non-interference in the internal affairs of other nations, China has condemned Israel, a U.S. ally, and demanded Israel commit to an immediate ceasefire to end its defensive military operation conducted in response to the Hamas-led massacre of 1200 Israeli civilians on October 7, 2023.[111] The atrocities, which included executing dozens of young people at the Nova music festival, burning people alive, gang rape, and the taking of hostages to Gaza, were filmed proudly by the perpetrators and celebrated in Gaza.[112] Yet in contrast to China's condemnation of Israel, China has refused to condemn Hamas, vetoing a UNSC resolution, and has argued that Hamas has a legal right to "resist"[113] which implies the October 7, 2023 atrocities are acceptable and did not constitute terrorism.[114] This policy choice is widely viewed as resulting from the perspective that Israel is an ally of the United States.

Yet in contrast to China's intense criticism of Israel, China's policy with respect to Russia's attack on Ukraine is entirely different. Eminent legal scholars have universally condemned the Russian invasion as an egregious violation of international law which has resulted in intentional infliction of massive Ukrainian civilian casualties and physical damage.[115]

> At the level of values, the invasion affronts the core principle of liberal internationalism: the outlawing of wars of aggression. In terms of state interests, the attack on Ukraine exposes much of Europe, especially the former members of the Soviet Union, to a heightened risk of military aggression. Political leaders who had preached pragmatic accommodation with the Putin regime feel betrayed and regret their willingness to rely on Russia to meet their energy needs. Outrage results.[116]

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110. *See, e.g.*, Shirzad Azad, *Cutting Both Ways: The Transfer of Chinese Technology to Iran in the Post-JCPOA Headwind*, 41 E. ASIA 91, 104 (2024) (discussing how Iran became increasingly reliant on China for technology following the United States "bludgeon[ing]" almost all countries with strong technology sectors from abandoning projects with Iran).

111. Adam Durbin, *Israel Gaza: China Condemns US Veto of Call for Immediate Ceasefire at UN*, BBC (Feb. 20, 2024), https://www.bbc.com/news/world-middle-east-68355436 [https:/perma.cc/F9DV-9V7].

112. JNS TV, *Bearing Witness: Kibbutz Be'eri, Hamas and a World Gone Mad*, YOUTUBE (Nov. 1, 2023), https://www.youtube.com/watch?v=Q6lmP4VSoxM; India Today, *Horrific Body Camera Footage Reveals Brutality of Hamas Terrorists During Oct 7 Massacre*, YOUTUBE (Oct. 23, 2023), https://www.youtube.com/watch?v=xawuLI9aS0Q; Hindustan Times, *Hamas Militant's Chilling Call to Family After Oct 7 Israel Massacre; 'Your Son's a Hero,'* YOUTUBE (Oct. 25, 2023), https://www.youtube.com/watch?v=Q2Z6b252I8k.

113. However, on October 7, 2023, no Israelis were in Gaza so there was no occupation to "resist" even assuming *arguendo* resistance consisting of executing civilians and gang rapes are somehow "legal."

114. *See* Middle East Eye, *China's Legal Representative at ICJ Emphasises Rights to Palestinian Self-Determination*, YOUTUBE (Feb. 22, 2024), https://www.youtube.com/watch?v=wmJUkWfIzTM.

115. *See, e.g.*, Peter Hilpold, *Justifying the Unjustifiable: Russia's Aggression Against Ukraine, International Law, and Carl Schmitt's "Theory of the Greater Space" ("Großraumtheorie")*, 22 CHINESE J. INT'L L. 409, 431 (2023) ("To show comprehension for Putin's justifications based on fully unacceptable distortions of international legal rules and for the rest . . . would throw the international community back to the early 1920s.").

116. Paul B. Stephan, *How Do We Express Our Outrage at Russia?*, 13 WAKE FOREST J.L. & POL'Y 189, 189 (2023).

Shortly before Russia's invasion of Ukraine, during Russian President Putin's visit to Beijing, Party Secretary Xi Jinping offered "friendship without limits" to Russia.[117] Indeed, China has refused to condemn Russia and has greatly strengthened cooperation with Russia including Western claims of Chinese aiding Russia militarily and collaboration on sanctions evasion.[118] Moreover, despite Russia's invasion of Ukraine, and the enormous scale of Ukrainian civilian casualties, China has no demand for a ceasefire in the Russian-Ukraine war. Notwithstanding Ukrainian requests for China to use its leverage with Russia for a ceasefire, according to China, "the time is not right" for a ceasefire.[119] The refusal to condemn Russia for its invasion of Ukraine, or to work for a ceasefire, is widely understood as resulting from the fact Russia is a U.S. adversary, and Ukraine is a U.S. ally.

These two exemplars of Chinese policies contribute to perceptions, and for some a manifestly clear belief, that China is increasingly willing to contest the U.S.-led international order. Furthermore, these policies corroborate that geo-strategic considerations increasingly drive Chinese governmental decisions. This is important since in China, businesses must adhere to the guidelines and directives of the Party. Even ostensibly private economic actors may be intertwined with the Party-State.[120] Unlike the U.S. market-capitalism model, Chinese businesses particularly important ones, may have national goal promotion embedded in their governance and decision-making. Such objectives might reflect national ambitions and encompass acquiring U.S. corporate knowhow and technological prowess which ultimately will be used by China both in its competition with the U.S. and/or transferred to U.S. adversaries.

In response to China's governance initiatives and policies which are perceived as constituting a national security threat, the U.S. is now focused on defending itself from an

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117. Alicja Bachulska, Mark Leonard & Janka Oertel, *China and Russia: A Friendship Without Limits*, EUR. COUNCIL ON FOREIGN RELS. (Mar. 31, 2023), https://ecfr.eu/podcasts/episode/china-and-russia-a-friendship-without-limits/ [https://perma.cc/3ZFK-UWH]; *accord* Elizabeth Wishnick, Opinion, *The China-Russia 'No Limits' Partnership Is Still Going Strong, with Regime Security as Top Priority*, S. CHINA MORNING POST (Sept. 29, 2022), https://www.scmp.com/comment/opinion/article/3193703/china-russia-no-limits-partnership-still-going-strong-regime [https://perma.cc/8YJK-DD47] (discussing the China-Russia 'no-limits' partnership).

118. OFF. OF THE DIR. OF NAT'L INTEL., SUPPORT PROVIDED BY THE PEOPLE'S REPUBLIC OF CHINA TO RUSSIA 3 (2023), https://democrats-intelligence.house.gov/uploadedfiles/odni_report_on_chinese_support_to_russia.pdf [https://perma.cc/M8D8-UX5A]; *See also* Alberto Nardelli & Jennifer Jacobs, *China Providing Geospatial Intelligence to Russia, US Warns* (Apr. 6 2024), https://www.bloomberg.com/news/articles/2024-04-06/china-is-providing-geospatial-intelligence-to-russia-us-warns (on file with the *Journal of Corporation Law*) (China accused by the U.S. of providing substantial assistance to Russia).

119. Colum Murphy, *China-Europe Ties Worsen on Ukraine and Dispute Over Trade*, BLOOMBERG (Feb. 20, 2024), https://www.bloomberg.com/news/articles/2024-02-21/china-europe-ties-worsen-on-ukraine-and-disputes-over-trade ("[C]onditions were not ripe for peace talks between Ukraine and Russia . . . .").

120. *See* Slawotsky, *The Impact of Geo-Economic Rivalry*, *supra* note 3, at 580–86 (discussing China's unique economic governance and how that affects Chinese corporations including ostensibly private entities). *See, e.g.*, Sara Zheng, *Alibaba Discloses State Ownership in More Than 12 Business Units*, BLOOMBERG (Feb. 26, 2024), https://www.bloomberg.com/news/articles/2024-02-26/alibaba-discloses-state-ownership-in-more-than-12-business-units (on file with the *Journal of Corporation Law*) (reporting that the ostensibly private Alibaba concedes that the Chinese government (i.e., the Party-State), owns part of the company in response to an inquiry from the U.S. Securities and Exchange Commission). For state institutions such as state-linked or state-owned businesses Party approval and influence over business decisions has increased in recent years. See Susan Finder, *How China's Supreme People's Court Supports the Development of Foreign-Related Rule of Law*, 8 CHINA L. & SOC'Y REV. 62, 69 (2023) ("During the Xi Jinping era, the Party leadership has focused attention on strengthening its leadership over state institutions.")

ascending China since "[n]o country presents a broader, more severe threat to our ideas, our innovation, and our economic security than China."[121]

> We need to be clear-eyed about the scope of the Chinese government's ambition. China—the Chinese Communist Party—believes it is in a generational fight to surpass our country in economic and technological leadership.
>
> . . . .
>
> The stakes could not be higher, and the potential economic harm to American businesses and the economy as a whole almost defies calculation.[122]

The U.S. perceives that "China . . . stands apart in terms of the threat that its government poses to the United States. China is unrivaled in the audacity and range of its malign efforts to subvert our laws."[123] Unsurprisingly, the U.S. has increasingly invoked national security as the justification for enacting an expansive array of sanctions and regulations to defend its hegemony from China.[124] Arguably, defending U.S. national security is currently understood not merely as containment but, rather, taking measures to weaken China to a sufficient degree to eliminate China as a peer competitor. This has striking implications for U.S. directors which is discussed *infra* in Part IV. The next subpart discusses how conceptualizing defending U.S. national security has been expanded in recent years.

B. Re-conceptualizing National Security into a Fusion of Interests

The U.S. conceptualization of national security has substantially broadened[125] through three progressive developments, each of which has pushed the exception further

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121. *See* Press Release, U.S. Dep't of Just., Attorney General Jeff Session's China Initiative Fact Sheet 2 (Nov. 1, 2018), http://www.justice.gov/opa/speech/file/1107256/download [https://perma.cc/VT3M-QZGS] (accusing China of endeavoring to become economically dominant through business and corporate activities).

122. *China's Attempt to Influence U.S. Institutions: A Conversation with FBI Director Christopher Wray* 3–4, HUDSON INST. (July 7, 2020), https://www.hudson.org/events/1836-video-event-china-s-attempt-to-influence-u-s-institutions-a-conversation-with-fbi-director-christopher-wray72020 [https://perma.cc/4A2G-BW34]

123. Matthew G. Olsen, Assistant Atty. Gen., Remarks on U.S. Servicemembers Arrested for Transmitting Military Information to the People's Republic of China (Aug. 3, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-matthew-g-olsen-delivers-remarks-us-navy-servicemembers [https;//perma.cc/R325-GQF4].

124. *See infra* Part III.C.

125. China is also expanding its conceptualization of national security. *See* Sheng Zhang, *Protection of Foreign Investment in China: The Foreign Investment Law and the Changing Landscape*, 23 EUR. BUS. ORG. L. REV. 1049, 1066–68 (2022) (discussing the expanded conceptualization of national security in the context of China's Foreign Investment Law and other Chinese laws). Indeed, China's 2015 National Security Law expanded notions of security into the realms of the environment, finance, information technology, culture, ideology, education, and religion. *See National Security Law*, CHINA L. TRANSLATE (July 1, 2015), https://www.chinalawtranslate.com/en/2015nsl [https://perma.cc/GWW7-2RTE] (discussing the preservation of national security); Daisuke Wakabayashi, Keith Bradsher & Claire Fu, *China Expands Scope of 'State Secrets' Law in Security Push*, N.Y. TIMES (Feb. 28, 2024), https://www.nytimes.com/2024/02/28/world/asia/china-state-secrets-law.html (on file with the *Journal of Corporation Law*) ("China passed revisions to an already stringent state secrets law, broadening the scope of the type of information that would be considered a national security risk in the world's second-largest economy."). China has also enacted laws against foreign sanctions. See Xinyue Lu, *How China's Anti Foreign Sanctions Law Affects International Arbitration Proceedings in China*, 2 TDM (forthcoming 2024).

away from the historic understanding of security which has underpinned the global investment and trade architectures in the post-World War II governance order—i.e., conceptualizing security as territorial defense emanating from a military threat or armed conflict.[126] In contrast to a military attack, the threat from China is currently perceived as arising primarily from various non-military levers of hegemonic power: economic, technological, and ideological[127] although there is substantial cross-over into the military power realms.[128] Moreover, all of these power spheres are not disparate but rather joint and several inasmuch as these levers impact each other and to a large degree will likely be "jointly responsible" for crowning the hegemonic winner.[129]

Demonstrating the blurring of distinctions between economic, technological, and ideological power spheres, Chinese businesses Huawei and ZTE have been singled out by the U.S. as undercutting competition and incurring losses to win contracts and funnel data to the Chinese State.[130] Data is extraordinarily important for economic power, technological power, and also with respect to ideology-driven political-economic

126. Interestingly, economic sanctions have historically been the pre-cursors to military conflict. *See* HOSSEIN G. ASKARI ET AL., ECONOMIC SANCTIONS: EXAMINING THEIR PHILOSOPHY AND EFFICACY 14 (2003) (linking sanctions imposition to sanctions imposition linked to armed conflict). Economic and trade sanction imposition, compliance, and impact on business, present numerous issues. See Sienho Yee, *Unilateral Sanctions: Kind and Degree; Long-arm and Strong-arm Jurisdiction; Real Intent and "Could-be" Intent*, 20(4) CHINESE J. INT'L L. 817, 817 (2021) (discussing and raising important questions regarding whether unilateral sanctions comport with international law); Xiaoyu Fan & Tong Qi, *Is the Investor-State Arbitration Appropriate As A Tool For Regulating Unilateral Sanctions - A Comprehensive Study of Sanction-Related ISDS Practices*, (2023) 53(1) HONG KONG L.J. 287, 287 (analyzing the legality and impacts of economic sanctions in the context of bilateral treaties and customary international law).

127. *See* OFF. OF THE PRES. OF THE UNITED STATES, UNITED STATES STRATEGIC APPROACH TO THE PEOPLE'S REPUBLIC OF CHINA 7 (2020), https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/05/U.S.-Strategic-Approach-to-The-Peoples-Republic-of-China-Report-5.24v1.pdf [https:perma.cc/5S78-4QNP] ("The PRC's attempts to dominate the global information and communications technology industry through unfair practices is reflected in discriminatory regulations . . . . PRC laws compel companies like Huawei and ZTE to cooperate with Chinese security services, even when they do business abroad, creating security vulnerabilities for foreign countries and enterprises utilizing Chinese vendors' equipment and services.").

128. Quantum computing, AI, and other emerging technologies have enormous applicability not merely for civilian economic exploitation but have substantial applicability in the military context. *See Quantum Technology in the Military*, NAT'L SEC. TECH. ACCELERATOR (Feb. 1, 2023), https://nstxl.org/quantum-technology-in-the-military [https://perma.cc/5ZGQ-S94Y]. Moreover, economic power can enable a large military build-up. *Id.*

129. *See* Slawotsky, *supra* note 4, at 29–38.

130. *See generally* Robert C. O'Brien, Nat'l Sec. Advisor, Remarks at Phoenix, Arizona: The Chinese Communist Party's Ideology and Global Ambitions (June 24, 2020), https://china.usc.edu/robert-o'brien-chinese-communist-party's-ideology-and-global-ambitions-june-24-2020 [https://perma.cc/TZ2W-82RY]. National security concerns regarding data transfer abound. *See* Julien Chaisse, *'The Black Pit:' Power and Pitfalls of Digital FDI and Cross-Border Data Flows*, 22 WORLD TRADE REV. 73, 87–88 (2023) (explaining that data triggers national security concerns, particularly in the context of foreign business control of the digital economy relating to cyber security and espionage). Data is also crucial for promoting visions for global governance exemplifying the cross-over from technology to the economic and ideological. *Id.*

governance.[131] The massive data hack at credit-reporting agency Equifax reportedly conducted by Chinese military hackers serves as an example of data's importance.[132]

Data is also considered a fundamental prerequisite for empowering China to influence other nations.[133] Significantly, the United States has linked these threats to an ideological struggle focused on data crucial for promoting visions for global governance, again illustrating the crossover of the economic and technological into the realm of ideology.[134] The U.S. believes that the CCP's stated goal is to create a "Community of Common Destiny for Mankind," and to remake the world according to the CCP. According to the U.S., China is endeavoring to "control thought beyond the borders of China".[135] Corroborating Chinese ambitions encompass advancing its version of data governance, which might appeal to other sovereigns,[136] China promotes its domestic governance model to developing nations.[137]

Another example of the dramatically expanded conceptualization of national security can be found in the November 2021 Report to Congress by the U.S.-China Economic and Security Review Commission. The report identified China's global capital market integration and development of a Central Bank Digital Currency (CBDC) as threats to U.S. national security.

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131. *See* Larry Catá Backer, *Next Generation Law: Data-Driven Governance and Accountability-Based Regulatory Systems in the West, and Social Credit Regimes in China*, 28 S. CAL. INTERDISC. L. J. 123, 153–54, 166 (2018). Indeed, China treats data as a national security asset. See infra III C.

132. The security breach was traced to various Chinese persons including the PLA. Aruna Viswanatha, Dustin Volz & Kate O'Keeffe, *Four Members of China's Military Indicted Over Massive Equifax Breach*, WALL ST. J. (Feb. 11, 2020), https://www.wsj.com/articles/four-members-of-china-s-military-indicted-for-massive-equifax-breach-11581346824 (on file with the *Journal of Corporation Law*).

133. In the past, China's language and cultural background impeded the Chinese governance model's ability to influence outside of China. BRZEZINSKI, *supra* note 9, at 187 ("Though the historical and universal categories of Marxist thought have been assimilated into that Chinese framework and become an extension of it, the cultural, linguistic, and racial distinctiveness of the Chinese has automatically made their communism much more difficult to export or emulate."). Fast forward to the 2020s/2030s and substitute the word "communism" with: "political-economic governance model and/or data-driven analytics and the algorithms that can be used to manage society." A digitalized world depends less on language and more on data, facial recognition, AI, and other forms of communication that are not dependent on language skills enabling easier emulation of China's model in other nations.

134. *See, e.g.*, Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697, 699–700 (2013) (discussing Chinese corporate governance and its interrelationship with China's political governance and ideology).

135. O'Brien, *supra* note 130.

136. *See* Backer, *supra* note 131, at 165 ("China seeks to develop a singular and coherent approach to data-driven analytics and the algorithms that can be used to manage society in all of its aspects. This effort to substitute deep systems of analytics overseen by political officials and technical administrators for the conventional deep systems of law and regulation overseen by bureaucrats and judges is unique. Should it succeed, it will revolutionize governance theory and potentially serve as a framework for the organization of developing states.").

137. Fanie Herman, *China's Party Training Programs in South Africa: A Quest for Political Alignment*, 13 FUDAN J. HUMANS. & SOC. SCIS. 437, 451 (2020) (discussing Chinese governmental efforts at political training); *see also* WHITE HOUSE, U.S. STRATEGY TOWARD SUB-SAHARAN AFRICA 5 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/08/U.S.-Strategy-Toward-Sub-Saharan-Africa-FINAL.pdf [https://perma.cc/4Y22-DBNN] ("The People's Republic of China . . . sees the [Sub-Saharan African] region as an important arena to challenge the rules-based international order, advance its own narrow commercial and geopolitical interests, . . . and weaken U.S. relations with African peoples and governments.").

> China's digital RMB does not present an immediate challenge to the U.S.-led global financial system, but in the long term it could undermine the status of the U.S. dollar and efficacy of U.S. financial sanctions.
>
> . . . .
>
> China's tightened integration with global financial markets poses distinct economic risks to U.S. investors and national security risks to the United States.[138]

In sum, this initial expansion conceptualized threats to U.S. national security as a fusion of interests encompassing Chinese telecommunications businesses, emerging technologies, economic power, ideological power, and even integration with global financial markets. While these power spheres may not be reflective of classic defense, today these power projections can degrade an adversary.

In a second stage of development (and further illustrating the fusion of threats as constituting joint and several threats) the U.S. conceptualized national security as retaining dominance. As the gap between China and the United States narrows, the United States is increasingly endeavoring to define national security as retaining superiority.[139] For example, former U.S. National Security Advisor Robert C. O'Brien identified China's State-centric model's subsidization of emerging technology as a serious threat to U.S. economic superiority as well as to U.S. technological supremacy.[140]

FBI Director Christopher Wray similarly echoed the emphasis on retaining U.S. dominance. "We need to be clear-eyed about the scope of the Chinese government's ambition. China—the Chinese Communist Party—believes it is in a generational fight *to surpass our country in economic and technological leadership*."[141] Former Attorney General William Barr remarked that China was aiming to surpass the United States which represented a threat to U.S. national security. The People's Republic of China is now engaged in an economic blitzkrieg—an aggressive, orchestrated, whole-of-government (indeed, whole-of-society) campaign to seize the commanding heights of the global economy and *to surpass the United States as the world's preeminent superpower*.[142]

While the emphasis on retaining superiority does not comport with traditional notions of territorial defense, the retention of superiority may indeed fall within the ambit of legitimate national defense for two reasons. One, an argument can be made that since emerging technologies have powerful military applications, emerging technologies' have

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138. U.S.–CHINA ECON. & SEC. REV. COMM'N, 117TH CONG., 2021 REPORT TO CONGRESS 9, 11 (2021), https://www.uscc.gov/sites/default/files/2021-11/2021_Annual_Report_to_Congress.pdf [https://perma.cc/N3GN-SLK5].

139. *See* Raymond Yang Gao, *A Battle of the Big Three?—Competing Conceptualizations of Personal Data Shaping Transnational Data Flows*, 22 CHINESE J. INT'L. L. 707, 773 (2023) ("[W]ith the ever-narrowing gap in economic clout and technological strength between these two superpowers, the US has increasingly framed China as a strategic competitor and foreign adversary, which poses growing threats to its dominance, leadership, and security interests.").

140. *See* O'Brien, *supra* note 130.

141. *China's Attempt to Influence U.S. Institutions*, *supra* note 122, at 3.

142. William P. Barr, Att'y Gen., U.S. Dep't of Just., Attorney General William P. Barr Delivers Remarks on China Policy at the Gerald R. Ford Presidential Museum (July 16, 2020), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-china-policy-gerald-r-ford-presidential [https://perma.cc/L88A-55GL] (emphasis added).

potentially enormous and transformational applicability in the military context.[143] Two, leadership in emerging technologies can yield enormous national development, and wealth enables the funding of a powerful military as well as general economic power.

In the third, and most recent development, U.S. National Security Advisor Jake Sullivan noted that maintaining dominance is no longer sufficient.[144] Defending national security is now understood as not merely retaining superiority, but rather building a lead as large as possible. Thus, while not explicitly stated, U.S. national security implicitly includes depriving a competitor of the means to compete.

> On export controls, we have to revisit the longstanding premise of maintaining "relative" advantages over competitors in certain key technologies. We previously maintained a "sliding scale" approach that said we need to stay only a couple of generations ahead.
>
> That is not the strategic environment we are in today.
>
> Given the foundational nature of certain technologies, such as advanced logic and memory chips, we must maintain as large of a lead as possible.
>
> . . . .
>
> This has demonstrated that technology export controls can be more than just a preventative tool.[145]

This is a remarkable conceptualization and underscores the deep concern in the upper echelons of the U.S. Government regarding the threat from China.[146] Indeed, pursuant to the 2022 export ban on advanced chips and chip-making machines, vanquishing China's ability to compete constitutes a U.S. national security interest.[147] The overall message from the United States is clear—engaging in transactions that could aid and abet China's progress in developing emerging technologies is counter to U.S. national security interests. Taken to its logical conclusion, corporate activities that enhance China's economic,

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143. *See, e.g.*, Ali Rogan & Harry Zahn, *How Militaries Are Using Artificial Intelligence on and off the Battlefield*, PBS NEWS WEEKEND (July 9, 2023), https://www.pbs.org/newshour/show/how-militaries-are-using-artificial-intelligence-on-and-off-the-battlefield [https://perma.cc/4EDX-DCFJ] (explaining the impact of artificial intelligence on modern warfare).

144. Jake Sullivan, Nat'l Sec. Advisor, The White House, Remarks at the Special Competitive Studies Project Global Emerging Technologies Summit (Sept. 16, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/16/remarks-by-national-security-advisor-jake-sullivan-at-the-special-competitive-studies-project-global-emerging-technologies-summit/ [https://perma.cc/LE8Z-C8LF].

145. *Id.*

146. *See* Antony J. Blinken, Sec'y of State, Address at the George Washington University: The Administration's Approach to the People's Republic of China (May 26, 2022), https://www.state.gov/the-administrations-approach-to-the-peoples-republic-of-china/ [https://perma.cc/H8GL-7BS6] ("Competition needs not lead to conflict. We do not seek it. We will work to avoid it. But we will defend our interests against any threat.").

147. As discussed *infra* Part III.C, the export controls also represent a third development which justifies eliminating a competitor as a legitimate measure to defend national security. Press Release, Bureau of Indus. & Sec., Commerce Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items to the People's Republic of China (PRC) 1 (Oct. 7, 2022), https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3158-2022-10-07-bis-press-release-advanced-computing-and-semiconductor-manufacturing-controls-final/file [https://perma.cc/6TSJ-XEEY].

technological, or ideological power, global financial market integration, capabilities in new emerging technologies, and degrade U.S. dominance in any of these expanding threats, might constitute damage to U.S. national security. The next sub-section discusses how corporations are vital actors in the power spheres impacting the China-U.S. rivalry.

C. The Importance of Corporations to National Security

Corporations are important economic actors and national security assets as exemplified by the exiting of Western corporations from Russia in response to the invasion of Ukraine.[148] Indeed, highlighting the crucial role of corporations, nations around the world are increasingly turning towards a more "state-centric" perspective,[149] embracing economic nationalism, stricter data control, enhanced reviews of inbound and outbound investments, and more governmental involvement in economic activity.[150] Corroborating the link between corporations and national security, in a prior historical era of global conflict and crisis, the conduct of large and strategic U.S. corporations was similarly viewed through the lens of national security.[151] U.S. corporations involved in strategic

148. *See Which Western Companies Are Leaving Russia?*, ECONOMIST (Mar. 10, 2022), https://www.economist.com/graphic-detail/2022/03/10/which-western-companies-are-leaving-russia (on file with the *Journal of Corporation Law*) (discussing examples of Western businesses leaving). However, the extent of Western corporate departure remains murky. Diane Francis, *Most Multinationals Remain in Russia and Fund Putin's Invasion of Ukraine*, ATL. COUNCIL (Sept. 18, 2022), https://www.atlanticcouncil.org/blogs/ukrainealert/most-multinationals-remain-in-russia-and-fund-putins-genocidal-invasion/ [https://perma.cc/M5S5-5JCQ] ("In a globalized world, the Russian invasion of Ukraine has left international companies in a deeply compromised position. They are understandably criticized for not exiting the Russian market and face the prospect of punishment from Russia if they do attempt to leave. This may explain why so many have announced but then delayed or postponed their exits.").

149. Economic governance models are inherently implicated in the great power competition as subsidies and other State intervention and promotion of economic nationalism can impact the hegemonic competition. *See* Ding, *supra* note 2, at 639 (U.S.-China trade conflict constitutes a manifestation of the tension between two economic models); *see generally* Ming Du, *China's State Capitalism and World Trade Law*, 63 INT'L & COMPAR. L.Q. 409 (2014) (discussing China's economic model and the WTO).

150. *See, e.g.*, Implementation of the CHIPS Act of 2022, Exec. Order No. 14080, 3 C.F.R. 414, 415 (2023) ("These investments will strengthen our Nation's manufacturing and industrial base; create well-paying, high-skilled jobs in construction, manufacturing, and maintenance; catalyze regional economic development throughout the country; bolster United States technology leadership; and reduce our dependence on critical technologies from China and other vulnerable or overly concentrated foreign supply chains."); Pascale Accaoui Lorfing, *Screening of Foreign Direct Investment and the States' Security Interests in Light of the OECD, UNCTAD and Other International Guidelines*, *in* 2021 EUROPEAN YEARBOOK INTERNATIONAL ECONOMICS LAW 179, 181–86 (Catharine Titi ed., 2021) (discussing different nation's institution of screening measures for foreign investment).

151. Historically, important corporations and their business decision was the subject of antitrust scrutiny in the context of trading with Nazi Germany. *See, e.g.*, Matt Stoller, *Wall Street Was America's First Foe in World War II*, FOREIGN POL'Y (Oct. 28, 2019), https://foreignpolicy.com/2019/10/28/wall-street-world-war-ii-democracy-monopoly/ [https//perma.cc/MR8U-9HGL] (discussing how U.S. monopolies lagged production during wartime—and in some cases, U.S. firms had cartel agreements with German firms). Unquestionably, the allure of substantial profits might incentivize corporate business dealings with U.S. adversaries. *See generally* EDWIN BLACK, IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION (2001) (documenting IBM's profitable relationship with Nazi Germany).

industries were at times considered to be acting in a treasonous fashion by engaging in business transactions with an enemy state.[152]

Until the most recent developments in the context of the China–U.S. hegemonic rivalry, non-defense-oriented corporations were generally not implicated in national security as business decisions did not involve threats to U.S. national interests.[153] However, while long dormant, the issue of financial profits juxtaposed against national security, and the resultant potential conflict of interests, is re-surfacing in the new era of hegemonic competition.

This is unsurprising given the expanded conceptualization of threats to national security. Large publicly traded corporations are inextricably connected to the power levers of the China–U.S. rivalry.[154] Particularly in the realms of emerging technologies, U.S. businesses are crucial actors in the China–U.S. rivalry as competitors of Chinese entities or enablers of China's quest for dominance.

> Likewise, with the new introduction of its digital currency, e-CNY, China aims to control and lead in payments worldwide. Additionally, China amasses data from payment transactions, positioning China apart from other countries in this tech supremacy quest.
>
> If China succeeds, China's quest for tech supremacy will have a profound impact on U.S. corporations, as they will soon discover that competition against Chinese companies in core industries where science and technology reign is daunting. . . . Time is of the essence for both the U.S. government and corporations to act.[155]

U.S. capital and business expertise is also "in demand" as strategies to aid China in building their own indigenous capabilities. "The Chinese deploy various means to acquire American technology including using bankruptcy courts or foreign venture capital companies that help fund startup firms. China has comprehensive strategies managed at the state level that synchronize foreign direct investment and direct industrial espionage across five-year cycles to dominate key technology verticals."[156]

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152. Senator Truman remarked that the conduct of some U.S. corporations was treasonous. *See* Chesly Manly, *Truman Accuses Standard Oil of Rubber 'Treason'*, CHI. TRIB., Mar. 27, 1942, at 12 (highlighting then-Senator Truman's accusation that Standard Oil had "treasonable relations with Germany . . . based upon evidence . . . regarding an international cartel [monopoly] agreement between Standard Oil and the I. G. Farbenindustrie" (alteration in original)).

153. Even in eras of relative stability, defense contractors are directly linked to national security. *See CIA Suspected Bribe to China in 1996*, CHI. TRIB., Dec. 24, 1998, at L9 (reporting a grand jury investigation of U.S. defense contractor Loral for providing China with information contrary to U.S. national security interests); Mariana Pargendler, *The Grip of Nationalism on Corporate Law*, 95 IND. L.J. 533, 570 (2020) ("There is new evidence, however, that the federal government strongly intervenes in the corporate governance structure of foreign-owned defense contractors to safeguard national security.").

154. *See supra* Part III.B; Slawotsky, *Impact of Geo-Economic Rivalry*, *supra* note 3, at 569–72 (explaining how Chinese corporate capabilities play a prominent role in U.S. national security concerns).

155. Xuan-Thao Nguyen, *Tech Supremacy: The New Arms Race Between China and the United States*, 49 J. CORP. L. 103, 105–06 (2023).

156. DEPARTMENT OF HOMELAND SECURITY: PUBLIC-PRIVATE ANALYTICS EXCHANGE PROGRAM, EMERGING TECHNOLOGY AND NATIONAL SECURITY 14 (2018) http://www.dhs.gov/sites/default/files/publications/2018_AEP_Emerging_Technology_and_National_Security.pdf (on file with the *Journal of Corporation Law*).

Demonstrating the importance of corporations in the developing China–U.S. competition, the United States has initiated numerous national security-based measures including Presidential Executive Orders claiming an array of Chinese conduct—which often involve corporations—constitute a dire national emergency that threatens U.S. national security.[157] Further illustrating, the United States believes that national security is impinged by Chinese corporations such as TikTok, WeChat, and Huawei.[158] TikTok and WeChat were the subjects of Executive Orders banning the apps[159] and declared threats to U.S. security based upon data collection and ideology.[160] While the Executive Orders are in litigation and are in abeyance, they demonstrate that important corporations are inextricably connected to the fusion of interests which define national security.

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157. *See infra* Part IV; O'Brien, *supra* note 130 ("The CCP accomplishes this goal, in part, by subsidizing hardware, software, telecommunications, and even genetics companies. As a result, corporations such as Huawei and ZTE undercut competitors on price and install their equipment around the globe at a loss. This has the side effect of putting out of business American manufacturers of telecom hardware and has made it very difficult for Nokia and Ericsson. Why do they do it? Because it is not telecom hardware or software profits the CCP are after, it is your data. They use 'backdoors' built into the products to obtain that data."); Addressing the Threat From Securities Investments That Finance Communist Chinese Military Companies, Exec. Order No. 13959, 3 C.F.R. 475, 475 (2021) ("I . . . find that the People's Republic of China (PRC) is increasingly exploiting United States capital to resource and enable the development and modernization of its military . . . which continues to allow the PRC to directly threaten the United States homeland . . . .").

158. *See* Jill Goldenziel, *The U.S. Tightens the Noose on Huawei—and China*, FORBES (Oct. 25, 2022), https://www.forbes.com/sites/jillgoldenziel/2022/10/25/the-us-tightens-the-noose-on-huawei-and-china (on file with the *Journal of Corporation Law*) (noting the 2018 ban on U.S. government procurement of Huawei products based on national security concerns and recent enforcement developments as "a major escalation in the U.S.'s legal war on Huawei—and on the People's Republic of China (PRC)"); David Shepardson, *U.S. FCC Set to Ban Approvals of New Huawei, ZTE Equipment*, REUTERS (Oct. 13, 2022), https://www.reuters.com/technology/us-fcc-set-ban-all-us-sales-huawei-zte-equipment-axios-2022-10-13/ [https://perma.cc/JZS9-ECR2] ("The U.S. Federal Communications Commission is set to ban approvals of new telecommunications equipment from China's Huawei Technologies and ZTE in the United States on national security grounds, according to an agency document."); Max Zahn, *FCC Commissioner Says US Should Ban TikTok*, ABC NEWS (Nov. 1, 2022), https://abcnews.go.com/Technology/fcc-commissioner-us-ban-tiktok-report/story?id=92486913 [https://perma.cc/62KW-FC9G].

159. *See* Addressing the Threat Posed by TikTok, Exec. Order No. 13942, 3 C.F.R. 412 (Aug. 6, 2020) (ordering sale of TikTok); Addressing the Threat Posed by WeChat, Exec. Order No. 13943, 3 C.F.R. 414 (Aug. 6, 2020) (blocking transactions with WeChat); Regarding the Acquisition of Musical.ly by ByteDance Ltd., Exec. Order No. 18360, 3 C.F.R. 606 (Aug. 14, 2020). The bans were later halted by litigation. *See* TikTok Inc. v. Trump, 507 F. Supp. 3d 92 (D.D.C. 2020); U.S. WeChat Users All. v. Trump, 488 F. Supp. 3d 912 (N.D. Cal. 2020). There are reports of a compromise being negotiated. *See Another Judge Blocks Trump's TikTok Ban; App Still in Limbo*, AP NEWS (Dec. 8, 2020), https://apnews.com/article/donald-trump-courts-a526c144fad9f0ebc37bf2d49a97740a [https:perma.cc/384V-4X8C] (outlining a proposal where Walmart and Oracle would invest in TikTok, and Oracle would manage U.S. user data, to alleviate national security concerns).

160. *See, e.g.*, Addressing the Threat Posed by TikTok, *supra* note 159, at 412–13 ("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 . . . . [TikTok] censors content that the Chinese Communist Party deems politically sensitive, such as content concerning protests in Hong Kong and China's treatment of Uyghurs and other Muslim minorities. This mobile application may also be used for disinformation campaigns that benefit the Chinese Communist Party, such as when TikTok videos spread debunked conspiracy theories about the origins of the 2019 Novel Coronavirus."). A Federal TikTok ban is a possibility. *See supra* note 9.

The Montana ban on TikTok is yet another illustration. The state government had found that TikTok represents a threat to the security and well-being of Montana residents as well as a national security threat.[161] The Bill clearly stated that China is an adversary and TikTok is a Chinese entity.[162] TikTok challenged the ban primarily (but not exclusively) on First Amendment Speech grounds. The Federal District Court found TikTok's claims sufficiently compelling to issue a preliminary injunction against the ban[163] notwithstanding that national security was the basis for the ban.[164] Yet in a Texas litigation, the District Court dismissed a First Amendment suit challenging Governor Abbott's order for Texas state agencies to ban TikTok from government devices as well as the University of North Texas System's implementation of a TikTok ban on University devices similarly motivated by national security. The District Court held the policy was neutral and a reasonable regulation.[165] As a vital component of ideological strength, social media is a critical factor in the overall China–U.S. rivalry providing a further exemplar of the nexus between corporations and U.S. national security.

Moreover, further corroborating the linkage between corporations and U.S. national security, is the tightening of both inbound and outbound foreign investment review. With respect to inbound review of foreign investment, President Biden's September 2022 Executive Order refers to corporate supply chains, defending the U.S. industrial base, and

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161. *Governor Gianforte Bans TikTok in Montana*, STATE MONT. NEWSROOM (May 17, 2023), https://news.mt.gov/Governors-Office/Governor_Gianforte_Bans_TikTok_in_Montana [https://perma.cc/B4Y4-8KCY] ("To protect Montanans' personal, private, and sensitive data and information from intelligence gathering by the Chinese Communist Party, Governor Greg Gianforte today banned TikTok from operating in Montana.").

162. The language provides:

> WHEREAS, the People's Republic of China is an adversary of the United States and Montana and has an interest in gathering information about Montanans, Montana companies, and the intellectual property of users to engage in corporate and international espionage; and
>
> WHEREAS, TikTok is a wholly owned subsidiary of ByteDance, a Chinese corporation; and
>
> WHEREAS, the People's Republic of China exercises control and oversight over ByteDance, like other Chinese corporations, and can direct the company to share user information, including real-time physical locations of users; and
>
> WHEREAS, TikTok gathers significant information from its users, accessing data against their will to share with the People's Republic of China . . . .

S.B. 419, 68th Leg., Reg. Sess. (Mont. 2023).

163. Alario v. Knudsen, No. CV-23-56-M-DWM, 2023 WL 8270811, at *1 (D. Mont. Nov. 30, 2023) (The District Court found that SB 419 is likely unconstitutional under the First Amendment's Free Speech Clause; the Supremacy clause as it is preempted by Federal Government's role in foreign affairs as well as potentially with CFIUS; and likely violates the Dormant Commerce Clause which limits state' ability to interfere with international commerce).

164. Peter Blumberg, *TikTok Ban in Montana Blocked by Court as Free Speech Threat*, BLOOMBERG (Dec. 1, 2023), https://news.bloomberglaw.com/privacy-and-data-security/tiktok-ban-in-montana-blocked-by-federal-judge [https//perma.cc/2TC-F3HN]. *See supra* note 162.

165. Coal. for Indep. Tech. Rsch. v. Abbott, No. 1-23-CV-783-DII, 2023 WL 8582597, at *9 (W.D. Tex. Dec. 11, 2023). The question of whether a federal ban would meet Constitutional scrutiny is interesting. A Federal ban would eviscerate some of the objections the District Court expressed in granting the preliminary injunction against the Montana ban. Yet the crux of the issue would be whether such a ban would violate the First Amendment. What level of scrutiny would a reviewing court implement and is there sufficient proof that TikTok promotes Chinese governmental interests?

investment.[166] Connecting national security to corporations is the Executive Order's focus on the "defense industrial base"; specifically noting the national security nexus to "biomanufacturing, quantum computing, advanced clean energy"; and finding the Committee on Foreign Investment in the United States should be cognizant of industry investment trends by a particular investor or group of investors from the same country within a specific industry or sector.[167]

Regarding outbound investment review, in August 2023, President Biden signed an Executive Order instructing the relevant agencies to develop rules barring persons under U.S. jurisdiction from investing in or requiring notification to U.S. regulatory agencies from investing in businesses, organizations, and governmental/political entities from "countries of concern" (only listing China, the HKSAR and Macau), with regard to activities related to semiconductors and microelectronics, quantum information technologies, and artificial intelligence.[168]

Furthermore, the importance of corporations to Chinese national security is exemplified by China's crackdown on corporations accused of mishandling data since "China has deemed [data] an issue of national security."[169] The Chinese government recognizes the nexus between corporations and national security and has increasingly fined Chinese corporations over endangering national security.[170] For example, China sanctioned Didi Global $1.2 billion for data breaches.[171] China's Alibaba and Tencent were similarly targeted with large fines for alleged violations of data security.[172] The saga over the DiDi IPO in New York further illustrates the importance of corporations to national security and the hegemonic competition.[173]

As discussed above, the United States increasingly conceptualizes national security expansively and perceives retaining dominance and eroding the capabilities of China as a

166. Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States, Exec. Order No. 14083, 3 C.F.R. 434, 436 (2023) ("The Committee shall consider . . . the covered transaction's effect on supply chain resilience and security, both within and outside of the defense industrial base . . . .").

167. *Id.*

168. Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern, Exec. Order No. 14105, 88 Fed. Reg. 54867 (Aug. 11, 2023).

169. Paul Mozur & John Liu, *China Fines Didi $1.2 Billion as Tech Sector Pressures Persist*, N.Y. TIMES: BUS. (July 21, 2022), https://www.nytimes.com/2022/07/21/business/china-fines-didi.html (on file with the *Journal of Corporation Law*).

170. *See* Nguyen, *supra* note 155, at 105 ("Unlike other nations with personal data protection laws, China zealously guards data by elevating data to a heightened level of national property. In so doing, China ensures that data is within its reach for its *tech supremacy purposes*." (emphasis added)).

171. Mozur & Liu, *supra* note 169 ("The penalty imposed by China's internet regulator on Didi, one of the country's most valuable tech companies, was the third in a series of major moves by the government to rein in China's high-flying internet sector. As China's leader, Xi Jinping, has waged an expansive campaign to strengthen state control over the economy, regulators have zeroed in on internet companies like Didi, which runs services similar to Uber, that have amassed sweeping and some say excessive influence over Chinese society.").

172. *See China Regulator Fines Alibaba, Tencent for Disclosure Violations*, REUTERS (July 9, 2022), https://www.reuters.com/world/china/china-regulator-fines-alibaba-tencent-disclosure-violations-2022-07-10/ (on file with the *Journal of Corporation Law*) (reporting the failure to comply with anti-monopoly rules on the disclosure of transactions by these corporations).

173. *See* Clay Chandler, Grady McGregor & Eamon Barrett, *How Didi's Data Debacle Doomed China's Love Affair with Wall Street*, FORTUNE (July 9, 2021), https://fortune.com/2021/07/09/didi-ipo-stock-data-crackdown-china-wall-street-investors/ [https://perma.cc/U54M-XJST].

crucial strategy to remain the dominant global power. Given the inextricable link between corporations and the fulcrums of hegemonic power, important corporations are vital national security assets.[174] In sum, the business decisions of corporations can impact national security and the significance of U.S. corporations as national security assets and therefore to U.S. national security cannot be questioned.

IV. U.S. NATIONAL SECURITY MAY NOW BE A CORE MISSION OF U.S. CORPORATIONS

This Part argues that—given the importance of strategic corporations to the economic, technological, and ideological spheres of power—monitoring national security implications of business activities may constitute a core critical mission in the context of the U.S. director oversight obligation. While Delaware courts have not explicitly limited the enhanced oversight duty to "mission critical" conduct, *Marchand* and other decisions referred to an enhanced monitoring duty when linked to a core mission or is "mission critical" to the corporation.[175] Consequently, it is important to evaluate whether national security falls within the rubric of mission critical to evaluate whether directors have a stronger oversight obligation to avoid conduct weakening U.S. national security.

Two compelling reasons exist for potentially viewing national security as mission critical for directors of large and/or strategic U.S. corporations.[176] One, national security can be viewed as mission critical because of the potential fines and enforcement in an increasingly security-conscious regulatory environment. U.S. government agencies and regulators are increasingly focused on national security and prosecutions are likely to expand. Two, national security can be understood as a critical mission within the ambit of director obligations pursuant to the promotion of ESG goals.[177] There are two aspects of this ESG promotion. First, short-termism may incentivize doing business with a competitor and inure to the detriment of the long-term profitability of the U.S. business for the sake of short-term profits. Second, as China has a different understanding of rights, assisting China

174. *See* Ridley, *supra* note 31, at 120 ("Owing to the pervasiveness of computer technology in industry, the home and governments, and the dominance of Microsoft, failure of some of Microsoft's most ubiquitous software from accidental or deliberate causes may seriously disrupt a nation or group of nations, depending on the nature and scale of the failure. Such a disruption has potential to threaten national and global security, as well as the economy and way of life at both levels.").

175. Marchand v. Barnhill, 212 A.3d 805, 824 (Del. 2019) ("As a monoline company that makes a single product—ice cream," food safety was an "essential and mission critical" compliance risk); *In re* Clovis Oncology, Inc. Derivative Litig., No. C.A. 2017-0222, 2019 WL 4850188, at *15 (Del. Ch. Oct. 1, 2019) (stating failure to comply with regulations was "a mission critical failure to comply"); *In re* Boeing Co. Derivative Litig., C.A. No. 2019-0907, 2021 WL 4059934, at *26, *29, *33 (Del. Ch. Sept. 7, 2021) (employing "mission critical" considerations in its ruling); Teamsters Local 443 Health Servs. & Ins. Plan v. Chou, No. 2019-0816, 2020 WL 5028065, at *18 (Del. Ch. Aug. 24, 2020) (indicating compliance with Federal regulations was "absolutely critical to its business").

176. *See* Ridley, *supra* note 31, at 111 ("[C]ritical infrastructure in Western nations is largely controlled by private sector organisations . . . .").

177. *See generally* Martin Lipton, *ESG, Stakeholder Governance, and the Duty of the Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 18, 2022), https://corpgov.law.harvard.edu/2022/09/18/esg-stakeholder-governance-and-the-duty-of-the-corporation/ [https://perma.cc/C2EQ-WCQX] (arguing that ESG is an integral aspect of fiduciary obligations and not at odds with increasing shareholder-value)*; see also* Ridley, *supra* note 31, at 112, 122–23 (arguing that national security is a part of ESG).

in meeting its economic, technological, and ideological power ambitions—which if successful would influence global governance—would be inimical to U.S. notions of rights and therefore inherently contrary to the promotion of ESG objectives.[178] Each of these two reasons are discussed below.

A. Operating in an Increasingly Security-Conscious Regulatory Environment

The *Caremark* oversight obligation has been understood as imposing a duty on directors to oversee ongoing company operations and prevent conduct that could lead to corporate losses including fines, reputational damage, and declining share prices. The landmark rulings establishing and expanding the contours of the duty of oversight; *Caremark*, *Stone*, and *Marchand*, involved large fines and/or penalties over violations of Federal law.[179] While medical equipment, financial chicanery, and food safety can lead to prosecution and substantial fines, Federal agencies and regulations have made it abundantly clear that the U.S. perceives China's rise as engendering the safety and security of the United States. Chinese capabilities are now a major focus of U.S. enforcement agencies.[180]

1. Regulatory Environment

Regulatory risk is increasing in the context of U.S. national security.[181] National security interests will likely be understood as paramount and superior to the economic

178. This is not a criticism of China; her notions of freedoms and rights are different than U.S. notions and are based upon China's culture, history, as defined by the single ruling authority, the CCP. *See generally* Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43 (2001) (describing the differences between Chinese and American developments of the rule of law); Sui-Lee Wee, *China's Top Court Says No to West's Model of Judicial Independence*, REUTERS (Feb. 25, 2015), https://www.reuters.com/article/idUSKBN0LU07L/ (on file with the *Journal of Corporation Law*) (reporting how China's Supreme People's Court urges Chinese judges to reject Western concepts such as judicial independence); *China Purging 'Western Erroneous Views' From Legal Education*, AP NEWS (Feb. 28, 2023), https://apnews.com/article/religion-and-politics-china-xi-jinping-education-ebb2697107b61b5fcc2f49fa42eb92b1# [https://perma.cc/7MJQ-Z9C8] (reporting Chinese government demands that schools "'oppose and resist Western erroneous views' such as constitutional government, separation of powers, and judicial independence").

179. *In re* Caremark Int'l Derivate Litig., 698 A.2d 959 (Del. Ch. 1996); Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362 (Del. 2006); Marchand v. Barnhill, 212 A.3d 805 (Del. 2019).

180. *E.g.*, Press Release, Fed. Commc'ns Comm'n, FCC Bans Equipment Authorizations for Chinese Telecommunications and Video Surveillance Equipment Deemed to Pose a Threat to National Security (Nov. 25, 2022), https://docs.fcc.gov/public/attachments/DOC-389524A1.pdf [https://perma.cc/E6EF-46K3] ("[P]rohibiting communications equipment deemed to pose an unacceptable risk to national security from being authorized for importation or sale in the United States."); Press Release, *supra* note 147 (restricting Chinese ability to obtain certain computing chips); Echo Wong, *China Private Investment Firms Face Growing U.S. Scrutiny, Analysts Say*, NIKKEI ASIA (Feb. 9, 2024), https://asia.nikkei.com/Politics/International-relations/US-China-tensions/China-private-investment-firms-face-growing-U.S.-scrutiny-analysts-say [https://perma.cc/Q4JF-YK6B] ("The Pentagon's addition of a Beijing-headquartered private equity and venture capital firm to a list of companies with alleged close ties to China's military underscores growing sanctions risks for the industry and is likely to result in pressure for more investment self-scrutiny, . . . The sanctions threat raises reputational risks for IDG Capital, as U.S. investors may 'reconsider co-investing' with an identified company . . . . IDG Capital has invested in more than 1,600 portfolio companies. It has 12 offices worldwide, including two in the U.S. and six in China. The others are in Singapore, South Korea and Vietnam.").

181. For evidence of this, see the corporate compliance-related measures adopted by the DOJ. Lisa Monaco, Deputy Att'y Gen., U.S. Dep't of Just., Remarks as Prepared for Delivery at the American Bar Association

interests of U.S. business. As exemplified in *FTC v. Qualcomm Inc.*, a recent antitrust enforcement proceeding, sometimes the Federal agencies are at odds with balancing national security concerns.[182]

> In the view of the Executive Branch, diminishment of Qualcomm's competitiveness in 5G innovation and standard-setting would significantly impact U.S. national security. Qualcomm is a trusted supplier of mission-critical products and services to the Department of Defense and the Department of Energy. Accordingly, the Department of Defense "is seriously concerned that any detrimental impact on Qualcomm's position as global leader would adversely affect its ability to support national security."[183]

Ultimately, the Qualcomm litigation demonstrates the willingness of U.S. enforcement and regulatory agencies to overlook potential antitrust violations in favor of national security defense.[184]

In addition, potential financial penalties are also increasing. For example, the Committee on Foreign Investment in the United States (CFIUS), the agency tasked with reviewing inbound investment, has been strengthened to include jurisdiction over additional security-linked businesses in critical technologies and data.[185] Particularly noteworthy, the U.S. Department of the Treasury issued the first Guidelines for inbound investment review under the CFIUS mechanism,[186] strongly implying that CFIUS will likely increase the imposition of penalties for violating mitigation agreements or otherwise

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National Institute on White Collar Crime (Mar. 2, 2023), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-american-bar-association-national [https://perma.cc/96H5-GN3N] (signaling that the DOJ is focusing on corporate compliance with federal laws); *see also* Maia Hamin & Isabella Wright, *The U.S.'s FAR-Reaching New Cybersecurity Rules for Federal Contractors*, LAWFARE (Feb. 1, 2024), https://www.lawfaremedia.org/article/the-u.s.-s-far-reaching-new-cybersecurity-rules-for-federal-contractors [https://perma.cc/29FD-EVZK] ("The new requirement for federal information technology contractors to comply with these directives therefore extends the reach of the CISA's evolving rules and norms for robust cybersecurity, enabling the enforcement of a wide range of security practices and closing certain gaps that could have resulted in the storage of federal data on systems that did not meet federal information security standards. Notably, adopting these compliance requirements would also mandate that contractors comply with all future directives.").

182. FTC v. Qualcomm Inc., 935 F.3d 752, 756 (9th Cir. 2019) (noting a split between federal agencies in the enforcement of antitrust principles: "the Department of Defense and Department of Energy aver that the injunction threatens national security, and the DOJ posits that the injunction has the effect of *harming* rather than *benefiting* consumers").

183. United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal at 12, FTC v. Qualcomm Inc., 935 F.3d 752 (9th Cir. 2019) (No. 19-16122) (citations omitted).

184. Antitrust also has national security dimensions particularly in eras of conflict. *See generally* Samuel K. Abrams, *Antitrust Laws in National Emergency*, 36 MINN. L. REV. 490, 490 (1952) (discussing how antitrust laws are utilized "[t]o keep the channels of distribution open and to secure the maximum output of the economy for defense").

185. Gao, *supra* note 139, at 773 ("With increasing invocations of national security grounds in trade and investment contexts, the US has deployed its investment screening mechanism, export control measures, and administrative power to target Chinese companies as threat actors, whether in its domestic market or globally.").

186. Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. 3112 (Jan. 17, 2020) (to be codified at 31 C.F.R. pts. 800, 801); Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, 85 Fed. Reg. 3158 (Jan. 17, 2020) (to be codified at 31 C.F.R. pt. 802); *see also* Ming Du, *The Regulation of Chinese State-Owned Enterprises in National Foreign Investment Laws: A Comparative Analysis*, 5 GLOB. J. COMPAR. L. 118 (2016) (noting the argument of regulating Chinese foreign investment).

violating CFIUS.[187] Violations can be substantial and while fines have only been sparingly imposed in the past, the law provides that failure to comply with mandatory filing requirement and/or material violations of mitigation agreements can result in a penalty of up to $250,000 *or the value of the transaction, whichever is greater*.[188] As the rivalry between the U.S. and China intensifies, the risks to businesses of failing to comport with CFIUS (and other U.S. laws) is rising.

2. Corporate Prosecutions

As explained above, corporations are inextricably linked to the hegemonic power spheres, compelling corporations to be vigilant to threats to U.S. national security. "Time is of the essence for both the U.S. government *and corporations* to act."[189] Companies that view themselves as peripheral to, or simply not involved in national security, are increasingly likely to be caught up in national security reviews and investigations.[190]

Exemplifying the new focus on business activities, the Department of Justice's (DOJ) National Security division is dedicated to prosecuting defendants including corporations who violate U.S. laws and weaken U.S. national security. In October 2022, the DOJ National Security Division highlighted that corporate wrongdoing which violates U.S. national security would be vigorously prosecuted and punished.[191] The DOJ explicitly stated that *corporations are responsible and business decisions are indeed risky—decisions for "competitive reasons" does not excuse weakening U.S. security interests*.

> Now more than ever, it is critical that the United States hold accountable companies and individuals who break our laws . . . we are dedicating additional enforcement resources to meet the urgency of this national security imperative.
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> . . . .
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> . . . [S]anctions and export control laws—extend to multi-national companies anywhere that come within the jurisdiction of our laws. And we are committed to ensuring that companies that seek to access U.S. markets and the U.S. financial system uphold their basic obligations under U.S. law.
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> . . . There are risks that come with transactions involving companies that operate in high-risk environments on account of U.S. terrorism designations and

187. Press Release, U.S. Dep't of the Treas., Treasury Releases CFIUS Enforcement and Penalty Guidelines (Oct. 20, 2022), https://home.treasury.gov/news/press-releases/jy1037 [https://perma.cc/946U-FT6D].

188. *See* 50 U.S.C. § 456 (authorizing CFIUS to impose monetary penalties and seek other remedies for violations of section 721 of the Defense Production Act of 1950, as amended, the implementing regulations, mitigation orders, conditions, or agreements pursuant thereto); 31 C.F.R. § 800.901 (2024) (stating those penalties and damages).

189. *See* Nguyen, *supra* note 155, at 106 (emphasis added).

190. *See* Tom C.W. Lin, *Business Warfare*, 63 B.C. L. REV. 1, 40 (2022) ("[T]he United States in recent years has taken a more aggressive view on the links between national security and business interests, particularly when it involves foreign investments.").

191. Matthew G. Olsen, Assistant Att'y Gen. for Nat'l Sec., Remarks on Lafarge Guilty Plea (Oct. 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-national-security-matthew-g-olsen-delivers-remarks-lafarge [https://perma.cc/U7DJ-AHMM] ("Now more than ever, it is critical that the United States hold accountable companies and individuals who break our laws . . . . [W]e are dedicating additional enforcement resources to meet the urgency of this national security imperative.").

> sanctions and export-control laws. Companies should not expect a free pass from the Justice Department simply because they are under new management.
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> . . . .
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> Here, former executives made what they viewed was a business choice to pay designated terrorist groups as a cost of doing business and as a way to gain ground on competitors. U.S. law is clear that this was not their choice to make. And the defendants are now facing the consequences.[192]

The specter of enhanced Federal enforcement over endangering national security transforms the ordinarily challenging decision-making process into a more concretized directive for corporate directors not to risk heavy economic punishment.[193] As the risk of prosecution and large penalties for endangering national security increases, national security will likely constitute a serious risk for U.S. corporations.[194] Thus, avoiding corporate misconduct that endangers national security may encompass a "mission critical" function.[195]

B. ESG Promotion in the Context of National Security

Promotion of ESG and embracing an enhanced shareholder value governance model has gained significant traction in recent years.[196] U.S. corporations have been perceived as over-zealously pursuing profits *uber alles*, placing profits before people, human rights, democracy, and wielding excessive power and influence within the U.S. political-economic architecture.[197] Consequently, shareholder-value governance is increasingly critiqued as inadequate for "today's capitalism" and detractors point to other stakeholders whose interests should be taken into account in the boardroom to generate "public good"

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192. *Id.*

193. *See* Langevoort, *supra* note 14, at 732 ("All that changes, however, when we move from state law fiduciary duties to federal or state regulatory enforcement. If a violation occurs and is detected, the company may face increased sanctions if business judgment led it to invest suboptimally in precaution.").

194. Gao, *supra* note 139, at 773 ("With increasing invocations of national security grounds in trade and investment contexts, the US has deployed its investment screening mechanism, export control measures, and administrative power to target Chinese companies as threat actors, whether in its domestic market or globally.").

195. Another potential impact of increasing emphasis on national security and potential liability is securities disclosure. Federal securities laws obligate issuers to disclose all material information to investors. The failure to fully disclose could also constitute a failure to oversee the business. Issuers are forbidden to omit material information regarding material agreements, such as acquisition agreements. Transactions that will be subject to national security review or potentially create a national security risk should be disclosed; the failure to do so and the resulting negative impact of a federal prosecution could lead to director liability.

196. *See* Strine, Smith & Steel, *supra* note 15, at 1902; Fairfax, *supra* note 47, at 1181–86 (detailing the increasing activism of ESG proponents and their successes in influencing corporate governance).

197. *See* John C. Coffee, Jr., *Crime and the Corporation: Making the Punishment Fit the Corporation*, 47 J. CORP. L. 963, 988 (2022) (discussing how pressure for greater profits incentivizes corporations to prioritize profits above other considerations); Joel Slawotsky, *Reining in Recidivist Financial Institutions*, 40 DEL. J. CORP. L. 280 (2015) (discussing rampant repeated misconduct in the financial sector); *see also* Larry Lessig, Harv. L. Professor, Our Democracy No Longer Represents the People. Here's How We Fix It, at TEDxMidatlantic (Oct. 20, 2015), https://www.youtube.com/watch?v=PJy8vTu66tE (on file with the *Journal of Corporation Law*) (recording Professor Lawrence Lessig describe excessive corporate power over domestic governance).

through the promotion of ESG.[198] The new era of China–U.S. competition interacts with the rise of ESG and potentially affects U.S. corporate director conduct and decision-making for two reasons: by countering short-termism and by avoiding empowering a competitor which would transform Western global governance norms.

1. Avoiding Short-termism

The re-examination of U.S. corporate purpose and increasing calls to modify classic U.S. shareholder-value maximization governance in favor of building long-term sustainable value (i.e., enhanced shareholder value) is an integral aspect of ESG.[199] Short-termism and an overly-zealous pursuit of shareholder-value might encourage doing business that directors know in a decade will damage the company but will—in the near term—bring enormous profits.[200]

U.S. corporations are incentivized to maximize short-term profits in a variety of methods such as outsourcing supply chains—or manufacturing—to foreign jurisdictions or slashing research and development. Directors, officers, and current shareholders may benefit from these short-term profitable results. However, excessive emphasis on short-term profits may adversely impact the long-term interests of the corporation, the economy, as well as national security.

> Continuous underinvestment in long-term projects can lead to individual companies' suicides, and to the U.S. economy's decline in competitiveness internationally. Take, for example, the tremendous investment required to develop fifth-generation wireless (5G) technology. While Cisco used its repatriated cash to boost its earnings through a gigantic $38 billion in stock buybacks in 2018 and 2019, its Chinese competitor Huawei did not repurchase stock at all. Instead, it reinvested its entire profits in the business. This investment in R&D helped Huawei take the lead over Cisco and other U.S. tech companies in the 5G race.[201]

It is not a stretch to imagine short-termism encouraging directors and officers to engage in profitable short-term business transactions with a U.S. rival which will confer long-term economic, technological, or ideological advantages to a U.S. adversary. The risk of erosion in U.S. manufacturing, loss of employment, and supply-chain risk are all potentially incentivized by short-termism that directly threatens U.S. economic security.

Therefore, the nexus between national security and short-termism militates in favor of finding that corporations might be sufficiently attracted to profits and willing to engage

198. *See* Dorothy S. Lund & Elizabeth Pollman, Essay, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2631–34 (2021) (advocating for a stakeholder-oriented business lens to maximize long-term gains).

199. Fairfax, *supra* note 47, at 1175.

200. Kris Van Cleave & Chrissy Hallowell, *How China Developed Its First Large Domestic Airliner to Take on Boeing and Airbus*, CBS NEWS (Apr. 11, 2023), https://www.cbsnews.com/news/china-domestic-airliner-c919-plane-boeing-airbus/ [https://perma.cc/E6PT-DLPN] ("As China moves closer to mass production of its first large passenger jet, details are emerging that reveal how a state-owned aircraft manufacturer was able to build a plane that looks remarkably similar to a Boeing 737. 'It really looks like a knockoff,' said Matt Pottinger, former deputy national security adviser during the Trump administration, describing the Chinese-built C919. . . . Sixty percent of the plane's components are the result of deals with America's top aerospace companies. . . .").

201. Nitsan Shilon, *Stock Buyback Ability to Enhance CEO Compensation: Theory, Evidence, and Policy Implications*, 25 LEWIS & CLARK L. REV. 303, 336–37 (2021).

in conduct adverse to U.S. national economic and security interests. Corporations have done so in the past when the U.S. was in active military battles with an adversary that—had it prevailed—would have extraordinarily serious negative repercussions on those very businesses.[202] An ESG or enhanced shareholder value perspective would militate in favor of eschewing the immediate gains due to the potential long-term damage to the business by empowering a competitor. In a real sense, one could argue that defending U.S. national security is an integral aspect of advancing ESG and long-term profitability.[203] Thus, the long term profitability of the corporation through promotion of ESG militates in favor of finding that large or strategic businesses that confer advantages on a U.S. competitor might be contributing to the power of a competitor in ways that will adversely impact the long-term prospects of the corporation and reduce innovation.[204] In other words, damaging U.S. national security might intrinsically implicate ESG.[205]

2. Upholding U.S. Notions of Rights

ESG inherently embraces and seeks to actively promote Western notions of rights and freedoms which are hallmarks of liberal democracies. The genesis of ESG was after all grounded on promoting human rights,[206] and freedoms of speech, assembly, and political rights are all clearly within the ambit of ESG promotion.[207] Such rights are not vested in Chinese citizens and the United States has increasingly linked U.S. notions of democracy and human rights to U.S. national security.[208] Indeed, a cornerstone of the Biden Administration's China policy is placing emphasis on casting the U.S.–China conflict as "a battle between the utility of democracies in the 21st century and autocracies."[209]

In a further exemplar, President Biden expanded the scope of an Executive Order signed by President Trump finding that the use of Chinese surveillance technology to facilitate repression or serious human rights abuses constitutes unusual and extraordinary

202. *See supra* Part III.C.

203. *See* Huq, *supra* note 32, at 638 ("National security bears all the hallmarks of a quintessential public good.").

204. *Cf.* Shilon, *supra* note 201, at 336–37 (using Cisco and Huawei as an example of how "underinvestment in long-term projects" undercuts the company focused on short-term gain).

205. *See* Ridley, *supra* note 31, at 113 ("It appears that risk to national and global security recently linked to the resilience of critical infrastructure may be another change to the social context that warrants examination of the relationships among stakeholders, as a CSR construct.").

206. *See* Elizabeth Pollman, *The Making and Meaning of ESG*, 13 HARV. BUS. L. REV. (forthcoming 2024) (manuscript at 6–11), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4219857 [https://perma.cc/EG5G-DPVU] (noting that ESG has an unfixed definition but providing the historical perspective regarding the foundational drivers of ESG as the advancement of social justice encompassing labor rights, environmental concerns, and human rights rooted in UN initiatives and tracing the development of ESG). ESG was broadly grounded as a base to promote a human rights-based agenda. *Id.* at 25.

207. MCGILL UNIV., SUSTAINABLE TRANSFORMATION OF BUS. AND FIN. (2023), mcgill.ca/business-law/files/business-law/2023tblsaimpactpaper_final_0.pdf [https://perma.cc/8RM6-ZSCA] (arguing ESG promotion is vital to western liberal democracies and defending human rights generally and particularly in the digital era).

208. *See supra* note 178 (describing how in China, law schools and courts are urged not to embrace Western notions of rights).

209. Joseph R. Biden, President, Remarks in Press Conference (Mar. 25, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/03/25/remarks-by-president-biden-in-press-conference/ [https://perma.cc/XB9A-3Y27].

threats.[210] In a release after signing the Executive Order, President Biden continued: "Tackling these challenges head-on is consistent with the Biden Administration's commitment to protecting core U.S. national security interests and democratic values."[211] The Biden Administration's emphasis on human rights shifted the criteria for businesses subject to the restrictions from purely military entities to a broader potential class of businesses encompassing alleged violations of human rights.[212]

If China's influence grows, China's model will be increasingly popular. As all great powers do, China would like to export its governance model which would lead to more sovereigns incorporating Chinese notions of values and rights which is different than the U.S. model. As U.S. Ambassador to China, Nicholas Burns remarked:

> The United States is locked in a war of ideas with China, which wants to replace the American model of democracy around the world with its communist system . . . .
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> . . . .
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> "It's a competition of ideas, a battle of ideas . . . . Our idea, America's big idea of a democratic society and human freedom, versus China's idea that a communist state is stronger than a democracy. We don't believe that. So there's a battle here as to whose ideas should lead the world. And we believe those are American ideas."[213]

Empowering U.S. competitors who do not share in U.S. notions of democracy and freedoms could potentially lead to a global order where U.S. adversaries' notions of rights dominate. Therefore, business decisions enabling a global governance order contrary to U.S. liberal democracy constitutes conduct contrary to the advancement of ESG. Indeed, to promote ESG objectives, national or societal interests might also be inherently embedded within the "other interests" that directors should take into account which might mandate foregoing an opportunity that places the company and the nation at a long-term

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210. Addressing the Threat from Securities Investments That Finance Certain Companies of the People's Republic of China, Exec. Order No. 14032, 3 C.F.R. 586 (2022); *see also* Addressing the Threat From Securities Investments That Finance Communist Chinese Military Companies, *supra* note 157 (Trump's executive order).

211. *FACT SHEET: Executive Order Addressing the Threat from Securities Investments that Finance Certain Companies of the People's Republic of China*, WHITE HOUSE (June 3, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/03/fact-sheet-executive-order-addressing-the-threat-from-securities-investments-that-finance-certain-companies-of-the-peoples-republic-of-china [https://perma.cc/234Y-HYSM].

212. *See* Ama A. Adams, Brendan C. Hanifin & Emerson Siegle, *Biden Administration Refines Chinese Military Companies Sanctions*, ROPES & GRAY (June 4, 2021), https://www.ropesgray.com/en/insights/alerts/2021/06/biden-administration-refines-chinese-military-companies-sanctions [https://perma.cc/V7HE-AX6] (discussing the changes of Biden's executive order).

213. Bill Gertz, *U.S. Engaged in 'Battle of Ideas' with Communist China, U.S. Ambassador Says*, WASH. TIMES (Feb. 26, 2024) https://www.washingtontimes.com/news/2024/feb/26/us-engaged-in-battle-of-ideas-with-communist-china [https://perma.cc/BR75-GC5D]; *See also* Simon Chesterman, *Asia's Ambivalence About International Law and Institutions: Past, Present and Futures*, 27 EUR. J. INTERN. L. 945, 950 (2016) ("In particular, there does not appear to be a comparable example of a great power (or multiple powers) rising within a normative framework not of its own making, where that normative framework has not undergone substantial change or revolution as a result of the new power's values and interests.").

disadvantage.[214] Accordingly, promoting U.S. liberal democracy (or at least not empowering an opponent to the model which seeks to replace the U.S. model) might constitute a societal interest ESG prioritizes to have incorporated into director decisions.[215]

Moreover, upholding democracy and rights might constitute good business practice and the failure to do so might lead to shareholder losses.

> Over 1,000 companies have cut back their presence in Russia, beyond requirements imposed by sanctions, since Russia invaded Ukraine. Some might characterize those moves as designed to achieve political goals, but a study by Jeffrey Sonnenberg and colleagues analyzed the reactions of the equity and credit markets to decisions by companies with exposure to Russia and concluded that decisions to pull back were rewarded by investors, likely due to concerns over "the negative effect of international economic sanctions, reputational risk and consumer scrutiny" of companies remaining." Additionally, all of these considerations could be considered to be financial factors, and no doubt many directors recognize that proper consideration of both these types of risks and various ESG factors can significantly impact shareholder value.[216]

Finally, while *Caremark* claims have until recently been understood as the duty to monitor to avoid fines and losses in the context of regulatory compliance, oversight has now expanded into ESG-related claims to encompass corporate liability for workplace harassment, climate change, and disclosure failure liability.[217] Defending U.S. national

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214. Taking into account stakeholders other than shareholders is not a simple elixir. Moving away from shareholder value maximization should not be viewed as a panacea. Indeed, other models of governance are also subject to corporate scandal, fraud, and corruption. *See* Ryan Browne, *'The Enron of Germany': Wirecard Scandal Casts a Shadow on Corporate Governance*, CNBC (June 29, 2020), https://www.cnbc.com/2020/06/29/enron-of-germany-wirecard-scandal-casts-a-shadow-on-governance.html [https://perma.cc/788W-4NPB] (discussing large fraud at major corporation); *Corporate Scandals Plague Top German Firms*, NBC NEWS (Aug. 8, 2005), https://www.nbcnews.com/id/wbna8875874 [https://perma.cc/V5JJ-HS4R] (highlighting rampant corruption); *The Corporate Scandals that Rocked Japan*, BBC (Nov. 19, 2018), https://www.bbc.com/news/business-46267868 [https://perma.cc/F53E-EAEF] (noting massive fraud at Olympus, Toshiba, Takata, Kobe Steel, and Nissan); Walter Sim, *Japan Inc Hit by Two Corporate Governance Scandals in as Many Months*, STRAITS TIMES (July 18, 2021), https://www.straitstimes.com/asia/east-asia/japan-inc-hit-by-two-corporate-governance-scandals-in-as-many-months [https://perma.cc/FAC3-YL44] (discussing scandals at Toshiba and Mitsubishi noting "[y]et there is a sense of deja vu—in 2017, several companies including Kobe Steel, Nissan, Subaru, Mitsubishi Materials and Toray Industries confessed to systematic data fraud."); *Toshiba's Lurch from Crisis to Crisis Since 2015,* REUTERS (Nov. 12, 2021), https://www.reuters.com/technology/toshibas-lurch-crisis-crisis-since-2015-2021-11-11 (on file with the *Journal of Corporation Law*) ("The once-storied conglomerate has been battered by accounting scandals, massive writedowns for its U.S. nuclear business, the sale of its prized chip unit and it was also found to have colluded to prevent overseas investors from gaining influence.").

215. See Stahl et al., *supra* note 6, on why Chinese competition must be managed while keeping the "peace" (China's ambition is to replace the U.S. and show the superiority of a communist state).

216. David H. Webber, David Berger & Beth Young, *The Liability Trap: Why the ALEC Anti-ESG Bills Create a Legal Quagmire for Fiduciaries Connected with Public Pensions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 27, 2023), https://corpgov.law.harvard.edu/2023/02/27/the-liability-trap-why-the-alec-anti-esg-bills-create-a-legal-quagmire-for-fiduciaries-connected-with-public-pensions [https://perma.cc/N7NC-AYSK] (footnotes omitted).

217. *In re* McDonald's Corp. S'holder Derivative Litig., 291 A.3d 652, 677, 680–81 (Del. Ch. 2023) (holding that sexual harassment within the workplace, can form the basis of a *Caremark* claim); Ontario Provincial Council of Carpenters' Pension Tr. Fund v. Walton, 294 A.3d 65, 85 (Del. Ch. 2023) (finding *Caremark* claims in

security might similarly constitute an important oversight obligation for directors as conceptualized through promotion of U.S. notions of rights. To fulfill their fiduciary oversight responsibilities, directors might have an obligation to be mindful that engaging in business with businesses in a jurisdiction that does not incorporate U.S. values might fail to comport with ESG.

However, injecting ESG into director decision-making either through voluntary measures, "soft-core" pressure such as ESG-inspired investment funds, or hard Federal law, carries risks both economic and political.

> [A]pplying *Caremark* to ESG issues will undermine Delaware's clear law of corporate purpose by extending director oversight duties to areas of social responsibility unrelated to corporate profit. *Caremark* can be justified as ensuring that a corporation complies with applicable laws, but ESG compliance remains voluntary. Advocates of extending *Caremark* to encompass ESG compliance thus likely hope doing so will push companies to adopt what they regard as socially responsible policies but which they have not been able to mandate through the political process. Asking corporate executives to take on governmental functions not only asks them to undertake tasks for which they are untrained and for which their enterprise is unsuited, it also subverts the basis of a liberal democracy. Government efforts to solve social problems are inherently limited by the checks and balances baked into the American political system. Mandated board attention to ESG risks would erode those checks and balances by asking unelected executives to undertake solving social ills.[218]

Furthermore, a rising chorus of ESG opponents point out that ESG (and particularly its variants such as DEI) have potentially extraordinarily negative impacts. There is growing pushback against failed (and arguably disastrous) DEI hiring and admissions policies which are increasingly perceived as damaging U.S. productivity, economic

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connection with the sale of opioids, which contribute to the national opioid epidemic, to constitute a "central compliance risk"); *see also* Gautam Naik, *Hedge Funds Target 'Catastrophic' ESG Cases for Huge Returns*, BLOOMBERG (Jan. 9, 2024), https://www.bloomberg.com/news/articles/2024-01-09/financiers-get-huge-returns-on-catastrophic-esg-breakdowns (on file with the *Journal of Corporation Law*) ("The area in question is litigation finance, and the focus is alleged ESG transgressions. Regularly bankrolled by hedge funds and other alternative investors, the lawsuits target supposed corporate misdeeds such as broken environmental pledges, exploited workers or corporate governance failings. A successful case can leave a litigation funder with returns well in excess of 25%.").

218. Stephen M. Bainbridge, *Don't Compound the Caremark Mistake by Extending It to ESG Oversight*, CLS BLUE SKY BLOG (Aug. 24, 2021), https://clsbluesky.law.columbia.edu/2021/08/24/dont-compound-the-caremark-mistake-by-extending-it-to-esg-oversight/ [https://perma.cc/2UTJ-KNDY] (footnote omitted). Indeed, picking which stakeholder interests to favor may be inherently conflicting and self-defeating in terms of benefiting stakeholders. *See also* Donald J. Kochan, The Purpose of a Corporation Is to Seek Profits, Not Popularity, HILL (Aug. 19, 2021, 2:30 PM ET), https://thehill.com/opinion/finance/568595-he-purpose-of-the-corporation-is-to-seek-profits-not-popularity [https://perma.cc/ CWW4-QXQ5] ("As corporations and their shareholders maximize wealth, resources flow into the economy in ways that necessarily increase overall social welfare."). Once maximizing shareholder-value is no longer the priority, a board is faced with various stakeholder interests to promote. As an exemplar, should a board favor lower prices to allow more consumers to buy a product proximately causing lower profit margins and therefore reduced employee bonuses? Should company policies encourage hiring more female members of a minority which inherently might prejudice male minority applicants? Which stakeholder interest is more important?

strength, and cultural vigor.[219] Clearly a risk of over-expansion in conceptualizing ESG obligations exists and caution is warranted. However, this Article opines that national security might should be understood as an obligation inherently different than other ESG initiatives such as DEI.

V. THE NEW ERA OF RIVALRY AND BOARDROOM DILEMMAS

Until recently, the United States has been unchallenged in the context of global hegemony.[220] This era of U.S. global dominance accustomed U.S. directors to a governance model where governmental geopolitical objectives were not connected to the corporation. Unsurprisingly therefore, since the end of World War II there were rarely conflicts between U.S. corporate director decision-making and U.S. national security.[221] Indeed, directors' consideration of global power politics and national security is counter to the U.S. model. "A business 'generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently."[222]

However conflicting interests between corporations and national security are returning in the new era of China–U.S. rivalry; U.S. corporate directors will increasingly be faced with the national security question. Unlike a prior adversary, the Soviet Union, China has enormous economic power and is integrated into the global economy. During the Soviet–U.S. rivalry, U.S. corporations did not extensively transact with the Soviet

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219. *See, e.g.*, Letter from Mark Brnovich, Ariz. Att'y Gen., et al. to Laurence D. Fink, CEO, BlackRock Inc. (Aug. 4, 2022), https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/BlackRock%20Letter.pdf [https://perma.cc/8Y9N-332A] (alleging BlackRock is improperly pressuring directors); New York Times Events, *BlackRock C.E.O. Larry Fink on ESG Investing*, YOUTUBE (Nov. 30, 2022), https://www.youtube.com/watch?v=PSVpth7uqb4 (Larry Fink saying "if you don't force behaviors, whether it be gender or race, or any way you want to say the composition of your team, you're going to be impacted"); Breck Dumas, *Billionaire and Harvard Grad Bill Ackman Suggests Harvard President Was a DEI Pick*, FOX BUS. (Dec. 7, 2023), https://www.foxbusiness.com/politics/billionaire-harvard-grad-bill-ackman-suggests-harvard-president-dei-pick [https:perma.cc/Q2RD-FRY] (discussing Bill Ackman's suggestions relating to the problems of DEI); *see also* Lisa Pham, *ESG Campaigns Seen Falling out of Favor with Activist Investors*, BLOOMBERG NEWS (Jan. 8, 2024), https://www.bloomberg.com/news/articles/2024-01-09/esg-campaigns-seen-falling-out-of-favor-with-activist-investors (reduction in activist ESG campaigns due to not being profitable); Silla Brush, *State Street Among Money Managers Closing ESG Funds*, BLOOMBERG (Sept. 21, 2023), https://www.bloomberg.com/news/articles/2023-09-21/blackrock-state-street-among-money-managers-closing-esg-funds (on file with the *Journal of Corporation Law*) (reporting that more ESG funds closed in 2023 than in prior three years).

220. While the Soviet Union was a nuclear power, it never was a global governance competitor or peer rival. Former National Security Advisor Zbigniew Brzezinski predicted that the Soviet Union's inability to innovate and compete with the U.S. technologically would proximately cause the Soviets to fail. *See* BRZEZINSKI, *supra* note 9, at 171–74. Unlike the Soviet Union, China is integrated in international trade, its currency may be used for oil transactions, and it has established alternative international financial institutions. *Id.*

221. *See* Richard M. Steuer & Peter A. Barile III, *Antitrust in Wartime*, 16 ANTITRUST 71, 73–75 (2002) (discussing what lessons should be taken from antitrust policy during World War II and contrasting it with situation after World War II). National security considerations also generally influence corporations. *See, e.g.*, Pargendler, *supra* note 153, at 569 ("In the 1980s, mounting anxiety about Japanese acquisitions of U.S. firms—which peaked after Fujitsu's proposed acquisition of Fairchild, a semiconductor manufacturer—led Congress to enact the Exon Florio Amendment to the Defense Production Act of 1950. Exon Florio authorizes the President to block acquisitions that threaten 'national security.'").

222. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 n.27 (1985) (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 760 (1984).

Union and dealings with Soviet businesses were minimal. However, the China–U.S. rivalry context is vastly different and a myriad of sanctions, controls, and regulations must be navigated in the context of supply chains and parties in other jurisdictions. For U.S. corporate directors, the injection of national security will not be straightforward in terms of balancing their obligations.[223] How should U.S. directors respond to the strategic realities? How does the national security reality impact the calculus of U.S. directors? Will the emphasis on profit-making prevail over national security? U.S. corporations have in the past engaged in transactions with enemies and have even been accused of acting contrary to the security of the United States.[224] In the new era, directors will need to evaluate whether a business transaction potentially adversely impacts U.S. security and whether the risk is worthwhile in light of potential prosecution or regulatory fines. Doing so is further complicated because directors will likely need to anticipate future developments in national security trends necessitating diligent director oversight. Accordingly, directors should be familiar with national security as it relates to their business, particularly with respect to emerging risks. Depending on the context, national security might constitute a "mission critical" focus of the business. A monitoring mechanism and perhaps a specialized committee dedicated to overseeing potential business transactions that might compromise national security should be established. Directors should be updated regularly, and national security and geo-economic experts will be needed by the board to describe and anticipate such risks so the board can identify, mitigate, and respond if necessary.

To be sure, overly emphasizing security over economic efficiency and competition carries the risk of excessively depriving U.S. corporate directors of the freedom to exercise reasonable risk-taking.[225] For example, in the antitrust context, placing national security over competition could backfire by reducing competition and thus innovation. Indeed, U.S. corporate innovation—a proximate cause of U.S. global economic leadership—relies upon a reasonable degree of freedom of action. Excessive caution may contribute to an overly zealous reluctance to take risks as engaging in business relations which might potentially implicate U.S. national security.

> Risk management failures do differ in degree from law violations or accounting irregularities. In particular, risk taking and risk management are inextricably intertwined. Efforts to hold directors accountable for risk management failures thus threaten to morph into holding directors liable for bad business outcomes**.** Caremark claims premised on risk management failures thus uniquely implicate

223. Within the rubric of enhanced shareholder governance which claims profits as the ultimate goal directors are faced with even more daunting challenges. For example, which stakeholder interest to favor to ensure the highest long-term profits?

224. *See supra* notes 151–52, 221 and accompanying text (discussing corporations' actions during World War II).

225. *See* Steven L. Schwarcz, *Regulating Financial Guarantors*, 11 HARV. BUS. L. REV. 159, 160 (2021) ("Although risk taking—especially if excessive—can cause externalities, the harm to third parties is usually either minimal, or outweighed from a societal perspective by the economic benefits of profitability, or required to be internalized through regulations and tort law.").

> the concerns that animate the business judgment rule's prohibition of judicial review of business decisions.[226]

The idea of "bigger is better," and therefore only large private U.S. entities can successfully compete with China's state-linked giants, may be incorrect. Indeed, innovation is often created by intense competitive rivalry and reducing such competitive spirit by lackluster antitrust enforcement might have deleterious effects on innovation, ultimately eroding U.S. technological supremacy.

Another dimension of complexity contributing to boardroom dilemmas is the uncertainty stemming from a blurring of distinctions between the Party-State and private Chinese business actors.[227] The Chinese domestic governance model ensconces political interests as superior to economic interests. The extent of private actors with embedded Party cells, Party-appointed CEOs, or Party-state interests in a private business entity may be opaque and unknowable.[228] Party members must swear allegiance to the Party; therefore, how can U.S. businesses know for certain whether representations made by a seemingly private Chinese business are true? Even ostensibly private Chinese entities will likely consider political interests and may need Party approval for important transactions underscoring the link between corporate activity and national security.

Technology transfer or other demands can be expected from the Party to economic actors in China. This includes not merely state-linked businesses but private businesses as well and the DOJ and other governmental agencies are aware that emerging technologies in the wrong hands pose a serious national security threat and can be expected to vigorously pursue corporations that damage national security.

> Russia, China, Iran and North Korea seek to obtain emerging technologies in critical areas such as semiconductors, quantum, hypersonics, advanced computing, and biosciences. These innovations bring the promise of improving lives around the world, but disruptive technologies pose real dangers in the hands of our adversaries.[229]

Thus, U.S. businesses will also need to be cautious when transacting with a Chinese business even if the Chinese entity is a presumably private corporation whose board is majority independent or when private institutions own a significant stake.

> In China, however, institutional investors are neither well developed nor major market players. In addition, in SOEs, it is difficult for institutional investors to be against a specific independent director, who is in reality supported by the

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226. *See* Stephen Bainbridge, *In Defense of Citigroup (the Judicial Opinion, Not the Company)*, PROFESSORBAINBRIDGE.COM (Jan. 6, 2010), https://www.professorbainbridge.com/professorbainbridgecom/2010/01/in-defense-of-citigroup-the-judicial-opinion-not-the-company.html [https://perma.cc/WA5C-ETLZ] (explaining that Chancellor Chandler correctly identified *Caremark* claims based on a lack of risk management by Citigroup that fell outside of the business judgment rule).

227. *See* Slawotsky, *Impact of Geo-Economic Rivalry*, *supra* note 3, at 581–85 (explaining that in China, economic interests serve the political objectives. Thus, even in private businesses, the Chinese Communist Party wields influence as members are embedded within the private sector).

228. *See* Zheng, *supra* note 120 (Alibaba disclosing that the Chinese government has ownership interests in business units).

229. Matthew G. Olsen, Assistant Att'y Gen. for Nat'l Sec., Remarks at the U.S. Embassy in Berlin, Germany (Nov. 3, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-national-security-matthew-g-olsen-delivers-remarks-roundtable [https://perma.cc/V97T-YXB4].

> government: many institutional investors are either related to the government or under its influence.[230]

Finally, in an era of enhanced scrutiny, endangering U.S. security interests can potentially be understood by enforcement and regulatory agencies as weakening the dominance of U.S. economic, technological, or ideological power. But that can be subject to excessive interpretation and represents a slippery slope—conceivably, pursuant to this definition, any transactions could be viewed as diminishing U.S. dominance. The slippery slope might suggest a degree of incorporation of a state-centric capitalist model such as incentivizing the U.S. Federal government to become shareholders in important businesses. Doing so brings risks and potential over-interference in markets with potentially seriously deleterious ramifications such as increased moral hazard within state-linked businesses, conflicts of interest with respect to governmental enforcement, and overall economic inefficiencies.

In sum, rapidly changing regulations and proliferating geo-economic turmoil pose serious challenges for directors in the context of defending U.S. national security. Directors need to develop monitoring systems to evaluate security threats and the overall impact of business decisions on U.S. national security. Moreover, boards will need to anticipate shifts and perform early (and continuous) due diligence of business partners, counter-parties, financial institutions, and geopolitical trends to ensure corporate conduct does not harm U.S. security

VI. CONCLUSION

U.S. corporate directors with business activities impacting on economic, technological, and ideological power—i.e., the fulcrums of hegemony—should take a rigorous review to evaluate national security concerns, ensuring that the business complies with all national security related laws and regulations. Moreover, boards will need to evaluate potential risks to U.S. national security and mitigate those security risks. While U.S. government officials primarily have this responsibility, U.S. corporations also have a crucial role in defending U.S. security particularly (but not exclusively) technology-related national security risks. Corporations possess vital IP, data, and innovative breakthroughs that the U.S. government may not possess and unlike China, the United States does not necessarily have access to this data. Moreover, corporations are vital in detecting risks to U.S. dominance globally in their respective industries and should be tasked with placing security above profits.

Simultaneously with the expanding conceptualization of national security, the landscape for director liability for failure to monitor the corporation has undergone a dynamic re-conceptualization. No longer relegated mostly to regulatory violations or damaging events, oversight claims are now being brought and contemplated in an expanding array of misconduct. Data breaches, cyber-attacks, workplace harassment, and climate change, are part of an increasing scope of potential director liability. Accelerating geo-strategic shifts and the new era of China–U.S. rivalry militate towards requiring director oversight responsibility to encompass national security. Oversight is now firmly

230. Sang Yop Kang, *The Independent Director System in China: Weaknesses, Dilemmas, and Potential Silver Linings*, 9 TSINGHUA CHINA L. REV. 151, 182 (2017).

entrenched as a violation of the duty of loyalty—particularly for "mission critical" functions—and thus not protected by the business judgment rule or entitled to indemnification. The question of whether national security constitutes a critical core mission of large and strategic publicly traded corporations is significant inasmuch as endangering U.S. national security might be viewed as a loyalty-based fiduciary violation.

Given the importance of corporations to economic, technological, and ideological power, national security should constitute a mission critical task of U.S. directors. While companies focused on emerging technologies and/or dual use technologies easily fall within the ambit of "national security assets," the hegemonic competition is quite broad and, for most large U.S. businesses, the dimension of national security may potentially implicate their business decision-making. Indeed, while particularly compelling for corporations engaged in aerospace, biotechnology, digital currencies, AI, and quantum computing, even non-technology-based sectors may fall within the rubric of security. Financial market leaders, social media, energy exploration, and industrial production capacities, may also implicate U.S. national security. Furthermore, preventing conduct that could potentially weaken U.S. national interests such as endangering supply chain resilience or providing an opportunity for Chinese businesses to outcompete the United States might conceivably also constitute threats imperiling U.S. national security. This last aspect is particularly challenging inasmuch as U.S. market capitalism eschews business decisions based on non-economic factors. Notwithstanding the complexities, identifying U.S. national security threats within the ambit of "mission critical" will require enhanced oversight by directors to ensure that the business does not harm national security. Doing so will likely influence U.S. corporate directors going forward. The injection of national security into the boardroom is complex but, as the competition intensifies will likely become an important factor for U.S. corporations.