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CONTINUING EVOLUTION OF  
**US-CHINA**  
**RELATIONS**  
**2023 AND BEYOND**

The 118th US Congress and the Select Committee

May 2, 2023

Giovanna M. Cinelli and David Mendelsohn



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# Presenters



Giovanna M. Cinelli



David Mendelsohn



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# How Policy Is Made: Statutory Authority and the Balance between the Branches of the US Government.



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# Executive Branch and Congressional Authorities



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# Background – Foundation

## Balance of the 3 Branches of Government

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graph LR; A((Balance of the 3 Branches of Government)) --- B[The Constitution: Articles I, II and III]; A --- C[Laws and budgets passed by Congress]; A --- D[Implementation by Executive Branch through regulations, Executive Orders (EOs) and Policy Statements]; A --- E[Court decisions interpreting the laws, regulations EOs and policy statements]; F[Executive  
Legislative  
Judiciary];
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Executive  
Legislative  
Judiciary

**The Constitution: Articles I, II and III**

**Laws and budgets passed by Congress**

**Implementation by Executive Branch  
through regulations, Executive Orders  
("EOs") and Policy Statements**

**Court decisions interpreting the laws,  
regulations EOs and policy statements**

# Background

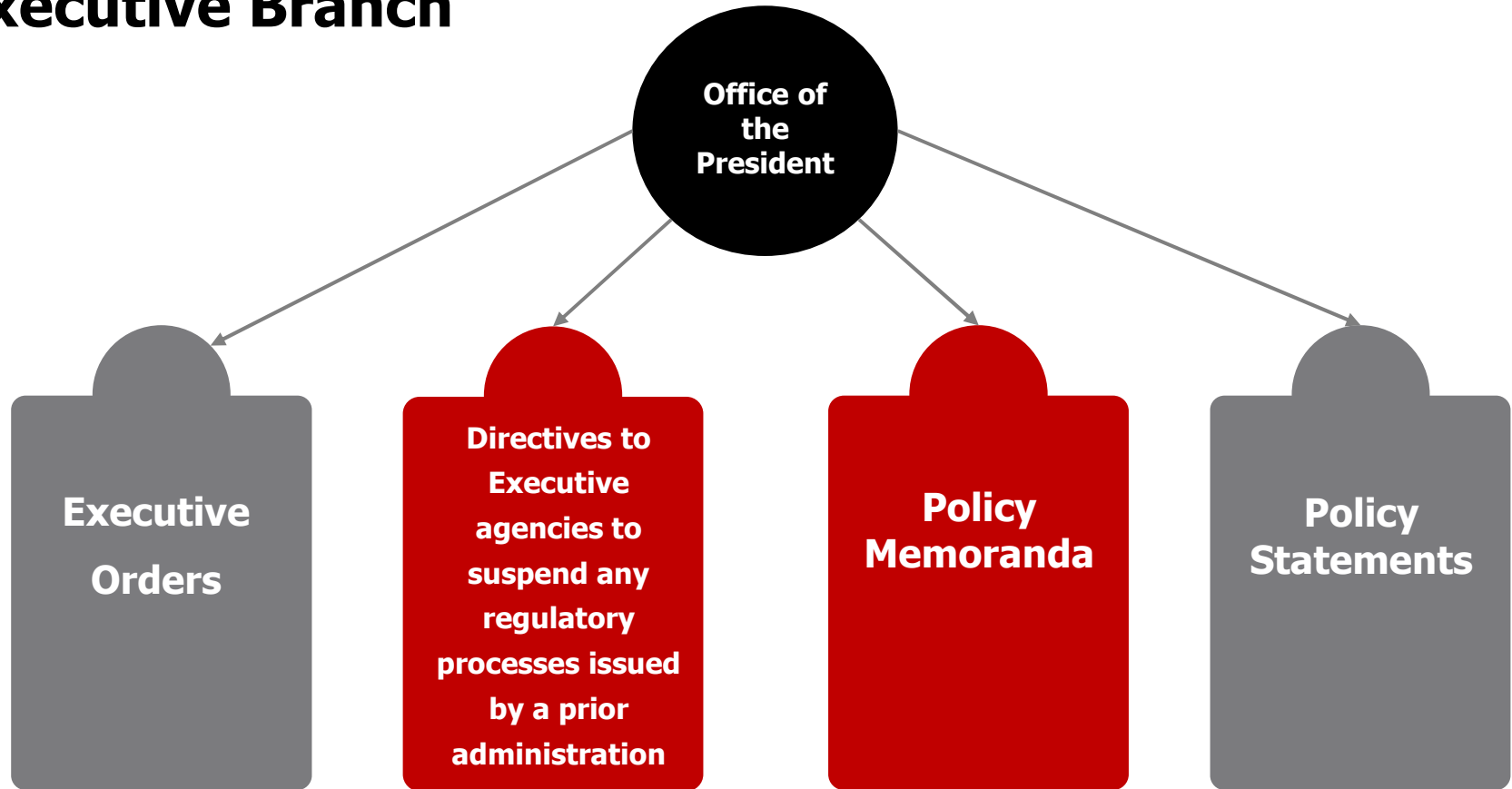
- Delicate balance in the national security and foreign policy space
  - Shared responsibilities primarily between Congress and the Executive branch
  - Shared responsibilities can create tensions
    - Conflicting goals
    - Differences in interpretations of underlying powers and authorities
    - Political objectives
    - Inconsistent applications
    - Unilateral, plurilateral, bilateral and multilateral approaches
  - Tensions create domestic reactions among Congress, the Executive branch and the Judiciary when one or all three take different paths
  - Tensions and a balancing of the equities also create global reactions which can result in foreign governments taking actions with intended and unintended consequences



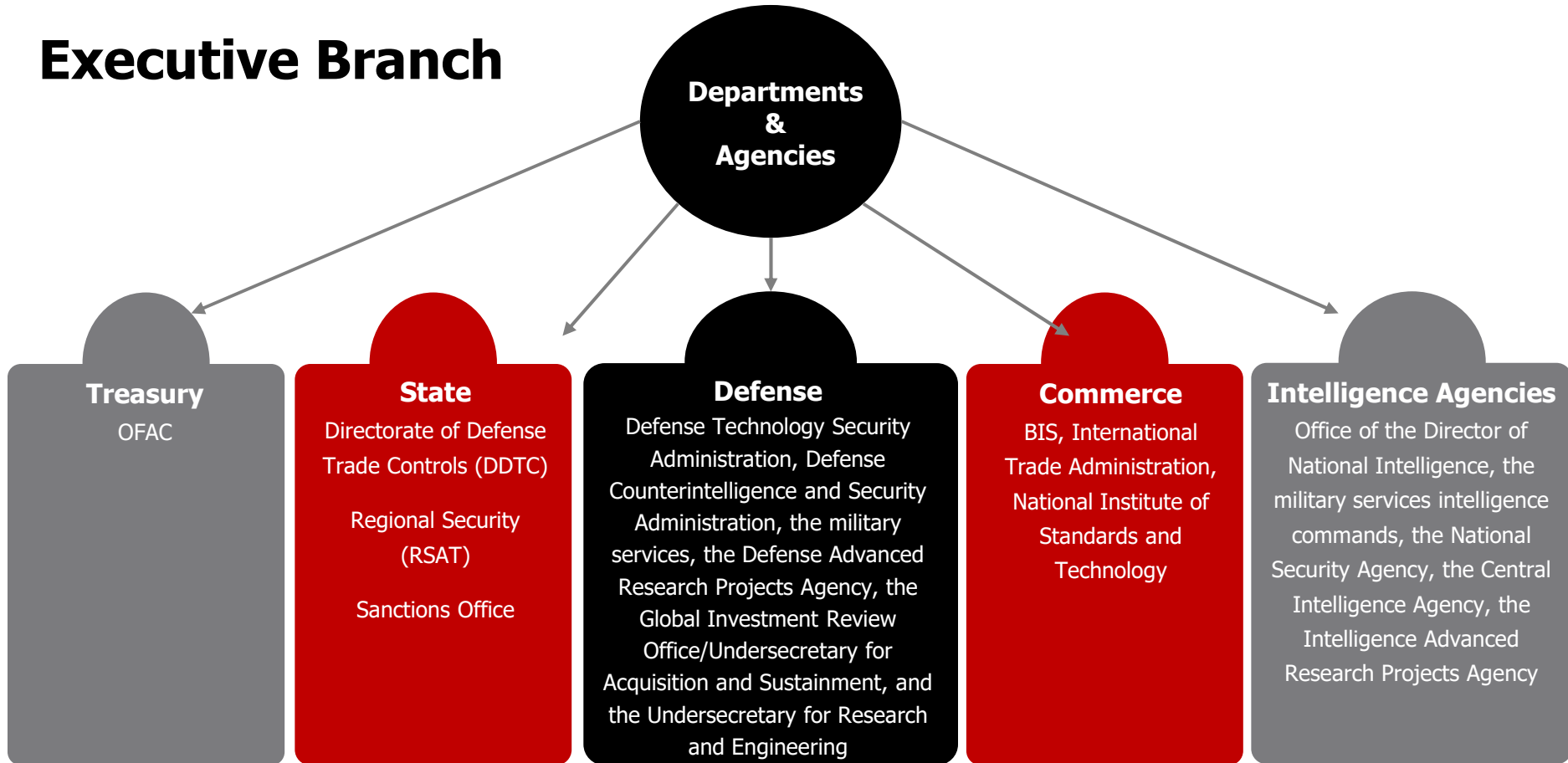
# Background

- Common perceptions about how the balance works
  - Some misperceptions on where, in the national security or foreign policy realm, politics prevails over legal processes
  - Over the last 50 years, the President and the Executive branch agencies have taken among the more aggressive stances in the exercise of national security and foreign policy authorities
    - Issuance of Executive Orders – which can be readily overturned without review by new administrations
    - Issuance of regulations with or without Administrative Procedure Act (“APA”) review – *e.g.*, October 2022 Export Administration Regulations (“EAR”) semiconductor and supercomputer regulations; sanctions implemented by Treasury/Office of Foreign Assets Control (“OFAC”), State/Sanctions Office, and Commerce/Bureau of Industry and Security (“BIS”)
    - Policy Memoranda and Statements – *e.g.*, April 18, 2023 BIS/Export Enforcement Policy Memorandum on Voluntary Self-Disclosures

# Executive Branch



# Executive Branch



# Executive Branch

## Interagency Efforts

- Committee on Foreign Investment in the United States (“CFIUS”) – foreign direct investment reviews in the United States
- Operating Committee/BIS – export licensing reviews for dual use items
- CHIPS Act review committee – to manage the CHIPS Act funding for the development of the US semiconductor base

## Other US Gov’t Statutory Orgs.

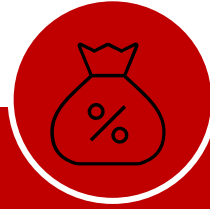
- Federal Communications Commission – has select national security authorities
- Securities and Exchange Commission – has select authorities with respect to reporting by public companies that can include issues involving national security

# Congress



## Legislative Authorities

- Resolutions
- Laws which build upon Constitutional authorities
- Laws which allocate responsibilities to the Executive Branch
- Laws which take actions generally allocated to the Executive Branch



## Appropriations

- Allocates budgets for Executive Branch
- Can predicate budgets on completion of certain requirements
- Can allocation discretion to Executive Branch agencies to spend the allocated budgets



## Oversight

- Special committees or commissions

# Standing Committees of Jurisdiction



## House

- Armed Services (HASC)
- Financial Services
- Foreign Affairs
- Ways & Means



## Senate

- Armed Services (SASC)
- Banking, Housing & Urban Affairs
- Foreign Relations
- Finance

# Ancillary Committees of Jurisdiction



**House**

Select Committee on Intelligence



**Senate**

Intelligence

# Judiciary Branch



**Interprets laws passed by Congress & implemented by Executive Branch**

**Grants deference to the Executive branch – *Chevron* deference – i.e., courts usually defer to agencies' interpretations of regulations, policies and enforcement priorities as long as those interpretations are reasonable and not dictated by specific statutory requirements**

***Curtiss-Wright* → The Supreme Court held that the Executive branch's authority is at its apex when dealing with national security or foreign policy matters. Authority is not unfettered.**

**Courts appeared to temporarily shift this deference during the Trump Administration where a number of challenges to Executive branch actions resulted in more activist court decisions – e.g., designations to the BIS Entity List; designations to the NDAA Section 1260H list**

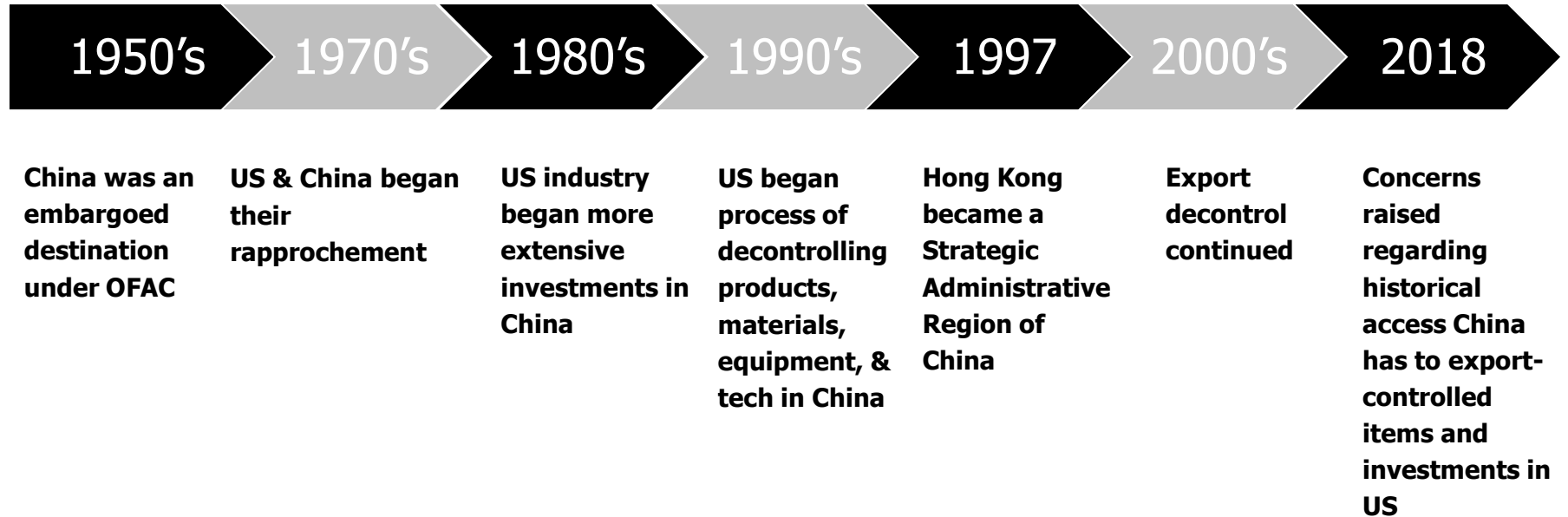


# Past is Prolouge?

## Recent US Policy & the Evolution of the US-China Relationship

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# US-China Relationship Evolution



# Executive Branch

## Tools

- Executive Orders
- Policy Statements
- Policy Memoranda
- Regulations

## Diplomatic Efforts

- Bilateral Treaties
- Multilateral Regimes
- Plurilateral Regimes
- Technology Focused Efforts

## Trade Disputes

# Congress: Actions Leading Up to the 118th Congress



## A Return of Industrial Policy?

- Did the US ever stop using Industrial Policy as a tool?
- CHIPS ACT
- Inflation Reduction Act
- Infrastructure Investment and Jobs Act
- Attempts to Change CFIUS jurisdiction



## High Profile Outreach to Taiwan

- Impact
- Anticipated outcome and reaction from China



## Sanctions for Foreign Policy Reasons

- Human Rights and Democracy Promotion
- Uyghur Forced Labor Prevention Act
- Status of Hong Kong

# China & the 118<sup>th</sup> Congress



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# The Select Committee on Strategic Competition Between the United States and the Chinese Communist Party



# Select Committee: Priorities



*I can confidently predict that the Chinese Communist Party is going to be our biggest national security problem for at least the next decade, if not the next three. So I think having a Select Committee that plays a coordinating and an oversight function in Congress where we're having that long-term look at what our country needs to do — that's going to endure beyond the next Congress*

**Chairman Mike Gallagher**  
(R-WI)



*The Chinese Communist Party poses serious economic and security threats to the United States and to democracy and prosperity across the globe, illustrated by its threats against Taiwan's democracy, its weaponization of TikTok, and its theft of hundreds of billions of dollars' worth of American intellectual property. I look forward to working with my colleagues in both parties on this committee to counteract the CCP's escalating aggression and ensure that our nation is prepared to overcome the economic and security challenges that the CCP presents to our country.*

**Ranking Member Raja Krishnamoorthi**  
(D-IL)

# Select Committee: Membership

## Republicans

Mike Gallagher, WI Chair

Robert J. Wittman, VA

Blaine Luetkemeyer, MO

Andy Barr, KY

Dan Newhouse, WA

John R. Moolenaar, MI

Darin LaHood, IL

Neal P. Dunn, FL

Jim Banks, IN

Dusty Johnson, SD

Michelle Steel, CA

Ashley Hinson, IA

Carlos A. Gimenez, FL

## Democrats

Raja Krishnamoorthi, IL

Kathy Castor, FL

André Carson, IN

Seth Moulton, MA

Ro Khanna, CA

Andy Kim, NJ

Mikie Sherrill, NJ

Haley M. Stevens, MI

Jake Auchincloss, MA

Ritchie Torres, NY

Shontel M. Brown, OH



# **U.S. Legislative and Policy Priorities: What to Watch**

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# Key Issues

## Outbound Investment Regime

### Decoupling

- Timing
- Impetus
- Likelihood
- Primary driver

### Inbound Foreign Investment (CFIUS)

- Expanded jurisdiction
- Shift in scope of review
- EO 14083

# Outbound Investment: Curtailing Capital Outflows

- Executive Orders
  - The US imposed an outbound investment regime in 1968 under President Johnson
    - Designed to address a balance of payments problem and the security issue of US investment in overseas development rather than domestic development
    - Attempted to address a “hollowing out” of some of the industrial base upon which agencies relied
    - Managed by the Department of Commerce
    - Not considered a success
    - Revoked by EO issued by President Reagan in 1986
    - Important history for both the Executive branch and Congress – depending upon who moves first to develop an outbound investment regime
- Select Committee
  - Focus on Financial Service Sector, Pensions, Non-Profits, and Passive Investing
  - “Fiduciary Duty”

# “Decoupling”

## Executive Branch Actions

- Implementation of CHIPS Act funding
  - National security guardrails for investment
- Government contracts regulations
  - Focus on removal of certain Chinese made parts, components, technology, software from certain defense and military systems

## Priority Sectors – Current Select List – US National Security Policy on Emerging & Critical Technologies

- Semiconductors
- Quantum encryption, communications, sensors, computing
- Robotics
- Biologics/genomics
- Sensors

## What Should Companies Consider?

- US Government regulations
- Reaction from China

# CFIUS

- Biden Administration
  - EO 14083 – directs CFIUS to consider specific factors during a CFIUS review
  - Considerations include supply chain, cybersecurity, access to personal information, critical technologies, relationships with sanctioned parties, etc.
  - More assertive review of cross-border investments involving certain technologies
- The Role of Congress
  - Seeks to expand CFIUS membership
  - Draft legislation to change certain cross-border reviews – i.e., reviews of agricultural land, reviews of greenfield projects
  - Allocated funds to Treasury and Commerce to “study” whether and how an outbound investment regime could occur
- Renewed Focus on Land Sales? States look to fill the void.

# **Uyghur Forced Labor Prevention Act- Human Rights and Trade**

**The Law**

**Priorities for Enforcement**

**Upcoming Changes?**

# Key Take-Aways



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# Biography



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Giovanna M. Cinelli is the Firm's global leader of the International Trade and National Security practice. As a practitioner for more than 35 years, she counsels clients in the defense and high-technology sectors on a broad range of issues affecting national security and export controls, including complex export compliance matters, audits, cross-border due diligence, and export enforcement, both classified and unclassified.

She handles complex civil and criminal export-related investigations and advises on transactional due diligence for regulatory requirements involving government contracts, export policy, and compliance, as well as settlement of export enforcement actions before the US Departments of State, Commerce, Treasury, and Defense, and related agencies. She is a member of three Federal Advisory Committees at State, Commerce and Defense, where she advises on matters related to national security and defense trade. She has conducted some of the most impactful export investigations of the last 30 years and has negotiated six consent agreements before the Department of State. She advises clients on matters before the Committee on Foreign Investment in the United States (CFIUS), and addresses mitigation requirements that may apply as part of CFIUS clearances for cross-border transactions. Giovanna is a member of the Morgan Lewis CFIUS working group and a former US Naval Intelligence Officer. She is considered a subject matter expert by Congress, the Department of Defense, and various think tanks, including the Center for Strategic and International Studies. She has testified before Congress on issues related to CFIUS, emerging technologies and export controls, as well as before the US-China Economic and Security Review Commission on emerging technologies and foreign investments.



# Biography



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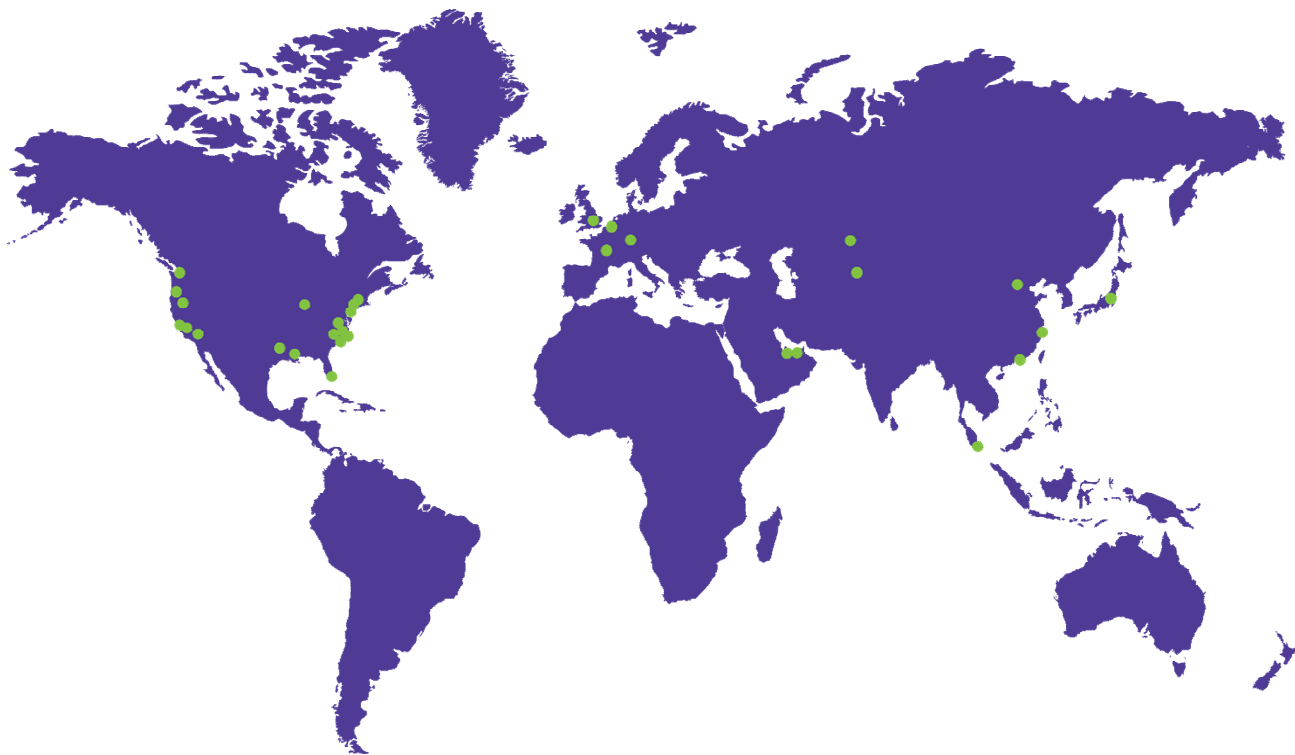
David leverages 15 years of government relations experience to advise Morgan Lewis attorneys and clients on legislative and regulatory policy matters and implement comprehensive government relations strategies. David works with clients and Morgan Lewis subject matter experts on a wide range of legislative issues, including: national security, trade, digital assets, transportation, energy, and health care. David is an active member of Morgan Lewis' responsible labor working group, US-China working group, Ukraine Conflict task force, digital assets working group, and automotive and EV industry groups.

## Our Global Reach

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Asia Pacific  
Europe  
Latin America  
Middle East  
North America

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Almaty  
Beijing  
Boston  
Brussels  
Century City  
Chicago  
Dallas  
Dubai  
Frankfurt  
Hartford  
Hong Kong  
Houston  
London  
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