

Defend the Field

America's Sportswashing Blindspot and How the United States Could Prevent Malicious Soft Power in Professional Sports Leagues

Dimitri DeChurch-Silva and Ian Platz

It's 10 PM: Do you know who's in your living room? Every year, as summer turns to fall, millions of Americans tune in to cheer on their favorite sports teams and players. For many, the entities that underwrite these teams are an afterthought, but recent trends have called into question whether and to what extent we, as a society, are willing to accept foreign influence in our everyday lives—particularly from places whose policies and practices directly clash with our own ideals. Likewise, it remains an open question whether, from a U.S. national security perspective, we are willing to cede the hearts and minds of potentially millions who partake in one of our nation's greatest pastimes—watching sports.

Broadly speaking, sportswashing can be defined as using sports to create a more palatable public perception of a political regime that would otherwise be associated with negative actions, by associating that regime with a positive or more revered cultural or institutional attraction.¹ From the 1936 Summer Olympics in Berlin to the 2023 World Cup in Qatar, sports have long been used as a means to shape political discourse. But while using sports as a cultural exchange market (i.e., a soft power tool) is not inherently bad, it raises questions regarding just how much foreign exchange and investment should take place domestically and what sort of access to unassuming U.S. consumers should be given to contrasting, and at times deplorable, political regimes. Because, simply put, the greater the cultural exchange, the greater the likelihood that the public may overlook regime-sanctioned crimes abroad, which in turn increases the likelihood that similar actions will take place again, thus creating a dangerous cycle which threatens to jeopardize U.S. national security in both foreseeable (e.g., greater exposure to foreign propaganda, or emboldening states to commit further wrongdoings) and unforeseeable ways.

The national security questions inherent in sports-based foreign investment are further complicated by the United States' longstanding status as a proponent of classical neo-liberal economic theory—that is, “free market economics.” Most recently, the LIV/PGA merger, funded by the Saudi Arabian sovereign wealth fund (the Public Investment Fund or PIF) has highlighted the salience of this issue, raising questions about public tolerance of sportswashing by foreign governments that do not share American values, as well as the best legal and political apparatuses to address future foreign investment into U.S. sports markets.

The tension between economic incentives and political and national security concerns is growing. On the one hand, granting foreign sovereign wealth funds greater access to domestic sports leagues could be relatively harmless. On the other, it could allow an unsavory political regime to sportswash its image clean of its more belligerent actions elsewhere (e.g., to minimize criticism for human rights violations or controversial military activities), or to use the league as a direct channel for communication of other perverse messaging. For example, human rights groups chided China's hosting of the 2022 Winter Olympics as an attempt to minimize Chinese treatment of Uyghur Muslims, particularly China's decision to select a Uyghur cross-country skier as a torchbearer in the opening ceremony.² In cases where foreign governments have acquired significant portions or outright control of certain sporting events, this trend is emerging as a conspicuous tool for shaping narratives.³ It is possible that Americans could soon find their weekend sports-watching rituals being sponsored by countries that hold values contrary to their own, and with potentially negative intentions. Thus, the question remains: how do we meaningfully limit access to U.S. markets and control the soft power implications that surround them?

Practical Tools for an Impractical Challenge

In the wake of the LIV/PGA merger and a general bipartisan unease about foreign investment groups purchasing large stakes or outright ownership in U.S. professional sports, several ideas have been floated as potential mechanisms for addressing the emerging national security threat posed by increased foreign

investment into U.S. sports. One popular idea, using the Committee on Foreign Investment in the United States (CFIUS) to screen and control foreign investment into domestic sports leagues, immediately came to the fore.⁴ Another, using U.S. antitrust law to stop mergers between foreign investors and domestic sports leagues, thereby precluding any alleged anticompetitive effects that would result from such mergers, also gained early traction.⁵ While laudable, both mechanisms suffer fundamental flaws that prevent effective deterrence.⁶ First, for CFIUS to have jurisdiction over these sorts of transactions, there would need to be a foreign investment in sensitive technology, infrastructure, or sensitive data, none of which are at issue here. Further, in the antitrust context, any proposed merger would need to leave consumers worse off post-merger than they were pre-merger, which is unlikely given that mergers like LIV/PGA produce more tournaments (i.e., increased revenue for the league and its players), more venues (i.e., increased revenue for host country clubs and courses), and more opportunities to watch (i.e., expanded fan engagement). A third, largely unexplored option, however, could provide a more comprehensive and immediate solution—the Federal Communications Commission (the FCC or Commission).

Switch Off, Opt Out, and Disconnect

The FCC is more than a repository of angry public comments; it is a powerful administrative agency charged with overseeing the implementation and enforcement of U.S. communications law. More specifically, the Commission regulates interstate and international communications by radio, television, wire, satellite, and cable across the greater United States.⁷ To do so, the FCC promulgates rules that serve as a benchmark for how U.S. communications law affects interested parties. But while the FCC may seem an unexpected choice for regulating issues critical to U.S. national security, there are historic and recent examples that support the case for using the FCC as a protection mechanism. Most notably, in April 2020, President Donald J. Trump created the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector (“Team Telecom”) by executive order.⁸ Executive Order 13913 established Team Telecom to “assist the FCC in its public interest review of national security and law enforcement concerns that may be raised by foreign participation in the United States telecommunications services sector.”⁹ Specifically, Team Telecom was tasked with (i) reviewing applications and licenses for risks to national security and law enforcement interests posed by such applications, and (ii) responding to potentially problematic applications by recommending that the FCC dismiss, deny, or condition grant of an application upon compliance with certain mitigation measures.¹⁰ The FCC subsequently promulgated a rule, codifying the executive order and adopting standard questions to ensure that Team Telecom could gather the information necessary to address the national security concerns surrounding FCC applications and petitions involving foreign ownership.¹¹ This Executive Order thus provides the FCC with direct authority over a foreign owned sports league’s access to U.S. airwaves, and provides a strong legal justification for controlling such access.

More recently, the FCC implemented the directive of the Secure Equipment Act, which prohibited the FCC from reviewing or issuing equipment licenses to firms if they were on a “Covered Equipment or Services List,” banning all Huawei and ZTE technologies from use in the United States.¹² The FCC took this action “to further secure our communications networks and supply chains from equipment that poses an unacceptable risk to national security of the United States or the security and safety of United States persons”—a broad mandate of authority.¹³ About the decision, FCC Chairwoman Jessica Rosenworcel said that “[t]he FCC is committed to protecting our national security by ensuring that untrustworthy communications equipment is not authorized for use within our borders[.]”¹⁴ This move, in conjunction with Congress’ newfound appetite for limiting transactions which could provide bad actors opportunities to exploit vulnerabilities in U.S. security and two separate administrations’ directives regarding the same, could serve as justification for a ban or restriction on air time for entities owned by select foreign persons.¹⁵ Any such control will eliminate or severely reduce the economic incentive for foreign investment into U.S. sports leagues, drastically reducing the likelihood that foreign sovereigns invest, while simultaneously limiting foreign sovereigns’ ability to strengthen their soft power.

Using the legal framework already in place, the FCC could limit or prohibit airtime allotted to entities owned by certain individuals or governments, and thus reduce the available advertisement revenue, and ultimately remove much of the economic impetus for sportswashing transactions.¹⁶ To be sure, doing so undoubtedly implicates the First Amendment; however, there is strong precedent holding that the First Amendment

protections enjoyed by noncitizens are narrower than those enjoyed by citizens.¹⁷ Further, while the First Amendment prohibits the FCC from preventing the broadcasting of a particular viewpoint, a blanket ban on any communications based on the owner/entity, or a similar restriction, is notably different because it is not necessarily viewpoint specific and is arguably content neutral.¹⁸

Rely on Available Options Rather Than Creating Something New

Given the tension between U.S. national security and other competing values, the growing number of foreign investment firms targeting professional sports, and the possibility of malicious activity resulting from foreign ownership of domestic sports leagues, it is crucial for U.S. policymakers to consider how strong the soft power implications from sportswashing are, and the tolerance level that we should have for sportswashing. At present, the tolerance level appears troublingly high, but as more countries with sharply contrasting values seek to exploit sportswashing opportunities in the United States, both policymakers and the public will eventually reach their limit. When they do, policymakers would be wise to pair creative thinking and innovative solutions using the legal and administrative tools already available to formulate a rapid response. Because CFIUS and antitrust claims are too inflexible, too crawling, and overly complicated to serve as an effective tool, U.S. policymakers should focus on recalibrating the system as it currently exists and using the FCC's infrastructure and resources to remove the economic incentives for state-owned foreign investment funds looking to purchase large shares or outright ownership of American sports leagues.

Dimitri DeChurch-Silva is an associate in the International Trade Group at Blank Rome LLP.

Ian Platz is the Senior Program Officer for Security Sector Governance and Reform at the U.S. Institute of Peace.

1 Michael Rosenberg, "Sportswashing Is Everywhere, But It's Not New," *Sports Illustrated*, December 29, 2022, <https://www.si.com/olympics/2022/12/29/sportswashing-olympics-world-cup-daily-cover>; Caroline Bologna, "What Is 'Sportswashing'?" *Huffington Post*, June 9, 2023, <https://www.huffpost.com/entry/what-is-sportswashing-pga-golf-1-647f717de4b0a7554f473efc>.

2 Amy Qin, "Bearing an Olympic Torch, and a Politically Loaded Message," *The New York Times*, February 8, 2022, <https://www.nytimes.com/2022/02/08/sports/olympics/china-uyghur-olympics.html>.

3 "'We Believe in the Power of Sport,' Says Saudia Marketing Chief After Partnering With Aston Martin Formula One Team," *Arab News*, March 14, 2023, <https://www.arabnews.com/node/2268591/sport>. "At Saudia, we have always believed in the power of sports to unite people and create a borderless world . . . Our Kingdom's love story with F1 has even led us to hosting a race, the Jeddah Grand Prix, and who knows, we may one day have our own Saudi F1 team."

4 Matt Perault and Asheesh Agarwal, "Live and Let LIV?" *Lawfare*, July 12, 2023, <https://www.lawfaremedia.org/article/live-and-let-liv>; Mike Lee (@SenMikeLee), "@SenAmyKlobuchar and I have serious competition concerns about any transaction or agreement between the @PGATOUR and @livgolf league [image attached]," *Twitter*, June 30, 2023, 10:14am, <https://twitter.com/senmikelee/status/1674783352744968193?s=61>.

5 "Warren, Wyden Call on Justice Department to Closely Scrutinize PGA Tour-LIV-Saudi Investment Fund Golf Merger for Potential Antitrust Violations," *Office of Senator Elizabeth Warren*, June 14, 2023, <https://www.warren.senate.gov/oversight/letters/warren-wyden-call-on-justice-department-to-closely-scrutinize-pga-tour-liv-saudi-investment-fund-golf-merger-for-potential-antitrust-violations>.

6 There are certain inescapable limitations to using either CFIUS or antitrust as the legal mechanism by which the United States addresses its national security concerns with regard to sportswashing. Problems with CFIUS: CFIUS operates pursuant to Section 721 of the Defense Production Act of 1950, as implemented by Executive Order 11858, as amended, and pursuant to chapter VIII of Title 31 of the Code of Federal Regulations ("CFR"). See 50 U.S.C. § 4565 available at <https://www.law.cornell.edu/uscode/text/50/4565>; see also Executive Order 11858; see also 31 C.F.R. Part 800, *et seq.* CFIUS is empowered to review, *inter alia*, acquisitions of "control" of U.S. businesses by foreign persons. CFIUS 101 available at <https://www.kabealo.law/wp-content/uploads/2020/04/CFIUS-101-1.pdf>. Any "TID" transaction (critical technologies, critical infrastructure, or sensitive personal data) will, therefore, trigger CFIUS review. 31 C.F.R. § 800.248 available at <https://www.ecfr.gov/current/title-31/subtitle-B/chapter-VIII/part-800/subpart-B/section-800.248>. CFIUS will review transactions based on the nature of the U.S. business (i.e., U.S. businesses with government contracts, or with access to sensitive data), the identity of the investor (i.e., the track record of the entity investing), foreign government control (i.e., the extent to which a foreign government exercises control over the foreign entity investing in the U.S. entity), and sometimes corporate restructurings. CFIUS Reform Guidance available at <https://home.treasury.gov/system/files/206/GuidanceSummary-12012008.pdf>; see also CFIUS Law and Guidance available at <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-laws-and-guidance>. Given its limited jurisdiction, CFIUS would, therefore, need to find a national security hook—a real estate purchase, access to sensitive data resulting from investment, etc.—in order to stop a proposed foreign investment into a domestic sports league. Absent a TID transaction and given the novelty of sovereign wealth fund investments into domestic sports leagues, it

remains unclear what exactly CFIUS could use to justify a review. Problems with antitrust: Section 1 of the Sherman Antitrust Act prohibits any contract in restraint of trade. 15 U.S.C. § 1. Section 2 of the Sherman Act prohibits monopolies and conspiracies to monopolize. 15 U.S.C. § 2. Modern antitrust law has placed consumers at the forefront of any anticompetitive inquiry, applying a standard commonly known as the “consumer welfare standard.” Herbert Hovenkamp, *Implementing Antitrust’s Welfare Goals*, 81 *FORDHAM L. REV.* 2471, 2476 (2013) (“[C]ourts almost invariably apply a consumer welfare test.”); Jonathan M. Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, *ANTITRUST SOURCE* at 2 (Aug. 2015) (The “consumer welfare standard is the standard understood to be employed in practice by the federal enforcement agencies”). This means that, absent evidence of harm to consumers (however defined), antitrust law is largely inapplicable as a mechanism to address national security concerns surrounding foreign direct investment into the United States in the context of sports. Using the LIV/PGA merger as an example, consumers are arguably better off post-merger because the combined entity will host more tournaments, in more cities, over the course of a longer season than previously established. Simply put, consumers will get to consume more golf—clearly a boon to consumers.

7 “*About the FCC*,” U.S. Federal Communications Commission, <https://www.fcc.gov/about/overview>.

8 “Executive Order 13913 of April 8, 2020, Establishing the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector,” Code of Federal Regulations, section 301 of title 3 (2020): 19643–19650, <https://www.federalregister.gov/documents/2020/04/08/2020-07530/establishing-the-committee-for-the-assessment-of-foreign-participation-in-the-united-states>.

9 *See* Exec. Order No. 13913 at Section 3.

10 *See* Exec. Order No. 13913 at Section 3(i)–(ii).

11 U.S. Federal Communications Commission, *Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, 47 C.F.R. § 1, 63, <https://www.federalregister.gov/documents/2021/12/02/2021-24944/process-reform-for-executive-branch-review-of-certain-fcc-applications-and-petitions-involving>.

12 Edward Graham, “FCC Bans Sale of New Devices From Chinese Companies Huawei, ZTE and Others,” *NextGov*, November 28, 2022, <https://www.nextgov.com/emerging-tech/2022/11/fcc-bans-sale-new-devices-chinese-companies-huawei-zte-and-others/380214/>.

13 U.S. Federal Communications Commission, *Report and Order, Order, and Further Notice of Proposed Rulemaking*, November 11, 2022, <https://docs.fcc.gov/public/attachments/FCC-22-84A1.pdf>.

14 U.S. Federal Communications Commission, “FCC Bans Authorizations for Devices That Pose National Security Threat,” November 25, 2022, <https://www.fcc.gov/document/fcc-bans-authorizations-devices-pose-national-security-threat>.

15 Defined as any individual or entity that is not a United States citizen, a permanent resident alien, or an entity organized under the laws of the United States or any jurisdiction therein.

16 *See, e.g.*, Exec. Order No. 13913; *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281 (D.D.C. 2011) (holding that while noncitizens do enjoy First Amendment protections, their rights are not necessarily as robust as the First Amendment rights of citizens); *see also United States v. China Telecom (Am’s.) Corp.*, 55 F.4th 939 (D.C. Cir. 2022) (banning Huawei and ZTE from entering U.S. networks); Secure Equipment Act of 2021, HR 3919, 117th Cong., *Congressional Record* Vol. 167 (2021), Pub. Law 117-55 – Nov. 11, 2021, 135 Stat. 423, <https://www.govinfo.gov/content/pkg/PLAW-117publ55/pdf/PLAW-117publ55.pdf>.

17 *Bluman*, 800 F. Supp. 2d 281 (D.D.C. 2011).

18 David Hudson Jr., “Content Based,” Free Speech Center at Middle Tennessee State University, September 19, 2023, <https://firstamendment.mtsu.edu/article/content-based/> (discussing the difference between content-based and viewpoint-based restrictions on speech).