

# *Ralls Corp. v. CFIUS*: A New Look at Foreign Direct Investments to the US

*The CFIUS process typically occurs privately and opaquely, but Ralls Corporation brought a legal challenge in federal courts resulting from an unfavorable ruling. For the first time, a United States federal court recognized standing of a foreign company in the CFIUS review process and further awarded it recognition of property rights and due process. However, significant substantive issues were left unanswered at the appeals stage, and real caveats were placed on the justiciability rights that had been granted. Before any clarifications could take place on the remand, the parties settled the suit and thereby left those issues outstanding. Though full resolution did not ultimately occur, the first and only CFIUS suit in history opened the door for future litigation and substantially strengthened investors' rights.*

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## INTRODUCTION

On October 9, 2015, the Committee on Foreign Investment in the United States (CFIUS) settled its first and only lawsuit in history.<sup>1</sup> Appellant Ralls Corporation, a Delaware-based corporation owned by two Chinese nationals, had entered into a transaction purchasing four American limited liability companies (Project Companies) in Oregon.<sup>2</sup> As this purchase resulted in “foreign control of any person engaged in interstate commerce in the United States,”<sup>3</sup> it fell under the purview of CFIUS, the Executive Branch committee charged with determining whether foreign acquisitions pose a threat to “national security.”<sup>4</sup>

The Ralls Corporation transaction and settlement were notable in several respects. First, Ralls opted not to undergo CFIUS review before the international investment, as is usually done by foreign companies,<sup>5</sup> but instead waited until after the transaction had closed to voluntarily file with CFIUS.<sup>6</sup> Second, because of this tactical delay, the President was involved with the CFIUS review and issued a Presidential Order in response to the transaction. Last, and most significantly, Ralls decided to pursue legal recourse in response to the orders by CFIUS and the President rather than walk away from the deal.<sup>7</sup> As the CFIUS review process usually occurs privately and opaquely,<sup>8</sup> this last move by Ralls was particularly unprecedented.

By the time of the settlement announcement, the case had been brought before the District Court of the District of Columbia and then reversed and remanded by the DC Circuit Court of Appeals. At the initial stage, the case was dismissed by the district court for mootness and nonjusticiability.<sup>9</sup> In a separate Due Process opinion, the court further held that Ralls did not have constitutionally protected property rights.<sup>10</sup> The Court of Appeals, in a surprising move, reversed in part.<sup>11</sup> Its decision held that Ralls, by having already acquired the Project Companies, had in fact gained protectable property interests and

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1. *Ralls Corp. v. Committee on Foreign Investment in the US*, 758 F.3d 296 (D.C. Cir. 2014).

2. *Id.*

3. Defense Production Act, 50 U.S.C. App. § 721, 2170 §(a)(3) (1950)

4. *Id.*

5. Stephen P. Mahinka & Sean P. Duffy, *The CFIUS Review Process: Current Issues and Enforcement Trends*. MORGAN LEWIS (April 25, 2013), [https://www.morganlewis.com/~media/files/publication/presentation/webinar/cfius\\_presentation\\_2013.ashx](https://www.morganlewis.com/~media/files/publication/presentation/webinar/cfius_presentation_2013.ashx); see also, *A Guide to Demystify the CFIUS Process*, BAKER BOTTS (April 25, 2013) [http://www.bakerbotts.com/file\\_upload/documents/CFIUSBooklet-EnglishVersion.pdf](http://www.bakerbotts.com/file_upload/documents/CFIUSBooklet-EnglishVersion.pdf).

6. *Ralls Corp.*, 926 F. Supp. 2d 71 (2013).

7. *Id.*

8. Jill Priluck, *The mysterious agency that can block a global merger*, REUTERS (July 8, 2013), <http://blogs.reuters.com/great-debate/2013/07/08/the-mysterious-agency-that-can-block-a-global-merger/>.

9. *Ralls Corp.*, 926 F. Supp. 2d, passim.

10. *Ralls Corporation v. Committee on Foreign Investment in the US*, 987 F.Supp.2d 18 (2013).

11. *Ralls Corp.*, 758 F.3d at 296.

was therefore guaranteed due process rights.<sup>12</sup> In addition, it reversed the district court by holding that the challenges against the CFIUS Order were not moot because they were “capable of repetition.”<sup>13</sup> As a result, the Court of Appeals sent the remaining questions on the merits, including whether CFIUS’s assumed authority had been in violation of the Administrative Procedure Act (APA), back to the district court on remand. It was at this stage that Ralls and the U.S. government decided to enter into a settlement agreement, thereby ending the only CFIUS lawsuit in history.

The litigation and settlement are landmark events for the Committee. For the first time, a US court pronounced that foreign companies have due process rights claimable against CFIUS. In addition, the court allowed a foreign investor to bring substantive challenges attacking CFIUS’s authority under the APA. These unprecedented moves by the court could result in shifts in power in future foreign direct investments (FDIs).

At the same time, the *Ralls* case is also a mixed victory. While due process is promised, significant impediments, such as protection of classified information and executive privilege, limit what types of evidence may be made available.<sup>14</sup> More importantly, the substantive issues regarding CFIUS’s authority were still undecided at the time of the settlement. Not addressing these challenges postpones any real changes in CFIUS until another litigation is brought. Thus, this Note ultimately argues that any predictions of monumental changes are premature; it may yet be too early for foreign companies to rely on this decision and change any strategic decisions vis-à-vis their filings with CFIUS.

This Note examines the *Ralls Corporation* decision and its significance in CFIUS reviews and foreign direct investments. Part I of the Note provides background into foreign direct investments and related concerns regarding national security. Part II focuses on the history of CFIUS, the pieces of legislation that have been enacted over time, and the structure of the agency and review process today. Part III delves into the significance of the *Ralls Corporation* case. Specifically, it looks at the factual background of the case, the specific challenges that were brought before the district court, and the holding of the DC Circuit Court. Part IV then discusses the impact of the holdings and the reasons the parties ultimately chose to settle.

## I. BACKGROUND ON FOREIGN DIRECT INVESTMENTS

Foreign direct investments are cross-border investments that transfer ownership of at least 10% of an asset for long-term holding.<sup>15</sup> Due to their non-temporary nature, FDIs are seen as “direct, stable and

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12. *Id.*

13. *Id.* at 324.

14. *Id.*

15. *Foreign direct investment, net inflows (BoP, current US\$)*, WORLD BANK, <http://data.worldbank.org/indicator/bx.klt.dinv.cd.wd>.

long-lasting links between economies.”<sup>16</sup> By allowing cross-country purchases, FDIs encourage transfer of technology, know-how, and investment opportunities between countries.

The United States was the top investing country in 2013 (USD 419 billion), followed by Japan (USD 114 billion) and the United Kingdom (USD 107 billion).<sup>17</sup> The United States was, in return, the highest recipient of global FDI inflows, netting 28% (USD 234 billion) of the OECD total and more than the combined inflows to Belgium, the United Kingdom, France and Germany.<sup>18</sup>

This position held by the United States stems from a longstanding view that foreign direct investments are a driver of economic growth.<sup>19</sup> Since prior to World War I, FDIs have constituted a large portion of United States’ gross domestic product (GDP).<sup>20</sup> Most recently, citing the United States as the “most attractive place for businesses to locate, invest, grow, and create jobs,” President Obama issued a statement reconfirming the country’s goal of maintaining an open investment policy.<sup>21</sup>

However, as longstanding are the goals towards openness and cross-border investments, concerns about national security of these FDIs are almost as deeply rooted. One of the earliest pieces of legislation addressing the need for national security, albeit in largely different terms, was the Defense Production Act of 1950 (DPA), 50 U.S.C. App. 2170.<sup>22</sup> Enacted as a response to the Korean War, the DPA initially provided the President a “broad set of authorities to ensure that domestic industry can meet national defense requirements.”<sup>23</sup> Specifically, the Act gave the President the authority to “prioritize contracts for goods and services, and offer incentives within the domestic market to enhance the production and supply of critical materials and technologies when necessary for national defense.”<sup>24</sup> In its original 1950 form, the DPA defined national defense as “the operations and activities of the armed forces, the Atomic Energy Commission, or any other

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16. OECD Factbook 2013: Foreign direct investment, OECD iLIBRARY, <http://www.oecd-ilibrary.org/sites/factbook-2013-en/04/02/01/index.html?itemId=/content/chapter/factbook-2013-34-en>.

17. *Id.*

18. *Id.*

19. *See generally* U.S. Bureau of Economic Analysis, “International Economic Accounts, International Investment Position,” <http://www.bea.gov/international/index.htm> (last visited August 22, 2015).

20. Tazeem Pasha & Rachel Crabtree, *Foreign Direct Investment in the United States: Drivers of US Economic Competitiveness*, SELECTUSA (Dec. 31, 2013), [http://selectusa.commerce.gov/documents/full\\_report\\_-\\_fdi\\_in\\_the\\_united\\_states.pdf](http://selectusa.commerce.gov/documents/full_report_-_fdi_in_the_united_states.pdf).

21. Statement by the President on United States Commitment to Open Investment Policy (2011), <http://www.whitehouse.gov/the-press-office/2011/06/20/statement-president-united-states-commitment-open-investment-policy>.

22. Defense Production Act, 50 U.S.C. Appx. §§2061 et seq.

23. Jared T. Brown & Daniel H. Else, *THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND REAUTHORIZATION 1* (Congressional Research Service, 2014).

24. *Id.*

department or agency directly or indirectly and substantially concerned with the national defense . . . .”<sup>25</sup>

Since 1950, the DPA has been reauthorized over 50 times and undergone significant amendments to its purview and scope. Importantly, it now houses the statutory language covering CFIUS and national security reviews.<sup>26</sup>

## II. BACKGROUND ON CFIUS

The Committee on Foreign Investment in the United States was initially created by an Executive Order by President Ford in 1975.<sup>27</sup> In its original form, the Committee comprised of the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the Secretary of Commerce, the United States Trade Representative, the Chairman of the Council of Economic Advisers, the Attorney General, and the Director of the Office of Management and Budget, with the Secretary of the Treasury serving as the chairman of the Committee.<sup>28</sup> The committee was tasked with “monitoring the impact of foreign investment in the United States,” specifically by reviewing investments that might have “major implications for United States national interests, and making a presentation of the investigation to the President.”<sup>29</sup> Any information that was relied on by the Committee was not to be publicly disclosed, except to the extent required by law.<sup>30</sup>

After its founding, CFIUS operated with relatively little fanfare, aside from an action the following year clarifying the types of data that fell under its purview.<sup>31</sup> In fact, between 1975 and 1980, the Committee met only ten times, and within those meetings, could not decide whether it needed to respond to the political or economic aspects of foreign direct investments.<sup>32</sup> Thus, CFIUS came to be seen by members of Congress as failing its mandate.<sup>33</sup>

This changed when Congress approved the Exon-Florio provision of the Omnibus Trade and Competitiveness Act of 1988.<sup>34</sup> Dur-

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25. *Id.* at 5.

26. Defense Production Act, *supra* note 3, at § 721.

27. Exec. Order No. 11,858, 40 F.R. 20263 (1975).

28. *Id.*

29. *Id.*

30. JAMES K. JACKSON, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) (Congressional Research Service, 2014).

31. International Investment Survey Act of 1976, Pub. L. No. 94-472, 90 Stat. 2059 (1976).

32. U.S. Congress. Committee on Government Operations, *The Adequacy of the Federal Responses to Foreign Investment in the United States*. Report by the Committee on Government Operations. H. Rept. 166-184, 96-1216, 96th Cong., 2nd sess., Washington: GPO, (1980).

33. Jackson, *supra* note 30.

34. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

ing the late 1980s, the United States saw a surge in foreign investments, particularly from Japan, and became increasingly concerned about the state of the U.S. economy. Members of Congress bemoaned that the United States was declining as an international economic power, and worried that Japanese companies were outpacing the United States in terms of technical development.<sup>35</sup> One particularly high-profile Japanese acquisition—the proposed sale in 1987 of Fairchild Semiconductor Co. by Schlumberger Ltd. of France to Fujitsu Ltd. of Japan—created unprecedented involvement by the Defense Department and Commerce Department in their opposition of the deal. The agencies cited worries that giving Japan control over a supplier of computer chips for the military would make U.S. defense industries more dependent on foreign suppliers for sophisticated high-technology products.<sup>36</sup> Though the campaign for President Reagan to block the transaction was ultimately unsuccessful, the stance taken by the agencies led to Fujitsu and Schlumberger calling off the transaction and served as a strong impetus for President Reagan’s approval of the Omnibus Trade and Competitiveness Act.

The Omnibus Trade and Competitiveness Act was introduced as a trade-balancing bill aimed to improve the U.S.’ economy. Crucially, the Act included a provision that significantly strengthened the powers of CFIUS and the President in reviewing foreign direct investments. Specifically, the Exon-Florio provision (Section 5021) amended Title VII of the Defense Production Act of 1950 and authorized the President to “make an investigation to determine the effects on national security of mergers, acquisitions, and takeovers” of U.S. corporations by foreign persons and persons engaged in U.S. interstate commerce.<sup>37</sup> Further, in the event that there was “credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security [of the United States],” the President was empowered to “suspend or prohibit” any acquisition “so that control will not threaten to impair the national security.”<sup>38</sup> The provision did not explicitly define “national security,” but it did set its parameters by obliquely referencing “domestic production needed for projected national defense requirements . . . the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security.”<sup>39</sup> The act stipulated that all information remain confidential save for “judicial

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35. HENDRIK VAN DEN BERG & JOSHUA J. LEWER, INTERNATIONAL TRADE AND ECONOMIC GROWTH (M.E. Sharpe, Inc., 2007).

36. Stuart Auerbach, *Cabinet to Weigh Sale of Chip Firm*, THE WASHINGTON POST (March 12, 1987).

37. Omnibus Trade and Competitiveness Act, *et seq.*

38. *Id.*

39. *Id.*; SUSAN C. SCHWAB, TRADE OFFS: NEGOTIATING THE OMNIBUS TRADE AND COMPETITIVENESS ACT (Harvard Business School Press, 1994) (There was debate over the language on the floor, and “national security and essential commerce” was ultimately shortened to just “national security.”)

action or proceeding” and that the “findings of the president” not be subject to judicial review.<sup>40</sup>

Though CFIUS was never specifically mentioned within the text of the Omnibus Trade and Competitiveness Act, its role was fundamentally altered from an administrative body with only investigatory powers to one tasked with the important role of advising the President on foreign investments and recommending which transactions needed to be blocked.<sup>41</sup>

The next significant change to CFIUS occurred with the passage of S. 1610, the Foreign Investment and National Security Act (FINSA) of 2007.<sup>42</sup> Among other things, the Act broadened the term “national security” to include “those issues relating to ‘homeland security,’ including its application to critical infrastructure.”<sup>43</sup> The term “critical infrastructure” is further defined as “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have debilitating impact on national security.”<sup>44</sup> In addition, FINSA amended the “factors under consideration” portion of the Defense Production Act by allowing for consideration of “national security-related effects on United States critical infrastructure, including major energy assets and the potential national security-related effects on United States critical technologies.”<sup>45</sup>

Today, CFIUS operates as an inter-agency committee comprised of ten agency members and headed by the Secretary of the Treasury. It is charged with reviewing “covered transaction[s] to determine the effects of the transaction on the national security of the United States.” Covered transactions include “any merger, acquisition, or takeover that is proposed or pending . . . by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States,”<sup>46</sup> and “control” means having the direct or indirect power to “determine, direct, or decide important matters affecting an entity.”<sup>47</sup> Control has been found to exist when a minority foreign investor obtains protective supermajority rights often seen in M&A and investment transactions.<sup>48</sup> A greenfield

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40. Omnibus Trade and Competitiveness Act § 721.

41. Jackson, *supra* note 30.

42. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (2007).

43. *Id.* at § 5.

44. *Id.*

45. *Id.* at § 4.

46. Foreign Investment and National Security Act § 2.

47. *Id.*; Regulations Relating to Money and Finance, 31 CFR § 800.204 (2010) (“The term *control* means the power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity[.]”).

48. Mahinka, *supra* note 5.

investment, meanwhile is not covered by CFIUS.<sup>49</sup> In other words, if a “parent company starts a new venture in a foreign country by constructing new operational facilities from the ground up,”<sup>50</sup> it has no obligations to file notice of its activity.

A CFIUS review formally begins when the parties to a covered transaction jointly file a voluntary notice or the President or CFIUS initiate a review *sua sponte*.<sup>51</sup> As the definition of “covered transaction” means “any merger, acquisition, or takeover that is proposed or pending,” the notice can take place either before or during a transaction.<sup>52</sup> Upon receiving the notice, the Staff Chairperson of CFIUS promptly determines whether the notice is complete and if so, begins a 30-day review period on the next business day.<sup>53</sup> During the review period, CFIUS may request additional information from the parties, which must be addressed within three business days of the request.<sup>54</sup> In most situations, CFIUS concludes action on the majority of transactions during or at the end of the 30-day review period.<sup>55</sup> In certain cases, CFIUS may also refer a transaction to the President for decision.<sup>56</sup> If so, the President must announce a decision within fifteen days of the completion of CFIUS’s investigation.<sup>57</sup> Again, if the President deems that there is credible evidence to constitute a threat to national security, he or she can suspend or prohibit that transaction “for such time as the President considers appropriate.”<sup>58</sup>

### III. *RALLS V. CFIUS*

#### A. *Factual Background of Case*

The *Ralls* case involves a foreign direct investment by Ralls Corporation (Ralls), a Delaware corporation privately owned by two Chinese nationals, into the Project Companies (four Oregon wind-farm projects, all Oregon limited liability companies) owned by the Terna Energy USA Holding Corporation (Terna), a Delaware corporation

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49. *CFIUS Reform: Final Regulations Issued on November 14, 2008*, U.S. DEPARTMENT OF THE TREASURY, <http://www.treasury.gov/resource-center/international/foreign-investment/Documents/Summary-FinalRegs.pdf>.

50. *Green Field Investment*, INVESTOPEDIA.COM, <http://www.investopedia.com/terms/g/greenfield.asp>.

51. Foreign Investment and National Security Act of 2007 § 2.

52. *Id.*

53. *CFIUS Process Overview*, U.S. DEPARTMENT OF THE TREASURY, (Dec. 1, 2010) available at <http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-overview.aspx>.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Defense Production Act of 1950 § 721.

publicly traded on the Athens Stock Exchange.<sup>59</sup> Ralls aimed to identify US market opportunities for wind energy projects and became interested in the Project Companies' assets, which consisted solely of "land rights to construct the wind-farms, power purchase agreements... and the government permits necessary to construct a commercial wind-farm."<sup>60</sup> The four projects are located in different sites in Oregon, which were to be connected to the PacificCorp transmission grid in the western United States.<sup>61</sup> Prior to Ralls's acquisition of the Project Companies, the Federal Aviation Administration (FAA) issued "Determination of No Hazard" for each of the plans at the locations where the Project Companies' wind-farms were to be sited.<sup>62</sup> This review involved a review by the Department of Defense (DOD) to "prevent, minimize, or mitigate adverse impacts on military operations, readiness and testing,"<sup>63</sup> and such a finding is tantamount to FAA and DOD approval. Shortly after the transaction, however, the United States Navy identified the "Lower Ridge Windfarm," one of the four projects, as being located within a restricted airspace.<sup>64</sup> The Navy advocated that Ralls move the Lower Ridge Windfarm in order to "reduce airspace conflicts,"<sup>65</sup> and Ralls assented.<sup>66</sup> The Navy did not express concerns about any of the remaining wind-farms, all of which "are located outside the restricted airspace."<sup>67</sup> The construction of the turbines at the projects began on April 23, 2012.<sup>68</sup>

On June 28, 2012, Ralls and Terna voluntarily submitted a notice to CFIUS informing it of the recent transaction between the two companies.<sup>69</sup> An investigation ensued, during which CFIUS requested follow-up items and Ralls and Terna complied.<sup>70</sup> In July and August of 2012, CFIUS issued two Orders Establishing Interim Mitigation Measures declaring that the Terna-Ralls transaction did indeed pose a national security risk to the United States and imposing mitigation efforts, including immediate cessation of construction operations.<sup>71</sup> A report to President Obama was made, and, on September 28, 2012, the President issued an Order stating that there is "credible evidence" that

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59. Complaint ¶¶ 2, 27-28, *Ralls Corporation v. Committee on Foreign Investment in the United States*, 758 F.3d 296 (2014), (No. 12-01513).

60. *Id.* at ¶29.

61. *Id.* at ¶32.

62. *Id.* at ¶35.

63. *Id.* at ¶36.

64. *Id.* at ¶37.

65. *Id.* at ¶38.

66. *Id.* at ¶39.

67. Amended Complaint ¶ 66, *Ralls Corporation v. Committee on Foreign Investment in the United States*, 926 F. Supp. 2d.

68. *Id.* at ¶ 67.

69. Complaint ¶ 41, *Ralls Corporation v. Committee on Foreign Investment in the United States*, 758 F.3d 296 (2014), (No. 12-01513).

70. *Id.* at ¶ 42.

71. Amended Order Establishing Interim Mitigation Measures, Ex. 5 to Amended Complaint, *Ralls Corporation v. Committee on Foreign Investment in the United States*, 926 F. Supp.2d 71.

Ralls Corporation “might take action that threatens to impair the national security of the United States” and, acting under section 721 of the Defense Production Act, immediately prohibited the transaction.<sup>72</sup> The Order required that Ralls divest its interest in the Project Companies within 90 days of the date of the Order and remove from the properties any installations that had been made to date.<sup>73</sup> The President further specified requirements for reporting to CFIUS and gave CFIUS authority to “implement measures it deemed necessary and appropriate . . . to ensure protection of the national security interests of the United States.”<sup>74</sup> No mention was made of the evidence relied upon by CFIUS or the President in their finding, nor was there any elaboration of the national security concerns regarding the transaction.<sup>75</sup>

### B. Ralls’s Arguments

Ralls brought an initial action in front of the District Court of the District of Columbia on September 12, 2012 after CFIUS issued the Interim Order, and later amended the complaint to include the President’s Order.<sup>76</sup> In the complaints, Ralls brought five counts against both CFIUS and the President as defendants, which are described in turn below.

#### 1. Count I: CFIUS Order violated the Administrative Procedure Act by exceeding statutory authority

Ralls argued that the Administrative Procedure Act (“APA”), a federal statute that protects against agency overreach, was violated when CFIUS acted “in excess of [its] statutory jurisdiction, authority, or limitations.”<sup>77</sup> Specifically, Ralls argued that CFIUS only possessed the power to “negotiate, enter into or impose, and enforce any agreement or condition with any party to the covered transaction in order to mitigate any threat to the national security of the United States.”<sup>78</sup> Meanwhile, the power to “suspend or prohibit”<sup>79</sup> was explicitly delegated to the President. Ralls argued that CFIUS’s August Order, by ordering Ralls immediately to cease all construction at the

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72. Order Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation at 1, Ex. 6 to Amended Complaint, *Ralls Corporation v. Committee on Foreign Investment in the United States*, 926 F. Supp.2d 71.

73. *Id.* at 2.

74. *Id.* at 3.

75. *Id.*

76. *Ralls Corp.*, 926 F.Supp.2d at 71.

77. Complaint at ¶¶ 55-71, *Ralls Corporation v. Committee on Foreign Investment in the United States*, 926 F. Supp.2d 71; Administrative Procedure Act, Pub. L. No. 79-404, 5 U.S.C. §§701-706 (1946).

78. Complaint at ¶ 63, *Ralls Corporation v. Committee on Foreign Investment in the United States*, 926 F. Supp.2d 71; Defense Production Act of 1950 § 721(l).

79. *Id.* § 721(d).

project sites, usurped the power of the President and exceeded its statutory scope.<sup>80</sup>

In addition, Ralls argued that the August Order “restrict[ed] transactions not within its purview”<sup>81</sup> by prohibiting the sale or transfer of “to any third party for use or installation” of “any items made or otherwise produced by the [parent company].”<sup>82</sup> The CFIUS statute limits “covered transactions” to those “by or with any foreign person which could result in foreign control of any person.”<sup>83</sup> CFIUS’s August Order aimed to cover *all* future transactions with the parent company vis-à-vis the Project Company assets, and for that reason, CFIUS argued that the action went beyond its statutory scope.<sup>84</sup>

## 2. Count II: CFIUS Order violated the Administrative Procedure Act by acting arbitrarily and capriciously

Ralls continued by arguing under the Administrative Procedure Act that CFIUS acted “arbitrarily and capriciously” in issuing its August Order.<sup>85</sup> The August Order contained “no evidence or explanation for its determination,” but rather “simply recited, in a conclusory manner,”<sup>86</sup> that the acquisition posed a national security threat to the United States. Moreover, Ralls contended that CFIUS “ignored readily available, adequate, and appropriate alternative measures”<sup>87</sup> and opted instead for an outright prohibition of the transaction. Lastly, Ralls pointed out that the CFIUS’s order overturned prior approval of the transaction, which had been previously granted by the Navy and Federal Aviation Administration.<sup>88</sup> For these reasons, Ralls argued that the CFIUS August Order violated the dictates of the APA.<sup>89</sup>

## 3. Count III: The President’s September Order was *ultra vires*

Similarly, Ralls alleged that the President acted beyond his statutory scope in ordering immediate removal of property, prohibiting future sales or transfers of any items, and authorizing CFIUS to further

80. Complaint at ¶¶ 55-71, *Ralls Corporation v. Committee on Foreign Investment in the United States*, 926 F. Supp.2d. 71.

81. *Id.* at ¶ 66.

82. Order Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation at 1, Ex. 6 to Amended Complaint, *Ralls Corporation v. Committee on Foreign Investment in the United States*, 926 F. Supp.2d 71.

83. Section of 721 of the Defense Production Act of 1950 at 2.

84. Amended Compl., *Ralls Corporation v. Committee on Foreign Investment in the United States*, 926 F. Supp. 2d. 71

85. *Id.*

86. *Id.* at ¶¶121-22.

87. *Id.* at ¶124.

88. *Id.* at ¶¶38, 66.

89. Amended Compl., *Ralls Corporation v. Committee on Foreign Investment in the United States*, 926 F. Supp. 2d.71.

implement measures.<sup>90</sup> These actions are all broader than the statutory authority of “tak[ing] such action for such time as the President considers appropriate to suspend or prohibit any covered transaction”<sup>91</sup> because they potentially extend to third parties and future purchases. As a result, the actions of the President in the September Order, as well as any steps taken by CFIUS to implement those actions, were argued to be *ultra vires*.<sup>92</sup>

4. Count IV: CFIUS and the Presidential Order were unconstitutional deprivations of property without due process

Ralls then raised a due process challenge under the Fifth Amendment to the United States Constitution that “no person shall be . . . deprived of life, liberty, or property, without due process law.”<sup>93</sup> It asserted that the “eviscerat[ion]” of Ralls’s property rights by the August and September orders were done without providing Ralls any evidence or explanation for those determinations.<sup>94</sup> As a result of the action, Ralls argued that it was left with no recourse and no ability to assert a challenge to its property rights before a court of law.

5. Count V: CFIUS and Presidential Order were unconstitutional deprivations of the right to equal protection

In its final argument, Ralls contended that it was deprived of equal protection of law under the Due Process Clause of the Fifth Amendment. It argued that there were at least seven other foreign-made turbines located within the disputed restricted airspace, and at least thirty located near it at a distance equal to or less than Ralls’s three other planned windfarms.<sup>95</sup> Because none of the other companies had similar prohibitions and restrictions ordered by CFIUS,<sup>96</sup> Ralls was being unfairly deprived of its right to equal protection under the law.

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90. *Id.* at ¶¶135-138.

91. Defense Production Act of 1950 § 721(d)(1).

92. Amended Compl. ¶¶ 139-142., *Ralls Corporation v. Committee on Foreign Investment in the United States*, 926 F. Supp. 2d.

93. U.S. Const. amend. V.

94. Amended Compl. ¶¶ 147-48, *Ralls Corporation v. Committee on Foreign Investment in the United States*, 926 F. Supp. 2d.

95. *Id.* at ¶161.

96. *Id.* at ¶163.

### C. Procedural posture

In a holding on February 26, 2013, the District Court dismissed Counts I, II, III, and V of the amended complaint.<sup>97</sup> Central to the decision was the finality provision of the CFIUS statute, which stated that “the actions of the President . . . and the findings of the President” (referring to the President’s act of suspending or prohibiting any covered transaction that threatens to impair national security and his findings that there is credible evidence of such threat) “shall not be subject to judicial review.”<sup>98</sup> The court found such language to serve as “clear and convincing evidence” that “Congress intended to restrict access to judicial review.”<sup>99</sup> Being that the equal protection and *ultra vires* challenges to the Presidential Order necessarily involved review of the findings and actions of the President (the very limitations set by Congress), the court ruled that the presumption of judicial review had been trumped and those claims could not be heard.<sup>100</sup>

However, the same line of reasoning led the court to allow judicial review of the due process claims against the Presidential Order (Count IV). Unlike the equal protection and *ultra vires* challenges, a due process challenge raises a “pure legal question that can be answered without second-guessing the President’s determinations.”<sup>101</sup> In other words, the due process challenge would not require a review of the actions and findings of the president, but rather the process of delivering those findings. Accordingly, it did not go against the finality provision and could be tried. The merits analysis of the claim was then delivered in a separate opinion in October 2013. In that decision, the court held that while Ralls could allege a due process claim, it did not succeed in asserting one because it could not demonstrate a protected property interest.<sup>102</sup> By knowingly purchasing property without first filing with CFIUS and the President, it had waived the opportunity for property protection and took the risk of having its property revoked.<sup>103</sup> This, plus the fact that Ralls did have meetings with CFIUS during the investigation<sup>104</sup> and was given notice before the final decision,<sup>105</sup> meant that Ralls’s due process challenge should fail.

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97. *Ralls Corp. v. Committee on Foreign Investment in the United States*, 926 F. Supp. 2d 71, 71 (D.D.C. 2013).

98. Defense Production Act, 50 U.S.C.A. § 2170(e) (1950) (current version at 50 U.S.C.A. §4565(e) (2007)).

99. *Ralls Corp.*, 926 F. Supp. 2d at 86..

100. *Id.* at 86-92.

101. *Id.* at 95.

102. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 987 F.Supp.2d 18, 18 (D.D.C. 2013).

103. *Id.* at 28.

104. Amended Complaint at ¶¶73-74, *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 926 F. Supp. 2d 71 (D.D.C. 2013) (No. 1:12-cv-01513).

105. *Ralls Corp.*, 987 F.Supp.2d at 34.

The District Court then held that the challenges to the CFIUS Order could not be heard because they did not present an actual controversy.<sup>106</sup> By issuing the Presidential Order in September, the president revoked the Orders that CFIUS had issued in July and August. Thus, the challenges to the CFIUS Orders were no longer “actual, ongoing controversies” as required by Article III, Section 2, of the Constitution. The mootness rule contains an exception for injuries “capable of repetition yet evading review.”<sup>107</sup> This describes a situation in which the “(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.”<sup>108</sup> Here, the district court held that Ralls did not meet the exception: Ralls had ample opportunity to challenge the action by filing a Temporary Restraining Order and Preliminary Injunction, and its vague plans of building future windfarms did not necessarily precipitate another CFIUS review.<sup>109</sup>

Ralls timely appealed the District Court’s dismissal of the due process challenge to the Presidential Order as well as the dismissal of its five CFIUS Order claims.<sup>110</sup>

#### *D. Holding of DC Circuit*

The DC Circuit addressed the questions regarding the Presidential Order on the merits and reversed and remanded the questions regarding the CFIUS Order for further consideration by the district court. Its findings are discussed in greater detail below.

##### 1. Presidential Order

As a threshold matter, the DC Circuit first affirmed that the court did in fact have jurisdiction over the due process claim (Count IV).

The appellees’ strong arguments invoking the finality provision notwithstanding, the Circuit Court found that such a “broadly worded statutory bar did not preclude . . . consideration of a procedural due process claim.”<sup>111</sup> Importantly, the court distinguished a bar to reviewing the final “action” of the president from a bar to a constitutional challenging of the underlying *process* preceding the presidential action.<sup>112</sup> Pointing to a lack of specific language and legislative history, the court concluded that the Congress never intended to preclude

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106. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 926 F. Supp. 2d 71, 95 (D.D.C. 2013).

107. *Id.* at 96. .

108. *Id.* (citing *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)).

109. *Ralls Corp.*, 926 F. Supp.2d at 97-99. .

110. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 307 (D.C. Cir. 2014).

111. *Id.* at 309 (citing *Ralphy v. Bell*, 569 F.2d 607, 619-20 (D.C. Cir. 1977)).

112. *Ralls Corp.*, 758 F.3d at 311.

a procedural due process challenge, a fundamental Constitutional right.<sup>113</sup> Rather, the court found that the more natural reading was to only preclude judicial review of the President's final action.<sup>114</sup>

Likewise, the Appellees' argument that Ralls's due process challenge raised a non-justiciable political question also failed. Again, the court drew a careful distinction between a president's final determination regarding the transaction and the process taken to reach such a determination. Whereas the prior would undoubtedly touch on a "policy determination" and suggest "lack of respect due coordinate branches of government,"<sup>115</sup> a Due Process Clause question regarding the process of determination does not create the same difficulties. In fact, the court found that the very task of interpreting the provisions of the Constitution was "entrusted to the judiciary." As this was precisely what was asked by the Appellants' here, the court saw no justiciability issues in the present case.<sup>116</sup>

Moving to the merits portion of the Due Process challenge, the DC circuit reviewed the challenge *de novo* and reversed the district court.

The court was satisfied that the first prong of the Due Process claim was met, that legitimate property interests existed prior to the Presidential Orders. Because Ralls had purchased 100% ownership of the Project Companies, and the Project Companies had in turn already obtained assets such as easements, agreements, and permits, Ralls therefore possessed property at the time of the CFIUS filing (as determined by Oregon state law).<sup>117</sup> Here, crucially, the DC Circuit overruled the arguments relied on by the District Court in holding that Ralls's property rights were too tenuous. First, the court noted that the property rights existed here in *state law* wholly separately from federal limitations. The permits and easements that the Project Companies owned had fully vested to Ralls at the completion of the transaction and were not contingent on federal approval.<sup>118</sup> As a result, Ralls did have constitutionally protected property interests at the time of the CFIUS orders. Second, the court further clarified that Ralls did not waive its property interests by not filing with CFIUS prior to the purchase of the Project Companies.<sup>119</sup> Importantly, the court noted that the regulatory scheme "expressly contemplates that a party to a covered transaction may request approval . . . either before *or after* the transaction is completed."<sup>120</sup> Such a flexible regime should not deprive parties of critical constitutional rights if it chooses to exercise the latter option. Regardless, the court also comments that the even if a waiver did exist, it would only exist insofar as to deprive the party of

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113. *Id.*

114. *Id.*

115. *Id.* at 312-13 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

116. *Ralls Corp.*, 758 F.3d at 314.

117. *Id.* at 315.

118. *Id.* at 316.

119. *Id.* at 317.

120. *Id.*

the rights to challenge any inadequate process, rather than depriving parties of the actual property interest.<sup>121</sup>

Regarding the second question of “what process is due,” the court turned to the seminal *Mathews v. Eldridge* balancing test for guidance.<sup>122</sup> Specifically, it considered (1) the private interests that will be affected by the official action, (2) the risk of erroneous deprivation and value in additional procedural safeguards, and (3) the government’s interests.<sup>123</sup> Here, the court believed that the balancing test tipped in Ralls’s favor.<sup>124</sup> Again, in recognizing that Ralls had constitutionally protected property interests in the form of the Project Companies’ assets, the court held that there were private interests that could be affected by the CFIUS order and potential risk of erroneous deprivation.<sup>125</sup> As to the government’s strong interest in protecting national security, the court relied on a prior DC Circuit opinion and ruled that the interest only extends to the nondisclosure of *classified* government documents.<sup>126</sup> In the present case, both classified and unclassified evidence were relied on by CFIUS and the President. Accordingly, the *Mathews* balancing test suggested that Ralls should have been provided with due process prior to a deprivation of its property, namely, receiving notice of the CFIUS actions and having the opportunity to rebut any evidence that was used in the determination.<sup>127</sup> Because none of those opportunities was afforded to Ralls before the CFIUS and Presidential orders, there was deprivation of Ralls’s due process rights. The court, however, did leave open the question of executive privilege, and whether that would shield the ordered disclosure, for remand to the district court.<sup>128</sup>

## 2. CFIUS Order

The DC Circuit then dismissed any challenges on the mootness of Ralls’s CFIUS Order claim. Again, the district court had held that because the CFIUS July and August Orders had been the expressly revoked by the Presidential Order, they were no longer “actual, ongoing controversies” and could not be litigated pursuant to Article III of the Constitution.<sup>129</sup> However, unlike the district court, the circuit court did find that the revoked CFIUS Orders met the mootness exception. Here, there was only a fifty-seven day time period between the CFIUS

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121. *Id.*

122. *Id.* at 317-318.

123. *Id.* at 318 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

124. *Ralls Corp.*, 758 F.3d at 319.

125. *Ralls Corp.*, 758 F.3d at 321.

126. *Ralls Corp.*, 758 F.3d at 318 (citing *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 196 (D.C.Cir.2001), for its holding that NCRI could not be designated a FTO and deprived of its property interests without first receiving notice of the proposed designation and access to unclassified evidence supporting the designation).

127. *Ralls Corp.*, 758 F.3d at 318 (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959); *Gray Panthers v. Schweiker*, 652 F.2d 146, 165 (D.C.Cir.1980)).

128. *Ralls Corp.*, 758 F.3d at 319.

129. *Id.* at 321.

Orders and the Presidential Order<sup>130</sup> and at least “some likelihood” that Ralls would enter into another foreign direct investment transaction and be subjected to CFIUS review.<sup>131</sup> Moreover, Ralls had not purposefully delayed filing the claim.<sup>132</sup> As a result, the mootness challenge was not a bar to Ralls’s claims here.

As a result, the merits of the CFIUS Order claims (Counts I and II in whole and Counts III, IV, and V in part) were remanded to the district court for review in the first instance.<sup>133</sup>

In summary, the DC Circuit unprecedentedly allowed judicial review of a due process challenge to presidential orders in CFIUS reviews. Moreover, it held that foreign investors do have constitutionally protected state property rights after the close of a transaction, and those rights could not be deprived without due process protections such as notice of deprivation, access to unclassified evidence, and opportunity for rebuttal. Importantly, this means that foreign investors do not have to file CFIUS orders *prior* to the transaction in question in order to protect their property interests, as many had counseled after the original district court opinion.<sup>134</sup> Also, this means that their state property interests exist independently of any federal (CFIUS) rulings. In the event that a CFIUS Order is revoked by a later Presidential order, there is also no mootness challenge barring dilatory measures taken by the party itself.

#### IV. IMPLICATIONS OF RALLS V. CFIUS

One of the more visible outcomes of the case was an affirmation of due process rights for foreign investors, which allows them to bring challenges to CFIUS orders in a court of law. Thus, there seems to be an incentive for purchasers to file CFIUS notices after a transaction has been completed, as opposed to the current “common practice” of “notify[ing] CFIUS of a pending transaction.”<sup>135</sup> Whereas precautionary filings were previously urged by law firms in order to stave off future punitive CFIUS action,<sup>136</sup> now there might be merit in the opposite course of action. The Circuit Court here affirmed longstanding

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130. *Id.* at 322.

131. *Id.* at 324-325.

132. *Id.* at 322-323 (citing *Armstrong v. FAA*, 515 F.3d 1294, 1296 (D.C.Cir.2008)).

133. *Id.* at 325.

134. John Villasenor, *If You Want to Buy an American Company, Ask Permission, Not Forgiveness*, FORBES (Nov. 14, 2012, 1:19 PM), <http://www.forbes.com/sites/johnvillasenor/2012/11/14/if-you-want-to-buy-an-american-company-ask-permission-not-forgiveness/>; Alexandra Lopez-Casero, *Ralls Case Shows Importance Of Proactively Engaging CFIUS*, LAW 360 (Mar. 12, 2013, 12:40 PM), <http://www.law360.com/articles/422744/ralls-case-shows-importance-of-proactively-engaging-cfius>; Christopher R. Brewster, *Foreign Investors Skip CFIUS Review at Their Peril*, STROOCK SPECIAL BULLETIN (Oct. 21, 2013), <http://www.stroock.com/SiteFiles/Pub1407.pdf>

135. Mahinka, *supra* note 5. See, e.g., Baker Botts, *supra* note 5.

136. Nova J. Daly & John b. Reynolds, *Overview of the CFIUS Process*, METROPOLITAN CORPORATE COUNSEL (Feb. 1, 2010), <http://www.metrocorp counsel.com/articles/12245/overview-cfius-process> (“While the CFIUS process is voluntary, and less than

tenets of Due Process law by declaring that “property interest [] recognized under state law is enough to trigger the protections of the Due Process Clause.”<sup>137</sup> Ralls had acquired ownership of the Project Companies, an entity that already owned easements, agreements, and permits for construction of windfarms,<sup>138</sup> and therefore gained property rights under Oregon law.<sup>139</sup> As a result, the court declared that Ralls is guaranteed at least minimum due process protections: “that an affected party be informed of the official action, be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence.”<sup>140</sup> Pointedly, the Circuit Court stated that an “opportunity to meet with CFIUS before CFIUS issued its first order establishing interim mitigation measures”<sup>141</sup> and “receiv[ing] advance notice of [CFIUS’s] intended actions”<sup>142</sup> in the case of non-compliance *do not* constitute notice and hearing, overruling the district court’s decision. Rather, the circuit court envisioned that Ralls be afforded “the opportunity to tailor its submission to the Appellee’s concerns or rebut the factual premises underlying the President’s action.”<sup>143</sup>

As to the issue of exactly what process is due, courts would again look to the “significance” of the property interest, the “risk of erroneous deprivation,” and the “importance of the government inter-

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10% of all foreign direct investment-measured by transactions-is reviewed, CFIUS actively monitors investment activity and can compel parties to file or initiate a review on CFIUS’s own motion. Thus, if national security issues may be involved in a transaction, parties should bring their investment to CFIUS’s attention. Transactions that are not reviewed by CFIUS can be examined at any time in the future by CFIUS and can be exposed to mitigation remedies, including divestiture . . . . Accordingly, knowledgeable parties typically make a CFIUS clearance a condition to closing a sensitive acquisition.”). *See also* William R. Vigdor & Adrienne Goins, *Trends in U.S. National Security Review: A More Active CFIUS*, MONDAQ (Feb. 23, 2011), <http://www.mondaq.com/unitedstates/x/121052/Trends+in+National+Security+Review+A+More+Active+CFIUS>.

137. *Ralls Corp.*, 758 F.3d at 317 (citing *Phillips*, 524 U.S. at 163–64, 118 S.Ct. 1925; *Loudermill*, 470 U.S. at 538, 105 S.Ct. 1487; *Paul*, 424 U.S. at 710, 96 S.Ct. 1155). The precise level of process due depends on the importance of the property interest, but all property is deemed to be worthy of due process protection as a theoretical matter. *Fuentes v. Shevin*, 407 U.S. 67, 87, 92 S. Ct. 1983, 1997, 32 L. Ed. 2d 556 (1972) (standing for the proposition that property does not have to be a “necessity” of life in order to be protectable, as “it is not the business of a court adjudicating due process rights to make its own critical evaluation of [individual’s choices in the marketplace] and protect only the ones that, by its own lights, are ‘necessary’”).

138. *Ralls Corp.*, 758 F.3d at 304.

139. *Id.* at 315–16 (*See, e.g.*, Or. Rev. Stat. Ann. § 63.239 (“A membership interest [in an Oregon LLC] is personal property.”); *McQuaid v. Portland & V. Ry. Co.*, 18 Or. 237, 22 P. 899, 906 (1889) (holder of easement has property interest); *Bunnell v. Bernau*, 125 Or.App. 440, 865 P.2d 473, 473–74 (1993) (same); *see also Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 78 L.Ed. 1434 (1934) (“Valid contracts are property [under the Fifth Amendment], whether the obligor be a private individual, a municipality, a state, or the United States.”)).

140. *Ralls Corp.*, 758 F.3d at 319 (referencing *McElroy*, 360 U.S. at 496, 79 S.Ct. 1400; *NCRI*, 251 F.3d at 208–09; *Schweiker*, 652 F.2d at 165.).

141. *Ralls Corp.*, F.Supp.2d at 32.

142. *Ralls Corp.*, 758 F.3d at 319–320.

143. *Id.*

ests.” The result of the balancing test determines the precise due process protections that ought to be granted,<sup>144</sup> though again, a *de minimis* level of due process involves notice and hearing.

While the *Ralls* court did not define a specific threshold for what “significant” interest would override the weighty interest of “national security,”<sup>145</sup> it did approvingly reference the estimated valuation of the Project Companies’ assets of \$6 million and a “small bank account” in another due process decision as successful examples.<sup>146</sup> These allusions suggest that some consideration of the objective value of the property is necessary for the consideration of the “significance” of the property interest, and is in line with prior decisions where courts have attempted to approximate property interests by evaluating factors such as the level of “hardship” felt by parties as a result of deprivation of property,<sup>147</sup> the “possible length of wrongful deprivation of . . . benefits,”<sup>148</sup> and the extent to which the property is “essential in the pursuit of a livelihood.”<sup>149</sup> Compared to other high profile foreign direct investments subject to CFIUS review, the value of the assets in the *Ralls* acquisition is in fact very minor. For example, China National Offshore Oil Company (CNOOC) proposed an \$18 billion acquisition of Unocal Oil Company in 2005,<sup>150</sup> Brazilian food producer JBS agreed to pay \$800 million to acquire Texas chicken company Pilgrim’s Pride Corp.,<sup>151</sup> and Chinese firm Dalian Wanda Group acquired AMC Entertainment for \$2.6 billion in 2012.<sup>152</sup> Thus, although the exact benchmark of “significant” property interest is unknown, major foreign companies will likely not have an issue meeting this requirement.

As a result, it seems that the *Ralls Corp* decision has wide-ranging implications for many similarly positioned foreign companies looking to invest in the United States. The case suggests that by first acquiring state-recognized property rights, and then filing with CFIUS, the investor will be guaranteed at least a *de minimis* level of due process protection. This seems to be a marked departure from current

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144. See generally *Hamdi v. Rumsfeld*, 542 U.S. 507 (because of high government interest of national security and practical limitations, Hamdi gets a medium between criminal trial process and no hearing).

145. *Haig v. Agee*, 453 U.S. 280, 307, 101 S.Ct. 2766, 82 L.Ed.2d 640 (1981) (“[N]o governmental interest is more compelling than the security of the Nation.”).

146. *Ralls Corp.*, 758 F.3d at 318-19.

147. *Mathews v. Eldridge*, 424 U.S. 319, 341-42, 96 S.Ct. 893, 906.

148. *Fusari v. Steinberg* 419 U.S. 379, 389.

149. *Bell v. Burson*, 402 U.S. 535, 539.

150. *China Oil firm in Unocal bid war*, BBC NEWS (June 23, 2005, 9:50 AM), <http://news.bbc.co.uk/2/hi/business/4121830.stm>.

151. Mike Spector, Lauren Etter & Alastair Stewart, *Brazilian Giant JBS Agrees to Buy Pilgrim’s Pride*, THE WALL STREET JOURNAL (Sept. 17, 2009, 11:50 PM) <http://www.wsj.com/articles/SB125310503697015705>.

152. Zachary R. Mider, *China’s Wanda to Buy AMC Cinema Chain for \$2.6 Billion*, BLOOMBERG BUSINESS (May 21, 2012, 4:33 PM), <http://www.bloomberg.com/news/2012-05-21/china-s-wanda-group-to-buy-amc-cinema-chain-for-2-6-billion.html>.

practice and could result in a relative shift of power between CFIUS and foreign investors.

However, in reality, the gains made by the Circuit Court will likely not result in foreign companies rushing to enter into transactions prior to CFIUS approval anytime in the near future. A closer reading of the holding indicates many caveats and legal uncertainties. Moreover, there still exist many benefits to filing with CFIUS as early as possible.

#### A. *Companies Have Incentives to File Early with CFIUS.*

First, there are real advantages to an early voluntary filing with CFIUS.<sup>153</sup> Once a company files and receives a final order regarding a covered transaction, that decision is final and not subject to further divestment activity by the President or CFIUS.<sup>154</sup> In addition, another portion of the statute provides that “any transaction in which a foreign person acquires an additional interest in a U.S. business that was previously the subject of a covered transaction for which the Committee concluded all action under section 721”<sup>155</sup> will not be deemed a covered transaction. Read together, this means that a company can undergo CFIUS review once, receive approval, and make additional purchases without any danger of future actions from CFIUS. This could be beneficial whether the company wants to intentionally delay purchase of more sensitive materials after CFIUS review or simply wants to leave open the option to acquire freely in the future. Otherwise, in the case that a company has not received CFIUS clearance, “all authority available to the President or the Committee under section 721(d), including divestment authority, shall remain available at the discretion of the President with respect to covered transactions proposed.”<sup>156</sup> This is precisely what happened in *Ralls*, where Ralls had already invested \$6 million in the Project Companies only to receive mandatory

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153. See H.R. 5337, *the Reform of National Security Reviews of Foreign Direct Investments Act: Hearing Before the Subcomm. on Domestic & Int'l Monetary Policy, Trade, & Tech. of the H. Comm. on Fin. Servs.*, 109th Cong. 31 (2005) (testimony of David Marchick, Attorney, Covington & Burling) (“[T]here are very, very strong incentives for those companies for which acquisitions could potentially affect national security to file. The potential negative ramifications of not filing are very, very severe. There is no statute of limitations, the transaction can be unwound at any time. There are very strong incentives and I think the voluntary filing system works.”); *A Review of the CFIUS Process for Implementing the Exon-Florio Amendment: Hearings Before the Comm. on Banking, Housing, and Urban Affairs*, 109th Cong. 114 (2005) (testimony of Robert M. Kimmitt, Deputy Secretary, U.S. Dep't of Treasury) (“[H]aving sat on boards of directors both at home and abroad, I cannot imagine in the post-Sarbanes-Oxley world . . . how any director could give the go-ahead on a transaction [that had not been completed], because the President's authority to unwind that transaction is without limit if the person has not received approval of the process . . . . [T]hat very powerful nonjudicially reviewable authority of the President to stop or unwind transactions acts as a real leavener on the process . . . .”); *Committee on Foreign Investment in the United States (CFIUS), One Year After Dubai Ports World: Hearing before H. Comm. on Fin. Servs.*, 110 Cong. 26 (2007) (statement of Rep. Barney Frank, Chairman, H. Comm. on Fin. Servs.) (“There is no right to buy. You do not have to file, but by not filing, you do not immunize yourself from a finding that the transaction could be canceled on security grounds.”)

154. 31 C.F.R. § 800.601

155. 31 C.F.R. § 800.204(e)

156. See note 153 *supra*.

divestment orders later. Depending on the outcome of their evidentiary challenge and several other open issues in the case, discussed below, this decision might prove to be costly.

*B. Protection of Classified Evidence Creates Potential Due-Process Limitations*

Second, the court included a significant caveat to the due process protections by not “requiring disclosure of classified information supporting official action.”<sup>157</sup> By creating such a limitation, the court could be effectively taking away much of the teeth of the due process protections.

As background, this court obliquely references the Classified Information Procedures Act, which defines “classified information” as “any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data.”<sup>158</sup> The Executive Order on Classified National Security Information,<sup>159</sup> then, outlines the different classification categories and their requirements<sup>160</sup> to be completed by designated “classification authority.”<sup>161</sup> Foreign purchasers are urged to look to DD Form 254 Preparation Guide<sup>162</sup> and Federal Acquisition Regulation 52.204-2 for guidance on how to comply with the notice requirements.<sup>163</sup>

Interestingly, the definition of “classification categories” itself lines up conveniently with the fairly vague parameters of “national security” in the CFIUS statute. Specifically, the Classified National Security Information Act includes in “classification” information pertaining to

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157. *Ralls Corp.*, 758 F.3d at 319.

158. 18 U.S.C.A. App.3 §1.

159. Executive Order 13526 – Classified National Security Information, THE WHITE HOUSE (Dec. 29, 2009), <http://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information>.

160. *See id.* sec. 1.4 (information may not be considered for classification unless it concerns: (a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including cover action), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources; (e) scientific, technological, or economic matters relating to the national security; (f) United States Government programs for safeguarding nuclear materials or facilities; or (g) vulnerabilities or capabilities of systems, installations, projects or plans relating to the national security; or (h) the development, production, or use of weapons of mass destruction.)

161. (a) The authority to classify information originally may be exercised only by: (1) the President and the Vice President; (2) agency heads and officials designated by the President; and (3) United States Government officials delegated this authority pursuant to paragraph (c) of this section. *See id.* sec. 1.3.

162. DD Form 254 Preparation Guide, Department of the Army, G-2, <http://www.cdse.edu/documents/cdse/DD254.pdf> (last visited April 1, 2016).

163. CFIUS Resource Center, U.S. DEPT. OF THE TREASURY, <http://www.treasury.gov/resource-center/faqs/CFIUS/Pages/default.aspx> (last visited April 1, 2016).

(a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources; (e) scientific, technological, or economic matters relating to the national security; (f) United States Government programs for safeguarding nuclear materials or facilities; or (g) vulnerabilities or capabilities of systems, installations, projects or plans relating to the national security.<sup>164</sup>

These are almost precisely the factors that are to be considered by the President in CFIUS decisions:

(1) domestic production needed for projected national defense requirements; (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services; (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security; (4) the potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to any country; (5) the potential effects of the proposed or pending transaction on United States international technological leadership in areas affecting United States national security; (6) the potential national security-related effects on United States critical infrastructure, including major energy assets; (7) the potential national security-related effects on United States critical technologies . . . .<sup>165</sup>

Therefore, definitionally speaking, it seems that a CFIUS determination necessarily requires consideration of documents that are classified; they are almost one and the same. Moreover, because the government itself has the final authority to classify documents that it reviews, there is more room for potential overlap. What is to stop the government from altering the classification of documents to avoid disclosing information?

Further, because of the lack of transparency of the CFIUS review process, relatively little is known about CFIUS decision-making and the types of evidence that are used. CFIUS can now hide behind this advantage by relying more heavily on classified documents in making their decision. Critically, the court decision only compels CFIUS to release unclassified documents used in the final order, not

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164. Exemption 1: Exec. Order No. 13,526, 2013 WL 4500600, at \*3, 3 C.F.R. 298 (2010). *See also* Executive Order 13526, *supra* note 159.

165. Defense Production Act of 1950 §721(f), 50 U.S.C.A. § 4565 (f).

to explain all of the documents and how they were important to the decision.<sup>166</sup> As a result, CFIUS has more ability to control the disclosure process.

In the present case CFIUS did turn over documents totaling 3,487 pages as well as a privilege log describing unclassified documents that were withheld on the basis of a claim of privilege.<sup>167</sup> As the information (privilege log and unclassified documents) is not publicly available, it is still to be seen if the documents are useful to Ralls in understanding and combating the final order. In summary, the classified versus unclassified distinction drawn by the courts can be a significant blow to the foreign investors' due process protections.

### C. *The President's Evidence May be Protected by Executive Privilege*

Another potential hurdle in the victory for Ralls is the open question of executive privilege. The Appellees requested "for the first time during oral argument" that the case be remanded to the district court for the issue to be considered.<sup>168</sup>

The principle of executive privilege stands for the idea that the President and high-level executive branch officers can withhold information from Congress and the public on certain bases. The privilege is not explicitly stated in the Constitution, but stems from broad concerns of separation of powers of government and the goal of protecting the office of the Executive. The most thorough exploration of this principle was made in *U.S. v. Nixon*.<sup>169</sup> There, while the court recognized the existence of a privilege, it also determined that it is not absolute.<sup>170</sup> Specifically, the court noted that the privilege requires more than just a "generalized interest in confidentiality" but a rather "claim of need to protect military, diplomatic, or sensitive national security secrets."<sup>171</sup> These factors are then to be balanced against the Congress or public's need for the information.<sup>172</sup> Where there generalized interest in confidentiality have been demonstrated or pressing needs for the

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166. *Ralls Corp.*, 758 F.3d at 321. (comment: this is not correct page number)

167. Joint Status Report, *Ralls Corporation v. Committee on Foreign Investment in the United States*, 758 F.3d 296 (2014), (No. 12-01513); Karlee Weinmann, *In Rare Move, CFIUS Hands Over Cache or Ralls Docs*, LAW 360 (Nov. 26, 2014, 1:16 PM), <http://www.law360.com/articles/599760/in-rare-move-cfius-hands-over-cache-of-ralls-docs>; 29 CFR 2700.105; Fed. Rules Evid., 28 U.S.C.A., 501 (2011); 10 U.S.C. § 130e (2015).

168. *Ralls Corp.*, 758 F.3d at 319.

169. *U.S. v. Nixon*, 418 U.S. 683 (1974).

170. *Id.* at 707 ("The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.").

171. *Id.* at 684-85.

172. *Id.*

information, such as in the form of a pending criminal trial, the privilege has been held to give way.<sup>173</sup>

It is unclear how the executive privilege argument will play out in the Ralls case. The Appellees will likely use it as a basis for withholding certain unclassified documents from disclosure by arguing that concerns of “national security” trump Ralls’s need for information.

However, it is far from certain that this argument will allow the President to gain much ground. Past courts have allowed executive immunity where their divulging evidence would be contrary to an “interest of national security,” particularly where military matters and defense technology were at stake. Here, once more, the analysis of “national security” roughly lines up with the criteria for classifying information. If information were to be deemed to be protectable by “national security interests,” it would be classified; conversely, if it were classified, it would signal pressing national security interests. The very fact that a document is unclassified likely means that it does not pose significant national security threats, thus weakening that side of the executive privilege balancing test. However, it is also true that a CFIUS review does not rise to the level of an “ongoing criminal investigation,” so the competing interests may be seen as relatively weak as well. In any event, it is not clear that an argument of “executive privilege” would gain the Appellees much protection when they already have the court’s limitation regarding classified materials.

#### *D. Challenges on the Merits Remain Undecided.*

Any ruling on the merits of the Administrative Procedure Act challenge (Counts I and II) could have had potentially much larger consequences, as these questions discuss the scope and function of the CFIUS body generally. First, Ralls contended that CFIUS exceeded its statutory provisions by ordering the Ralls to “suspend or prohibit” the Project Companies investment, usurping a power explicitly delegated to the President.<sup>174</sup> Then, Ralls argued that CFIUS’s Order did not pass the “arbitrary and capricious” test required by the APA because it lacked “evidence or explanation for its determination” and ignored other logical alternatives to divestment.<sup>175</sup> These challenges could have fundamentally changed the ability for CFIUS to issue orders. If Ralls had won on either argument, CFIUS would have seen a reduction in power from either needing to request Presidential backing for orders or providing more reasoned analysis for its decisions. This would in turn cost CFIUS significant leverage in negotiations with investors during the mitigation agreements stage.

The Equal Protection challenge against CFIUS (Count V) also remained available for further ruling, as it survived the dismissal on

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173. *U.S. v. Poindexter*, 732 F. Supp. 142 (D.D.C. 1990) at 146.

174. See Exemption 1, *supra* note 164; 50 U.S.C.A. § 4565 (d).

175. Amended Compl., *Ralls Corporation v. Committee on Foreign Investment in the United States*, 926 F. Supp. 2d at ¶¶121-22, 124.

the grounds of mootness or bar by the finality provision.<sup>176</sup> Ralls had alleged that it was treated singularly and unfairly with a CFIUS order when hundreds of other similarly situated turbines were within the area of the restricted airspace. Thus, it claimed that CFIUS and the President violated its equal protection rights under the Fifth Amendment of the Constitution. A merits ruling on this issue would have resulted in unprecedented review of CFIUS Orders. In the district court opinion, the court relied heavily on the finality provision of the CFIUS statute to bar the equal protection claim and refuse a review of the factual record precipitating the Presidential Order.<sup>177</sup> However, as the finality provision only extended to the “actions of the President under paragraph (1) of subsection (d)”<sup>178</sup> and not CFIUS Orders, such reliance would be inapplicable here. In fact, though the statute did not envision that CFIUS would share its reasoning with parties (only “Notice of results to parties” is required),<sup>179</sup> it did not outright bar review of its decisions. As a result, the same Congressional “[withdrawal] from the courts”<sup>180</sup> does not, as it had for Presidential Orders, exist here. Unless the district court had found another reason to refuse review, it was certainly possible that the court would have engaged in a determination “whether the alleged differential treatment is rationally related to a legitimate government purpose.”<sup>181</sup> This would have resulted in unprecedented judicial review of CFIUS orders. It would have required a complete turning over of CFIUS’s factual record regarding the decision, additional investigation into similarly situated foreign companies, and judicial evaluation of the “relatedness” of the legitimate government purpose.

### *E. Settlement*

Settling at this stage was a tactical decision that benefited both parties. CFIUS, realizing that its core powers to issue orders stood to be diluted, feared a district court’s judgment of the issues on the merits. As it stands, the Court of Appeals decision guarantees due process rights, but does not compel disclosure of national security information. This trove of information, as discussed earlier, remains protected and still affords CFIUS significant deference in justifying its orders. Ralls, on the other hand, also had much to gain by settling. It had secured a key victory on the due process issue against the U.S. government, enabling it to rally support in the Chinese market. However, it also real-

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176. *Ralls Corp.*, 926 F.Supp.2d at 71.

177. *Id.*

178. *See* Exemption 1, *supra* note 164; 50 U.S.C.A. § 4565 (d).

179. *Id.* (“Any information or documentary material filed with the President or the President’s designee pursuant to this section shall be exempt from disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, *except as may be relevant to any administrative or judicial action or proceeding*” (emphasis supplied).).

180. *Ralls Corp.*, 926 F.Supp.2d at 92.

181. *Id.*

ized the Pyrrhic victory meant only prolonged litigation and still-limited access to national security documents. By settling, Ralls held on to its gains and might have even received money or other compensation, though the settlement terms are not disclosed.

#### CONCLUSION

The *Ralls Corp.* decision is a landmark case in the history of CFIUS reviews. Typically a private and obscure review process, CFIUS decisions have never previously been reviewed by a federal court. The legal challenge brought here marks the first time that a foreign company, as well as the courts, have formally argued that CFIUS decisions are open to judicial review. The Court's holding, moreover, gave unprecedented recognition of a foreign company's property rights and protection under due process.

However, while the decision first seemed to promise significant changes to the CFIUS review process, several caveats in the decision and the ultimate settlement weakened this notion. Though due process was granted, the protection may prove somewhat hollow due to the limitations on the release of classified evidence and executive privilege. Other questions more fundamental to the role of CFIUS remain unanswered, and challenges under the Administrative Protection Act were prevented from being litigated by the settlement.

Thus, though Ralls itself did not bring wholesale change to the CFIUS process, it certainly laid important groundwork for future litigation. This is indeed an interesting time for CFIUS, and *Ralls Corp.* could very well be the harbinger of substantial change to come.

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