

Tilting at Windmills: National  
Security, Foreign Investment, and  
Executive Authority in Light of *Ralls  
Corp. v. CFIUS*

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## INTRODUCTION

In February 2006, a political maelstrom broke out in Washington, D.C., over the recent acquisition of six major United States ports by Dubai Ports World (DP World).<sup>1</sup> The Committee on Foreign Investment in the United States (CFIUS or the Committee) had approved the sale of the ports to DP World, a United Arab Emirates-based company controlled by Sheikh Mohammed bin Rashid Al Maktoum, the Emir of Dubai.<sup>2</sup> Despite clearing this crucial regulatory hurdle, the DP World deal was quickly met with a barrage of political opposition; with September 11, 2001, still fresh in lawmakers' minds, many feared that putting a Middle Eastern company in charge of U.S. critical infrastructure would increase the risk of another terrorist attack on American soil.<sup>3</sup> Although DP World soon abandoned its takeover of these ports, the political fight over CFIUS and its regulatory authority was only beginning.<sup>4</sup>

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<sup>1</sup> *Key Questions About the Dubai Port Deal*, CNN (Mar. 6, 2006, 8:15 PM), [http://www.cnn.com/2006/POLITICS/03/06/dubai.ports.qa/index.html?\\_s=PM:POLITICS](http://www.cnn.com/2006/POLITICS/03/06/dubai.ports.qa/index.html?_s=PM:POLITICS). These ports included terminals in New York City, Philadelphia, and New Orleans, amongst other major hubs. *Id.*

<sup>2</sup> Randall Beisecker, *DP World and U.S. Port Security*, NUCLEAR THREAT INITIATIVE (Mar. 1, 2006), <http://www.nti.org/analysis/articles/dp-world-and-us-port-security/>; see also Julio J. Rotemberg, *The Dubai Ports World Debacle and Its Aftermath*, HARV. BUS. REV., Aug. 29, 2007, at 2–5, <https://hbr.org/product/dubai-ports-world-debacle-and-its-aftermath/707014-PDF-ENG> (detailing DP World's ownership structure).

<sup>3</sup> See Jonathan Masters, *Foreign Investment and U.S. National Security*, COUNCIL ON FOREIGN REL. (Sept. 27, 2013), <http://www.cfr.org/foreign-direct-investment/foreign-investment-us-national-security/p31477>.

<sup>4</sup> *Id.*

In the aftermath of the DP World controversy, Congress amended the CFIUS process by passing the Foreign Investment and National Security Act of 2007 (FINSAs).<sup>5</sup> Originally established in 1950, CFIUS scrutinizes foreign acquisitions that take place in the United States through the lens of national security; in particular, CFIUS reviews international transactions that lead to the acquisition of American assets for potential national security threats.<sup>6</sup> Foreign companies and individuals do not have unfettered access to the American market; rather, they must be reviewed and approved by CFIUS.<sup>7</sup> As then-House Financial Services Chairman Barney Frank noted during the 2007 hearings on amendments to the CFIUS process, “[t]here is no right to buy. You do not have to file [with CFIUS], but by not filing, you do not immunize yourself from a finding that the transaction could be canceled on security grounds.”<sup>8</sup>

Despite the ensuing legislative action and Representative Frank’s comments, a considerable amount of ambiguity remained surrounding the Committee’s authority to cancel foreign transactions.<sup>9</sup> Under what circumstances may CFIUS terminate or rescind a foreign purchase?<sup>10</sup> What kinds of procedural protections are due to foreign entities during the course of a CFIUS national security review?<sup>11</sup>

For the most part, these questions went unanswered by the federal judiciary.<sup>12</sup> In 2012, however, CFIUS found itself in the judicial spotlight, when the Obama administration blocked the sale of four Oregon wind farms to a Chinese company, Ralls Corp. (Ralls).<sup>13</sup> Ralls subsequently filed suit in the District Court for the District of Columbia, arguing that CFIUS’s actions violated Ralls’ procedural due

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<sup>5</sup> Foreign Investment and National Security Act of 2007, Pub. L. No. 110–49, 121 Stat. 246 (2007); *see also* Masters, *supra* note 3 (discussing how the DP World Controversy sparked CFIUS reform).

<sup>6</sup> Masters, *supra* note 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Committee on Foreign Investment in the United States (CFIUS), One Year After Dubai Ports World: Hearing before the H. Comm. on Fin. Servs.*, 110th Cong. 26 (2007) (statement of Rep. Barney Frank, Chairman, H. Comm. on Fin. Servs.).

<sup>9</sup> Lauren Bateman, *Foreign Purchases of U.S. Businesses, Presidential Power, and National Security: Ralls Corp. v. CFIUS*, LAWFARE (Apr. 11, 2014, 11:00 AM), <http://www.lawfareblog.com/2014/04/foreign-purchases-of-u-s-businesses-presidential-power-and-national-security-ralls-corp-v-cfius/>.

<sup>10</sup> *See id.*

<sup>11</sup> *See id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

process rights, as well as the Administrative Procedure Act.<sup>14</sup> The district court initially dismissed Ralls' due process claim, holding that (1) Ralls had failed to state a protected property interest under the Due Process Clause, and (2) even if Ralls had been deprived of a protected property interest, Ralls received sufficient process through the Committee review process.<sup>15</sup> Ralls appealed and, in a move that surprised many legal observers and commentators, the Court of Appeals for the D.C. Circuit reversed in July 2014.<sup>16</sup> Unlike the district court, the D.C. Circuit held that, not only had Ralls stated a protected interest under the Due Process Clause, but Ralls was in fact denied due process during its CFIUS review.<sup>17</sup> Subsequently, the district court ordered CFIUS to turn over its unclassified evidence and gave Ralls an opportunity to challenge both the unclassified documents as well as assertions of executive privilege made with regard to classified evidence.<sup>18</sup> In November 2014, for the first time in the Committee's

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<sup>14</sup> *Id.* Because this Note solely focuses on Ralls' claim as it relates to procedural due process and, in particular, the amount of deference courts owe the executive on matters of national security, this Note will not address Ralls' claim under the Administrative Procedure Act.

<sup>15</sup> *Ralls Corp. v. Comm. on Foreign Inv. in the U.S. (Ralls I)*, 987 F. Supp. 2d 18, 32 (D.D.C. 2013).

<sup>16</sup> See, e.g., Christine E. Savage et al., *Ralls Corp. v. Committee on Foreign Investment in the United States: Court of Appeals' Decision May Change How CFIUS Conducts National Security Reviews*, KING & SPALDING 1 (July 18, 2014), <http://www.kslaw.com/imageserver/KSPublic/library/publication/ca071814b.pdf> (characterizing the D.C. Circuit's decision as "unprecedented and surprising"); Ralls v. CFIUS: *D.C. Circuit Explains Constitutional Due Process Requirements During CFIUS Review*, SULLIVAN & CROMWELL LLP 4 (July 17, 2014), [http://www.sullcrom.com/siteFiles/Publications/SC\\_Publication\\_Ralls\\_v\\_CFIUS\\_DC\\_Circuit\\_Explains\\_Constitutional\\_Due\\_Process\\_Requirements.pdf](http://www.sullcrom.com/siteFiles/Publications/SC_Publication_Ralls_v_CFIUS_DC_Circuit_Explains_Constitutional_Due_Process_Requirements.pdf) ("In light of the substantial deference that courts usually afford to the Executive Branch on national security matters, as well as the lack of comparable litigation historically, *Ralls* is a surprising decision."); Raffaella Wakeman, *Bringing More Due Process to CFIUS: An Overview of the D.C. Circuit's Opinion in Ralls*, LAWFARE (July 17, 2014, 6:00 PM), <http://www.lawfareblog.com/2014/07/bringing-more-due-process-to-cfius-an-overview-of-the-d-c-circuits-opinion-in-ralls/> (remarking that the D.C. Circuit's reversal "came as quite a surprise"). This surprise was not limited to the American legal community, but was also reported in the media. See William Mauldin & Brent Kendall, *Appeals Court Faults Government Order Prohibiting Ralls Corp. Wind Farm Deal*, WALL ST. J. (July 15, 2014, 7:46 PM), <http://online.wsj.com/articles/appeals-court-faults-government-order-prohibiting-ralls-corp-wind-farm-deal-1405439077> (describing the appellate court's opinion as "an unprecedented legal victory over the White House").

<sup>17</sup> *Ralls Corp. v. Comm. on Foreign Inv. in the U.S. (Ralls II)*, 758 F.3d 296, 316, 319 (D.C. Cir. 2014).

<sup>18</sup> Brandon Lowrey, *Chinese-Owned Co. Set to Fight US Bar to Wind-Farm Deal*, LAW360 (Nov. 6, 2014, 9:08 PM), <http://www.law360.com/articles/594280/chinese-owned-co-set-to-fight-us-bar-to-wind-farm-deal>.

history, CFIUS submitted close to thirty-five hundred pages of documents to Ralls from its review of the wind farm purchase.<sup>19</sup>

This Note explores the implications that the D.C. Circuit's opinion in *Ralls II* will have on (1) traditional conceptions of due process, (2) judicial deference to the executive branch on issues of national security, (3) national security as it relates to future disclosure of sensitive information, and (4) the attractiveness of the United States to foreign investors. Part I introduces CFIUS's history and purpose, and details the 2007 changes to the Committee's authority under FINSA. Part II surveys the relevant factual history in *Ralls*. Part III traces the holding and rationale of both the district court's decision in *Ralls I* and the D.C. Circuit's opinion in *Ralls II*. Finally, Part IV analyzes the *Ralls II* decision and argues that the D.C. Circuit took an improper view of the kinds of procedural protections required in a CFIUS assessment. Part IV also contends that, as a result of the D.C. Circuit's misapplication of the Fifth Amendment, the *Ralls II* decision is simultaneously overbroad and overly narrow: it unnecessarily undermines the President's powers as Commander in Chief and jeopardizes American national security, yet will likely fail to make CFIUS more transparent. Part IV concludes by proposing an independent Article III court, modeled after the Foreign Intelligence Surveillance Court, which could review CFIUS's national security decisions.

## I

### BACKGROUND: HISTORY AND PURPOSE OF THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES

#### A. CFIUS's Purpose

CFIUS was created to balance the need for foreign investment in American industry with the potential security concerns that accompany foreign control of U.S. companies. Generally speaking, domestically owned companies and foreign-owned companies are perceived differently in the United States; while U.S.-based entities are presumed to be credible and trustworthy, foreign corporations are met with suspicion and caution.<sup>20</sup> For example, a foreign company could be

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<sup>19</sup> Karlee Weinmann, *In Rare Move, CFIUS Hands Over Cache of Ralls Docs*, LAW360 (Nov. 26, 2014, 1:16 PM), <http://www.law360.com/articles/599760>.

<sup>20</sup> ALAN P. LARSON & DAVID M. MARCHICK, COUNCIL ON FOREIGN RELATIONS, CSR NO. 18, FOREIGN INVESTMENT AND NATIONAL SECURITY: GETTING THE BALANCE RIGHT

influenced by the government of a country that is hostile to the United States. In such a scenario, a foreign power could use the stealth acquisition of an American company to undermine strategic U.S. interests.<sup>21</sup> In other instances, like the one at play in the DP World scandal, a company might work alongside law enforcement and intelligence agencies and thus have access to classified or sensitive information.<sup>22</sup> Pentagon contractors, for example, have access to a wealth of classified information, and it is important that companies with sensitive military contracts handle such information with discretion.<sup>23</sup> Additionally, under the Patriot Act,<sup>24</sup> the U.S. Department of Justice relies on telecommunications firms to wiretap and gather bulk collection data from emails and phone calls.<sup>25</sup> Similarly, the intelligence gathered by these kinds of intercepts should be closely guarded and not be disclosed or leaked to a foreign government.<sup>26</sup>

Although many countries also review international transactions that involve sensitive information or technologies,<sup>27</sup> the United States, in particular, has been increasingly skeptical of foreign investment because—due to globalization—traditional American adversaries can now both directly and indirectly invest in U.S. companies and strategic assets.<sup>28</sup> As noted by international investment experts Alan Larson and David Marchick, “many of the companies from China and the Middle East are government owned and, in some cases, government controlled. The majority of publicly traded Chinese companies . . . continue to be government-owned and -controlled . . . [even if they are] nominally private . . . .”<sup>29</sup> Accordingly, even if the vast majority of foreign ownership in U.S. firms is benign, concerns can become particularly

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9 (2006) (“Rightly or wrongly, there is a perception in some parts of the U.S. government that American-owned and -controlled companies are more likely to abide by the spirit of U.S. government laws, regulations, and policies.”).

<sup>21</sup> *See id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 10.

<sup>24</sup> USA PATRIOT Act, Pub. L. No. 107–56, 115 Stat. 272 (codified in scattered sections of 8, 12, 15, 18, 20, 31, 42, 47, 49, 50 U.S.C.).

<sup>25</sup> LARSON & MARCHICK, *supra* note 20, at 10.

<sup>26</sup> *Id.*

<sup>27</sup> Masters, *supra* note 3 (Restrictions imposed on foreign investment by U.S. lawmakers mirror actions by “their peers around the globe . . . . In recent years, many nations have reassessed their [foreign investment] laws in light of fears associated with international terrorism and global investments by state-owned enterprises . . . and sovereign wealth funds . . . .”).

<sup>28</sup> *See* LARSON & MARCHICK, *supra* note 20, at 20.

<sup>29</sup> *Id.* at 21.

acute where “the foreign company’s decisions become an extension of the government’s policy decisions rather than the company’s commercial interests.”<sup>30</sup> As a result, U.S. lawmakers are particularly suspicious of sensitive acquisitions that can be traced back to a foreign government that does not share U.S. strategic interests. CFIUS, then, fills this crucial regulatory role—to monitor the foreign acquisition of American firms and to ensure that such transactions are in line with U.S. national security interests.

### *B. CFIUS’s Structure and Authority*

CFIUS was established pursuant to section 721 of the Defense Production Act of 1950 (DPA).<sup>31</sup> The DPA gives the Committee and the President authority over “covered transaction[s],” which are defined as “any merger, acquisition, or takeover . . . by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.”<sup>32</sup> The Committee is chaired by the Secretary of the Treasury and is composed of other cabinet-level appointees and high-level officials, all of whom have portfolios that include foreign policy, national security, and the economy.<sup>33</sup>

Congress considerably expanded CFIUS’s authority in 1988 under what was colloquially known as the “Exon-Florio” Amendment.<sup>34</sup>

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<sup>30</sup> *Id.* Larson and Marchick cite Gazprom’s 2006 decision to cut off natural gas supplies to Ukraine as a cautionary example. *Id.* For many Western observers, the Ukraine shut off was an indication of the way in which Gazprom manipulates the global supply of energy in order to further Russia’s foreign policy goals rather than the company’s own financial interests. *See id.*

<sup>31</sup> *Ralls I*, 987 F. Supp. 2d 18, 22 (D.D.C. 2013).

<sup>32</sup> Section 721 of the Defense Production Act of 1950, 50 U.S.C.A. § 4565(a)(3) (West 2012) (previously codified at 50 App. U.S.C.A. § 2170(a)(3) (West)).

<sup>33</sup> *Id.* § 4565(k)(2)–(3). In addition to the Treasury Secretary, the Committee includes the Secretaries of Homeland Security, Commerce, Defense, State, and Energy; the United States Attorney General; the Secretary of Labor and the Director of National Intelligence, who act as nonvoting, ex officio members; and other appropriate officials appointed by the President. *Id.* § 4565(k)(2). The United States Trade Representative and the Director of the Office of Science and Technology Policy have been presidentially appointed to CFIUS, and five other officials have been designated to participate in CFIUS activities as observers by the President. Exec. Order No. 13,456 §§ 3(b)–(c), 73 Fed. Reg. 4677, 4677 (Jan. 23, 2008). These observers include the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisers, the National Security Advisor, the Assistant to the President for Economic Policy, and the Assistant to the President for Homeland Security and Counterterrorism. *Id.* at § 3(c).

<sup>34</sup> Jonathan C. Staggs, Note, *Scrutinizing Foreign Investment: How Much Congressional Involvement is Too Much?*, 93 IOWA L. REV. 325, 335 (2007). Throughout this Note, the

Exon-Florio's passage was prompted by the Fujitsu Corporation's attempted takeover of the Fairchild Semiconductor Corporation.<sup>35</sup> American officials, fueled in part by Tokyo's increased dominance on the international stage, were concerned that a Japanese acquisition of Fairchild would threaten not only the competitiveness of the U.S. semiconductor industry, but also American national security more broadly.<sup>36</sup> Alarmed that existing foreign investment laws did not give the President the authority to block such acquisitions without declaring a national emergency, the Reagan administration pushed Congress to pass a law that would allow the White House to effectively veto foreign transactions that potentially jeopardized national security.<sup>37</sup> Congress soon acquiesced with the passage of Exon-Florio.<sup>38</sup>

Exon-Florio significantly widened the President's authority to review foreign transactions by giving the executive considerable discretion to block such acquisitions.<sup>39</sup> As noted by Jonathan Stagg, "Congress's purpose in enacting Exon-Florio was . . . to provide a mechanism to review and, if the President finds it necessary, restrict foreign investment when it threatens national security."<sup>40</sup> No longer restricted to his emergency powers, the provision authorized the President to suspend or prohibit a foreign acquisition if he determines that such an action is appropriate in light of national security concerns, subsequent to an investigation known as a CFIUS national security review.<sup>41</sup> Exon-Florio set up a four-part process for examining foreign transactions, which was later amended in 2007.<sup>42</sup>

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laws granting authority to CFIUS are interchangeably referred to as the Defense Production Act or Exon-Florio.

<sup>35</sup> *Id.*

<sup>36</sup> LARSON & MARCHICK, *supra* note 20, at 4.

<sup>37</sup> JAMES K. JACKSON, CONG. RESEARCH SERV., PUB. NO. RS22197, THE EXON-FLORIO NATIONAL SECURITY TEST FOR FOREIGN INVESTMENT 3–4 (2006), <https://www.fas.org/sgp/crs/natsec/RS22197.pdf>; *see also* Stagg, *supra* note 34, at 335.

<sup>38</sup> Stagg, *supra* note 34, at 335.

<sup>39</sup> Marc Greidinger, *The Exon-Florio Amendment: A Solution in Search of a Problem*, 6 AM. U. J. INT'L L. & POL'Y 111, 118 (1991).

<sup>40</sup> Stagg, *supra* note 34, at 336.

<sup>41</sup> JACKSON, *supra* note 37, at 2–3; Stagg, *supra* note 34, at 336.

<sup>42</sup> H.R. REP. NO. 110-24, pt. 1, at 10 (2007) (Conf. Rep.). These four steps are:

- (1) voluntary notice by the companies;
- (2) a 30-day review to identify any national security concerns;
- (3) an optional 45-day investigation to determine whether identified concerns require more extensive mitigation efforts or a recommendation to the President for possible action; and
- (4) a Presidential decision to permit, suspend, or prohibit an acquisition in those instances where potential national security concerns are identified.

*Id.*

A CFIUS national security review is initiated in one of two ways. First, any party to a covered transaction may initiate a review by submitting a written notice to the Treasury Secretary.<sup>43</sup> A party may send this notice either before or after the transaction is completed.<sup>44</sup> Alternatively, the Committee may unilaterally initiate a review of any covered transaction.<sup>45</sup> Although CFIUS filings are strictly voluntary, companies have multiple incentives to file on their own. First, the Treasury Department and other federal agencies have historically encouraged foreign companies “to seek approval whenever they have reason to believe that the acquisition might raise national security issues.”<sup>46</sup> Second, CFIUS provides a carrot to foreign companies by immunizing transactions that receive the Committee’s approval from future scrutiny.<sup>47</sup> Finally, the Committee’s authority to review and order divestiture of a transaction at any time, including after the deal has been completed, acts as a stick to encourage voluntary review.<sup>48</sup>

A CFIUS national security review evaluates a transaction’s effects on national security through eleven factors which are set out in the Exon-Florio Amendment.<sup>49</sup> If CFIUS determines that a transaction

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<sup>43</sup> 50 U.S.C.A. § 4565(b)(1)(C)(i) (West 2012) (previously codified at 50 App. U.S.C.A. § 2170 (West)).

<sup>44</sup> 31 C.F.R. § 800.401(a) (2015) (“A party . . . to a *proposed or completed* transaction may file a voluntary notice of the transaction with the Committee.” (emphasis added)).

<sup>45</sup> 50 U.S.C.A. § 4565(b)(1)(D)(i).

<sup>46</sup> LARSON & MARCHICK, *supra* note 20, at 11.

<sup>47</sup> *Id.* If parties engage in misrepresentation during the initial CFIUS review process, however, they do not receive this “safe harbor.” *Id.*; see also 50 U.S.C.A. § 4565(b)(1)(D)(ii)–(iii).

<sup>48</sup> LARSON & MARCHICK, *supra* note 20, at 11.

<sup>49</sup> 50 U.S.C.A. § 4565(f). These factors include:

- (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 [certain] countr[ies] . . . [;]
- (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[;]
- (8) whether the covered transaction is a foreign government-controlled transaction . . . [;]
- (9) as appropriate, and particularly with respect to transactions [which are unmitigated threats to U.S. national security; which are a foreign government-controlled transaction; or which would result in

poses an unmitigated threat to U.S. national security,<sup>50</sup> the Committee must “immediately conduct an investigation of the effects of [the] transaction on . . . national security . . . and take any necessary actions in connection with the transaction to protect . . . national security.”<sup>51</sup> After completing its review, CFIUS must “send a report to the President requesting the President’s decision” if the Committee concludes that a transaction jeopardizes national security.<sup>52</sup> Upon such a referral, the President is then authorized by the Exon-Florio Amendment to “take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States.”<sup>53</sup> However, the President may only take such actions if he finds that (1) there is credible evidence that the foreign interest exercising control might take action that threatens to impair national security, and (2) other laws do not adequately allow the President to protect national security.<sup>54</sup> When making his decision, the President evaluates a transaction’s potential national security threat through the same factors as the Committee.<sup>55</sup> Notably, any findings made or actions taken by the President pursuant to the CFIUS review process are final and are statutorily excluded from judicial review.<sup>56</sup>

### *C. CFIUS in a Post-9/11 World: Key FINSA Changes*

The DP World scandal prompted Congress to pass FINSA.<sup>57</sup> As noted in the bill’s legislative history, the DP World debacle raised

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foreign control of U.S. critical infrastructure in a manner that poses an unmitigated threat to U.S. national security], a review of the current assessment of [the foreign country’s adherence to nonproliferation regimes and the foreign country’s relationship with the United States] [;] (10) the long-term projection of United States requirements for sources of energy and other critical resources and material[;] and (11) such other factors as the President or the Committee may determine to be appropriate, generally or in connection with a specific review or investigation.

*Id.*

<sup>50</sup> *Id.* § 4565(b)(2)(B).

<sup>51</sup> *Id.* § 4565(b)(2)(A).

<sup>52</sup> 31 C.F.R. § 800.506(b) (2015).

<sup>53</sup> 50 U.S.C.A. § 4565(d)(1).

<sup>54</sup> *Id.* § 4565(d)(4).

<sup>55</sup> *Id.* § 4565(d)(5); *see also supra* note 49 (listing factors).

<sup>56</sup> 50 U.S.C.A. § 4565(e) (“*The actions of the President under paragraph (1) of subsection (d) and the findings of the President under paragraph (4) of subsection (d) shall not be subject to judicial review.*” (emphases added)).

<sup>57</sup> H.R. REP. NO. 110-24, pt. 1, at 12–13 (2007) (Conf. Rep.).

Congressional concerns about the CFIUS review process; legislators were worried that the acquisition had received insufficient scrutiny from the Committee, that junior-level policymakers were making the final call on CFIUS decisions, and that Congress did not have sufficient oversight over CFIUS reviews.<sup>58</sup> Congress was additionally concerned that CFIUS's review standards were ambiguous, which led to unpredictable investigatory outcomes.<sup>59</sup>

In response, Congress passed FINSA.<sup>60</sup> FINSA expanded the CFIUS review process by increasing the rigor of the Committee's national security investigations in five relevant ways.<sup>61</sup>

First, FINSA clarified Exon-Florio's national security concept to include transactions that center around critical infrastructure<sup>62</sup> and technology.<sup>63</sup> Thus, all transactions involving critical infrastructure and technology automatically trigger a full CFIUS review. Second, under FINSA, transactions involving corporations owned by foreign governments automatically trigger heightened CFIUS scrutiny.<sup>64</sup> Third, FINSA imposed a second, forty-five-day investigatory review for transactions that pose unmitigated threats to national security.<sup>65</sup> Fourth, FINSA added the Director of National Intelligence (DNI) to the Committee as an ex officio member, instructing the DNI to independently coordinate and conduct CFIUS's investigations of

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 13 (“Key concerns raised by the DPW case included . . . ambiguity in the standards by which CFIUS determines the need for second-stage investigations . . . . The Committee believes passage of [FINSA] will . . . return the certainty and predictability to the CFIUS process that legitimate foreign investors are seeking.”).

<sup>60</sup> Foreign Investment and National Security Act of 2007, Pub. L. No. 110–49, 121 Stat. 246 (2007).

<sup>61</sup> See Warren G. Lavey & Ivan A. Schlager, *US Foreign Investment Act: Impact on Asian Companies*, ASIALAW, Sept. 2007, at 24, [https://www.skadden.com/sites/default/files/publications/Publications1319\\_0.pdf](https://www.skadden.com/sites/default/files/publications/Publications1319_0.pdf).

<sup>62</sup> Pub. L. No. 110–49, § 2(a)(5) (“The term ‘national security’ shall be construed so as to include those issues relating to ‘homeland security’, including its application to critical infrastructure.”); Lavey & Schlager, *supra* note 61, at 24. Critical infrastructure, as defined in the statute, means “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 a debilitating impact on national security.” Pub. L. No. 110–49, § 2 (a)(6).

<sup>63</sup> Pub. L. No. 110–49, § 2(a)(7) (“The term ‘critical technologies’ means critical technology, critical components, or critical technology items essential to national defense . . . .”); Lavey & Schlager, *supra* note 61, at 24.

<sup>64</sup> Pub. L. No. 110–49, § 2(b)(1)(B); see also Lavey & Schlager, *supra* note 61, at 24.

<sup>65</sup> Lavey & Schlager, *supra* note 61, at 26.

national security threats.<sup>66</sup> Finally, FINSA added six factors that the Committee must consider when evaluating a transaction's potential implications on national security.<sup>67</sup>

In addition to boosting CFIUS's rigor, FINSA also aimed to enhance CFIUS's clarity and transparency.<sup>68</sup> In large part, this was accomplished by reeling in the Committee's independent authority and instead placing CFIUS's review powers under the auspices of Congress. For example, FINSA was the first legislative codification of the Committee's powers.<sup>69</sup> More importantly, FINSA mandated that the Committee provide an annual report to Congress which details the types of transactions that CFIUS has reviewed.<sup>70</sup> To an extent, this places CFIUS's decisions in public view and thus gives companies notice of the factors the Committee evaluates when analyzing a specific transaction.<sup>71</sup> FINSA also increased CFIUS's transparency by requiring the Committee to publish guidance on the types of covered transactions that may pose threats to U.S. national security or critical infrastructure.<sup>72</sup>

Thus, although FINSA continues to prohibit judicial review of CFIUS decisions, the 2007 legislation increased CFIUS's transparency through Congressional oversight and mandatory public reporting; together, these moves raised foreign investors' knowledge of the

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<sup>66</sup> Pub. L. No. 110-49, § 2 (b)(4)(A) ("The Director of National Intelligence shall expeditiously carry out a thorough analysis of any threat to the national security of the United States posed by any covered transaction. The [DNI] shall also seek and incorporate the views of all affected or appropriate intelligence agencies with respect to the transaction."); Margaret L. Merrill, *Overcoming CFIUS Jitters: A Practical Guide for Understanding the Committee on Foreign Investment in the United States*, 30 QUINNIPIAC L. REV. 1, 8 (2011).

<sup>67</sup> These factors are codified at 50 U.S.C.A. §§ 4565(f)(6)–(11) (West 2012) (previously codified at 50 App. U.S.C. § 2170 (f)(6)–(11) (West)). See *supra* note 49.

<sup>68</sup> John J. Muldowney & Judith J. Sullivan, *Recent Reforms to U.S. Foreign Investment Law: The Foreign Investment and National Security Act of 2007 and Final Regulations*, WHITE & WILLIAMS LLP (Apr. 9, 2010), <http://www.whiteandwilliams.com/resources-alerts-102.html>.

<sup>69</sup> Merrill, *supra* note 66, at 8.

<sup>70</sup> 50 U.S.C.A. § 4565(m)(1) ("The chairperson shall transmit a report to the chairman and ranking member of the committee of jurisdiction in the Senate and the House . . . before July 31 of each year on all of the reviews and investigations of covered transactions completed [pursuant to FINSA].").

<sup>71</sup> *Id.* § 2170(m)(3)(B) ("All appropriate portions of the annual report . . . may be classified. An unclassified version of the report, as appropriate, . . . shall be made available to the public." (emphasis added)); Merrill, *supra* note 66, at 14.

<sup>72</sup> 50 U.S.C.A. § 4565(b)(2)(E).

CFIUS review process.<sup>73</sup> Despite this heightened transparency, however, the CFIUS debate came to a head almost seven years after FINSA's passage, after a Chinese corporation attempted to purchase several wind farms in Oregon.

## II FACTUAL BACKGROUND IN *RALLS*

In March 2012, Ralls Corp., a Delaware corporation owned by two Chinese nationals, purchased four American companies in order to develop wind energy in Oregon.<sup>74</sup> These companies were originally created by an Oregon corporation with the purpose of constructing four wind farms (Butter Creek).<sup>75</sup> Prior to Ralls' acquisition, these companies had acquired numerous wind farm-related assets, including property easements, power purchase agreements, transmission agreements, and turbine construction permits.<sup>76</sup> Ralls did not voluntarily notify CFIUS of the wind farm transaction.<sup>77</sup>

The Butter Creek projects are located in and around a restricted airspace and bombing zone maintained by a nearby U.S. Navy installation.<sup>78</sup> Ralls planned to install Chinese-made wind turbines at the projects.<sup>79</sup> The Navy requested that Ralls move one of its project sites, which was in restricted airspace, in order to avoid conflicts with military training flights.<sup>80</sup> Notably, other foreign-owned wind turbines are located near the secured area.<sup>81</sup> Although Ralls moved the project site, the wind farm remained within the restricted airspace.<sup>82</sup>

CFIUS quickly contacted Ralls and encouraged the company to file a voluntary notice under Exon-Florio, warning that a unilateral CFIUS

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<sup>73</sup> See Maira Goes de Moraes Gavioli, *National Security or Xenophobia: The Impact of the Foreign Investment and National Security Act ("FINSA") in Foreign Investment in the U.S.*, 2 WM. MITCHELL L. RAZA J. 1, 23 (2011).

<sup>74</sup> *Ralls I*, 987 F. Supp. 2d 18, 21 (D.D.C. 2013).

<sup>75</sup> *Ralls II*, 758 F.3d 296, 304 (D.C. Cir. 2014) (citing Am. Compl. ¶ 5, *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 987 F. Supp. 2d 18 (D.D.C. 2013) (No. 1:12-cv-01513)).

<sup>76</sup> *Id.*

<sup>77</sup> *Ralls I*, 987 F. Supp. 2d at 23.

<sup>78</sup> *Ralls II*, 758 F.3d at 304; *Ralls I*, 987 F. Supp. 2d at 21.

<sup>79</sup> *Ralls I*, 987 F. Supp. 2d at 21.

<sup>80</sup> *Ralls II*, 758 F.3d at 304–05.

<sup>81</sup> *Id.* at 305. According to Ralls, there are "dozens if not hundreds" of such turbines both in and near the restricted airspace, and these turbines are both foreign-owned and foreign-made. *Id.* (citing Am. Compl. ¶ 57).

<sup>82</sup> *Id.* at 304–05.

review would ensue if Ralls failed to file.<sup>83</sup> Ralls filed a voluntary notice with the Treasury Department, arguing that its Butter Creek transaction posed no threat to U.S. national security.<sup>84</sup> CFIUS initiated its national security review pursuant to the DPA, followed up with specific questions for Ralls, and received a presentation from Ralls.<sup>85</sup>

After completing its initial review, CFIUS performed a full investigation of the Ralls transaction. CFIUS submitted a report to the President on September 13, 2012, and requested a presidential decision.<sup>86</sup> Fifteen days later, the President issued an order finding credible evidence that Ralls' acquisition of the Butter Creek projects posed an unmitigated threat that could impair U.S. national security.<sup>87</sup> Amongst other things, the Presidential Order (1) prohibited Ralls from owning any of the four wind farm companies, (2) directed Ralls to divest all its assets in the companies, (3) required that Ralls remove all structures or installations from the project sites, and (4) ordered Ralls to refrain from selling or transferring any interest in the companies.<sup>88</sup> Ralls did not receive notice from the Committee or the President on the relevant evidence used in their respective decisions, and Ralls also did not receive an opportunity to rebut that evidence.<sup>89</sup>

Subsequently, Ralls filed a complaint against CFIUS which, at its core, alleged that Ralls did not receive adequate procedural due process during the Committee's and the President's review of the Butter Creek transaction.<sup>90</sup> Specifically, Ralls contended that its Fifth Amendment rights were violated because it received neither a detailed explanation of the President's decision, nor an opportunity to be heard.<sup>91</sup>

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<sup>83</sup> *Ralls I*, 987 F. Supp. 2d at 24.

<sup>84</sup> *See id.*

<sup>85</sup> *Ralls II*, 758 F.3d at 305; *Ralls I*, 987 F. Supp. 2d at 24.

<sup>86</sup> *Ralls II*, 758 F.3d at 305; *see also Ralls I*, 987 F. Supp. 2d at 24 (citing Am. Compl. ¶ 90).

<sup>87</sup> *Ralls II*, 758 F.3d at 306; *Ralls I*, 987 F. Supp. 2d at 24 (citing Order Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corp., Ex. 6 to Am. Compl. ("President's Order") [Dkt. # 20-6] at 1).

<sup>88</sup> *Ralls I*, 987 F. Supp. 2d at 24-25 (citing President's Order at 1-3).

<sup>89</sup> *Ralls II*, 758 F.3d at 306.

<sup>90</sup> *Ralls I*, 987 F. Supp. 2d at 25.

<sup>91</sup> *Id.*

### III HOLDINGS AND RATIONALES

#### *A. The District Court Decision*

Judge Amy Jackson, writing for the District Court for the District of Columbia, held that Ralls' due process rights were not violated during the CFIUS national security review because Ralls failed to allege a protected property interest under the Fifth Amendment.<sup>92</sup> Alternatively, Judge Jackson determined that, even if Ralls had stated a cognizable property interest, the CFIUS review provided Ralls with adequate process.<sup>93</sup>

##### *1. Legally Protected Interests Under the Due Process Clause*

The district court initially focused on whether Ralls had stated a claim under the Due Process Clause.<sup>94</sup> For the court, the crucial requirement was whether the plaintiff had pled "that the government [had] interfered with a cognizable liberty or property interest."<sup>95</sup> Although the court acknowledged that, through the Butter Creek transaction, Ralls had acquired property rights under Oregon law, Judge Jackson noted that Ralls obtained these property interests "subject to the known risk of a Presidential veto."<sup>96</sup> Crucially, the court stressed that Ralls failed to file a pre-acquisition notice with the Committee, despite the incredibly strong incentives to do so.<sup>97</sup> By failing to file a section 2170(b)(1)(C) notice, Ralls waived the ordinary due process protections that apply to a CFIUS review.<sup>98</sup> Ralls would have received procedural protections consistent with the Fifth Amendment if it had filed a voluntary notice, yet it chose not to.<sup>99</sup> Essentially, by entering the transaction without the Committee's preapproval, Ralls assumed the risk of having its state law property

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<sup>92</sup> *Id.* at 21, 32.

<sup>93</sup> *Id.* at 37.

<sup>94</sup> *Id.* at 26.

<sup>95</sup> *Id.* (quoting *Hettinga v. United States*, 677 F.3d 471, 479–80 (D.C. Cir. 2012) (per curiam)) (quotation marks omitted).

<sup>96</sup> *Id.* at 26–27. These property rights included the holding companies, easements, agreements with an Oregon utility, and turbine construction permits. *See supra* note 76 and accompanying text.

<sup>97</sup> *Id.* at 27–28; *see also supra* text accompanying notes 42–45.

<sup>98</sup> *Ralls I*, 987 F. Supp. 2d at 27–29.

<sup>99</sup> *Id.* at 29–30.

rights revoked by the President.<sup>100</sup> Thus, Ralls could not state a due process claim based on those very state law rights.<sup>101</sup>

The court also rejected Ralls' argument that CFIUS's actions deprived the company of an expectation interest under *Board of Regents v. Roth*.<sup>102</sup> In *Roth*, the Supreme Court recognized property rights and interests that go beyond traditional concepts of ownership; if a person has "a legitimate claim of entitlement" to a benefit, then they have a property interest in that benefit.<sup>103</sup> *Roth* further recognized that property rights "are not created by the Constitution," but rather have their roots in both state law and common law.<sup>104</sup> Accordingly, because Ralls had acquired property rights under Oregon law when it completed the Butter Creek transaction, Ralls' counsel contended that the company had a *Roth*-based reliance interest in the wind farms; Ralls' state property rights created an expectation of due process.<sup>105</sup> By purchasing the Butter Creek site, Ralls contended that it had a legitimate claim of entitlement to the properties, triggering the Fifth Amendment's procedural protections as well as the safeguards embedded in the DPA.<sup>106</sup>

The court rejected Ralls' expectation interest argument for two reasons. First, the court noted that Exon-Florio does not create an entitlement or benefit for foreign companies; rather, "it simply authorizes the President to stop a transaction from going forward."<sup>107</sup> Second, because Exon-Florio vests expansive, non-reviewable authority in the President to cancel a foreign acquisition, foreign companies do not have a *Roth*-like expectation interest.<sup>108</sup> The

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<sup>100</sup> *Id.* at 27 ("Ralls . . . voluntarily acquired those state property rights subject to the known risk of a Presidential veto. . . . Ralls's claim cannot be squared with the fact that Ralls waived the opportunity . . . to obtain a determination from CFIUS and the President before it entered into the transaction.").

<sup>101</sup> *Id.* at 28–29 (citing *Parker v. Bd. of Regents of Tulsa Junior College*, 981 F.2d 1159, 1163 (10th Cir. 1992); *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000)).

<sup>102</sup> *Ralls I*, 987 F. Supp. 2d at 31–32; *Bd. of Regents v. Roth*, 408 U.S. 564 (1972).

<sup>103</sup> *Roth*, 408 U.S. at 577; see also Joel Hugenberger, Note, *Redefining Property Under the Due Process Clause: Town of Castle Rock v. Gonzales and the Demise of the Positive Law Approach*, 47 B.C. L. REV. 773, 782 (2006).

<sup>104</sup> *Roth*, 408 U.S. at 577 ("Property interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.").

<sup>105</sup> *Ralls I*, 987 F. Supp. 2d at 29.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 30.

<sup>108</sup> *Id.* at 30–31.

President has the final discretion to approve or deny a CFIUS application, and Exxon-Florio does not constrain the President to a particular process, limit the factors which the President can consider, or guarantee a particular outcome.<sup>109</sup> Accordingly, foreign companies like Ralls do not have an expectation interest in U.S.-based international acquisitions; the statute instead “puts foreign-owned companies on notice that they do not have an entitlement to engage in mergers, acquisitions, or takeovers in the United States: they are subject to Presidential review.”<sup>110</sup>

## 2. *Sufficiency of Process*

After concluding that Ralls had waived its due process rights, the court went on to evaluate the amount of process that the company received during its CFIUS review.<sup>111</sup> The court held that, even assuming that Ralls was entitled to the protections of the Fifth Amendment, Ralls received sufficient process from the Committee and the President.<sup>112</sup> Classically, as designated by the Court in *Cleveland Bd. of Educ. v. Loudermill*, due process requires notice and an opportunity to be heard.<sup>113</sup> The court began by stressing the flexible, context-specific nature of the Due Process Clause’s procedural protections.<sup>114</sup> The court broke Ralls’ claim into two components: the alleged lack of notice and rebuttal opportunity, and the President’s refusal to provide Ralls with the evidence on which he made his decision.<sup>115</sup> Under the familiar *Mathews v. Eldridge*<sup>116</sup> balancing test—which weighs the private interest that will be affected by official action, the risk of erroneous deprivation of that interest as well as the probable value of additional procedural safeguards, and the government’s interest<sup>117</sup>—the district court concluded that Ralls was not denied due process in either regard.<sup>118</sup>

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<sup>109</sup> *Id.* at 30–32.

<sup>110</sup> *Id.* at 30.

<sup>111</sup> *Id.* at 32.

<sup>112</sup> *Id.*

<sup>113</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

<sup>114</sup> *Ralls I*, 987 F. Supp. 2d at 32 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481, 492 (1972)).

<sup>115</sup> *Id.*

<sup>116</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>117</sup> *Id.* at 335.

<sup>118</sup> *Ralls I*, 987 F. Supp. 2d at 32.

First, Judge Jackson noted that Ralls received notice from the Committee and that Ralls had the opportunity to be heard.<sup>119</sup> For the district court, Ralls received notice insofar as the Committee expressly notified Ralls that the transaction was subject to CFIUS review, recommended that Ralls file a voluntary notice with the Committee, and informed Ralls that a unilateral review would ensue if Ralls did not file a voluntary notice.<sup>120</sup> Additionally, Ralls received an opportunity to be heard insofar as the company filed a notice with CFIUS in which it contended that the Butter Creek projects did not threaten national security, responded to follow-up questions from the Committee, and gave a presentation to the Committee on the benign nature of the wind farms.<sup>121</sup> Thus, the court concluded that Ralls received the *Loudermill* requirements of notice and an opportunity to be heard.

Turning to the *Mathews* test, the court determined that the factors “weigh[ed] overwhelmingly in favor of the government.”<sup>122</sup> For the court, the government’s interest in protecting national security considerably outweighed any property interest that Ralls might have had in the four Oregon companies.<sup>123</sup> Moreover, to the extent that Ralls sought disclosure of the evidence on which the President and the Committee based their decisions, the executive branch has a valid national security interest in withholding information about a specific national security threat from the group that it believes poses that threat.<sup>124</sup> Finally, because the President retains complete discretion to block a foreign transaction, the court found that the probable value of additional protections, including evidentiary disclosure, would be minimal.<sup>125</sup> As a result, the *Mathews* balancing test favored CFIUS and the President.<sup>126</sup>

Next, the court more directly addressed Ralls’ claim that the President was required to disclose the reasons for his decision.<sup>127</sup> Ralls’ argument stemmed from a line of cases involving the Anti-

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 33.

<sup>123</sup> *Id.* (“Even if the Court were to find that Ralls was deprived of some kind of property interest, that property interest is relatively weak in the face of the strong governmental interest in protecting the national security.”).

<sup>124</sup> *Id.* at 34 (citing *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State (Mojahedin)*, 182 F.3d 17, 21 (D.C. Cir. 1999)).

<sup>125</sup> *Id.* at 34–35.

<sup>126</sup> *Id.* at 37.

<sup>127</sup> *Id.* at 35.

Terrorism and Effective Death Penalty Act of 1996 (AEDPA), which authorizes the Secretary of State to formally designate an organization as a Foreign Terrorist Organization (FTO).<sup>128</sup> Under these cases, the Secretary of State may only designate an organization as an FTO after considering three public record findings, as well as the classified and unclassified information that suggests that an organization threatens national security.<sup>129</sup>

The court distinguished *Ralls* from the AEDPA decisions in three ways. First, the court noted that AEDPA decisions, unlike those under Exon-Florio, are subject to judicial review.<sup>130</sup> Second, the court stressed that even the AEDPA cases do not mandate disclosure of evidence related to national security findings; although *People's Mojahedin Organization of Iran v. United States Department of State* and other cases require due process procedures for the Secretary of State's public record findings, they do not force the government to turn over any evidence—classified or not—that the Secretary relied upon in determining a group's threat to national security.<sup>131</sup>

Third, Judge Jackson pointed out that, unlike the AEDPA cases, public dissemination of the government's nonclassified evidence was not inevitable in *Ralls*.<sup>132</sup> In *National Council of Resistance of Iran v. Department of State (NCRI)*,<sup>133</sup> the D.C. Circuit held that the government did not have a strong interest in the nondisclosure of unclassified evidence when that evidence was ultimately going to be made public anyway.<sup>134</sup> By contrast, the circuit court held that disclosure was not required where the evidence was outside of the public purview and concerned national security.<sup>135</sup> For the district court, the situation in *Ralls* was largely analogous to the latter context, where the government's evidence was unlikely to ever seep into the

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<sup>128</sup> *Id.* For the full text of the AEDPA, see 8 U.S.C. § 1189 (2012).

<sup>129</sup> *Ralls I*, 987 F. Supp. 2d at 35 (summarizing *Mojahedin*, 182 F.3d at 23).

<sup>130</sup> *Id.* at 36; *see also* 8 U.S.C.A. § 1189(c)(1) (“[T]he designated organization may seek judicial review . . .”).

<sup>131</sup> *Ralls I*, 987 F. Supp. 2d at 35–36 (summarizing cases).

<sup>132</sup> *Id.* at 36–37.

<sup>133</sup> *Nat'l Council of Resistance of Iran v. Dep't of State (NCRI)*, 251 F.3d 192 (D.C. Cir. 2001).

<sup>134</sup> *Id.* at 208–09.

<sup>135</sup> *Id.* (“The notice must include the action sought, but need not disclose the classified information . . . This is within the privilege and prerogative of the executive, and we do not intent to compel a breach in the security which that branch is charged to protect.”).

public domain.<sup>136</sup> Accordingly, the AEDPA cases did not require the executive branch to inform Ralls of the specific grounds for its decision, and the district court held that Ralls had been afforded adequate due process during the CFIUS review process.<sup>137</sup>

### *B. The D.C. Circuit's Decision*

In July 2014, the D.C. Circuit reversed the district court decision. Writing for a unanimous panel, Judge Karen LeCraft Henderson held that Ralls was denied due process during its CFIUS review because (1) Ralls was never advised of the national security concerns stemming from its wind farms, and (2) Ralls was not allowed to view or rebut the government's national security evidence.<sup>138</sup>

#### *1. Legally Protected Property Interests Under the Due Process Clause*

Like the district court, the D.C. Circuit began its analysis by looking at the extent to which the CFIUS review process implicated a constitutionally-protected property interest owned by Ralls.<sup>139</sup> In a departure from the trial court's reasoning, Judge Henderson concluded that Ralls had alleged a protected property interest under the Fifth Amendment.<sup>140</sup> The circuit court noted that property interests are usually protected by the Constitution if they fall within state law property rights.<sup>141</sup> Disagreeing with the district court, the D.C. Circuit held that Ralls' property rights were not sufficiently contingent as to bar protection under the Fifth Amendment.<sup>142</sup>

Unlike the district court, the D.C. Circuit rejected the argument that, because Ralls acquired the Butter Creek properties subject to the known risks of a CFIUS review, Ralls did not have a vested property interest in its wind farms.<sup>143</sup> For the circuit court, Ralls' state property rights fully vested upon the completion of the Butter Creek transaction and these state rights were in no way affected by the mere potential of later federal action.<sup>144</sup> Even though Ralls faced the possibility of a

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<sup>136</sup> *Ralls I*, 987 F. Supp. 2d at 36–37.

<sup>137</sup> *See id.* at 37.

<sup>138</sup> *See Ralls II*, 758 F.3d 296, 301, 320–21 (D.C. Cir. 2014).

<sup>139</sup> *Id.* at 315.

<sup>140</sup> *Id.* at 319.

<sup>141</sup> *Id.* at 315–16.

<sup>142</sup> *Id.* at 316.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

presidential veto, this risk did not disassemble Ralls' bundle of rights.<sup>145</sup>

Moreover, according to the D.C. Circuit, Ralls did not waive its property interest in the Butter Creek properties by failing to petition CFIUS for preacquisition approval.<sup>146</sup> Although the court conceded that Ralls failed to initiate a CFIUS review on its own, Judge Henderson concluded that this waiver was not relevant when determining whether a property interest is at stake; at most, such a waiver only helps determine the amount of process that a party is entitled to receive.<sup>147</sup> Furthermore, for the D.C. Circuit, Ralls' failure to engage in CFIUS's preapproval process only begged the question of whether that preapproval process was constitutionally adequate—parties do not waive due process claims by forgoing constitutionally inadequate procedures.<sup>148</sup> Finally, because CFIUS allows parties to initiate a national security review either before or after a transaction is completed, the D.C. Circuit concluded that Ralls did not waive its due process rights by failing to seek preapproval.<sup>149</sup>

## 2. *Sufficiency of Process*

Because the circuit court concluded that Ralls had not waived its due process rights, it went on to analyze whether CFIUS had provided the company with adequate procedural protections.<sup>150</sup> Drawing heavily on cases from the FTO-designation context, the D.C. Circuit held that the Committee had provided Ralls with insufficient process under the Fifth Amendment.<sup>151</sup> For Judge Henderson and her colleagues, Ralls was entitled to receive notice of its CFIUS review, owed access to the unclassified evidence which supported the Committee's decision, and entitled to rebut the Committee's unclassified evidence.<sup>152</sup>

The D.C. Circuit began its sufficiency of process analysis by noting that due process requires both the right to know the factual basis for a

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<sup>145</sup> *See id.*

<sup>146</sup> *Id.* at 317.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 317 n.18.

<sup>149</sup> *Id.* at 317.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 318–19.

<sup>152</sup> *Id.*

decision, as well as the opportunity to rebut the relevant evidence.<sup>153</sup> Notably, although the court cited the *Mathews* balancing test, it declined to expressly go through an analysis of the balancing factors.<sup>154</sup> Instead, the court analogized the CFIUS review process to the FTO-designation procedure under AEDPA, which requires the Secretary of State to notify an organization of its designation as an FTO, disclose unclassified evidence to the organization, and allow the organization to rebut such unclassified evidence.<sup>155</sup> The court noted that both CFIUS and FTO reviews affect a party's property interests; FTO reviews are prohibited from accessing American bank accounts, just as foreign corporations are barred from accessing assets involved in a covered transaction.<sup>156</sup>

The court extended its FTO analysis to the CFIUS context. In *NCRI* and its line of cases, the D.C. Circuit concluded that an FTO-designee could not be deprived of a property interest without receiving notice of the proposed designation, access to supporting unclassified evidence, and the opportunity to rebut that unclassified evidence.<sup>157</sup> Importantly, FTO-designees are entitled to these protections despite the government's compelling national security interests, and despite the low probability that an FTO-designee could successfully rebut the State Department's evidence.<sup>158</sup> The D.C. Circuit stressed, however, that companies undergoing a CFIUS review are entitled only to see the Committee's unclassified evidence; due process does not require the disclosure of classified documents.<sup>159</sup>

The D.C. Circuit disagreed with the district court's analysis of the AEDPA cases. First, the D.C. Circuit read the AEDPA cases—and

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<sup>153</sup> *Id.* 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)).

<sup>154</sup> *Id.* at 317–18; see also Amy S. Josselyn, *National Security at All Costs: Why the CFIUS Review Process May Have Overreached Its Purpose*, 21 GEO. MASON L. REV. 1347, 1377 (2014).

<sup>155</sup> *Ralls II*, 758 F.3d at 318 (citing *People's Mojahedin Org. of Iran v. Dep't of State (Mojahedin III)*, 613 F.3d 220 (D.C. Cir. 2010); *Chai v. Dep't of State*, 466 F.3d 125 (D.C. Cir. 2006); *NCRI*, 251 F.3d 192 (D.C. Cir. 2001)).

<sup>156</sup> *Id.* at 318.

<sup>157</sup> *Id.* (citing *NCRI*, 251 F.3d at 201, 208–09).

<sup>158</sup> *Id.* at 318–19 (parenthetically quoting *NCRI*, 251 F.3d at 207, 209 (“We have no reason to presume that the petitioners . . . could have offered evidence which might have . . . changed the Secretary's mind . . . . However, without the due process protections which we have outlined, we cannot presume the contrary either.”)).

<sup>159</sup> *Id.* at 319 (parenthetically quoting *NCRI*, 251 F.3d at 209–10 (“classified [documents and] information [are] ‘within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect’”)).

*NCRI* in particular—to affirmatively require the disclosure of unclassified evidence under the Due Process Clause.<sup>160</sup> Thus, for Judge Henderson, due process requires the disclosure of unclassified evidence, regardless of whether public dissemination of that evidence is inevitable.<sup>161</sup> Second, the appellate panel noted the similar “dearth” of statutory procedural protections under both AEDPA and Exon-Florio.<sup>162</sup> Because both laws afforded aggrieved parties with minimal process, both should be extended additional protections by the Fifth Amendment.<sup>163</sup>

For these reasons, the D.C. Circuit concluded that “the Presidential Order deprived Ralls of its constitutionally protected property interests without due process of law.”<sup>164</sup> The court held that due process requires, at a minimum, that an affected party (1) be informed of CFIUS’s action, (2) be given access to the unclassified evidence on which CFIUS relied, and (3) be allowed to rebut CFIUS’s unclassified evidence.<sup>165</sup> The D.C. Circuit disputed the district court’s claim that Ralls had received sufficient notice and an opportunity to be heard.<sup>166</sup> The district court had emphasized that CFIUS had expressly notified Ralls that its transaction was subject to a national security review, accepted a filing from Ralls in which the company argued that the Butter Creek projects did not impair U.S. national security, and received a presentation from Ralls on the nature of the company’s Butter Creek activities.<sup>167</sup> Nonetheless, for the D.C. Circuit, this process fell short of the Fifth Amendment’s standard.<sup>168</sup> Although Ralls was aware of the CFIUS proceeding and was able to submit evidence to the Committee, this process was insufficient because Ralls was unable to either tailor its evidence to the government’s concerns or rebut the government’s arguments.<sup>169</sup> Importantly, even though the government has a significant national security interest in the CFIUS

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<sup>160</sup> *Id.* at 320.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 319.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Ralls I*, 987 F. Supp. 2d 18, 32 (D.D.C. 2013).

<sup>168</sup> *Ralls II*, 758 F.3d at 319.

<sup>169</sup> *Id.* at 319–20.

process, this interest only extends to the dissemination of classified evidence.<sup>170</sup>

For the D.C. Circuit, the potential national security implications of evidentiary disclosure are cabined by limiting such disclosure to unclassified documents. The President is not required to “disclose his thinking on sensitive questions related to national security” in reviewing a CFIUS transaction, but must only turn over nonsensitive documents at some point before issuing a presidential order.<sup>171</sup> Because CFIUS acts on behalf of the President when reviewing foreign transactions, CFIUS itself can provide a party with adequate process at the Committee review stage of the process.<sup>172</sup> Here, because Ralls did not receive the government’s unclassified evidence or the opportunity to rebut such evidence at any point before the President ordered the company to divest its holdings, the CFIUS review process violated the Due Process Clause.<sup>173</sup> Accordingly, the D.C. Circuit reversed the opinion of the district court and remanded the case with instructions to ensure that Ralls received adequate procedural due process.<sup>174</sup>

#### IV IMPLICATIONS

Although the D.C. Circuit’s attempt to increase the amount of CFIUS-related due process is laudable, the *Ralls II* decision raises two interrelated problems. First, by ducking the *Mathews* balancing test, the D.C. Circuit misapplied the controlling law on procedural due process. In particular, the D.C. Circuit’s approach—which, in *all* circumstances, requires notice, the presentation of unclassified evidence, and an opportunity for the opposing side to rebut the government—failed to take into account the context-specific nature of due process analysis. Second, and relatedly, by mandating minimum procedural requirements regardless of the magnitude of a specific national security threat, the *Ralls II* decision undercuts the President’s Article II war powers in a manner that could potentially jeopardize U.S. strategic interests. To be clear, the heightened procedural requirements have their benefits: they likely increase the transparency of the CFIUS review process in a way that will attract additional international

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<sup>170</sup> *Id.* at 320.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 320–21.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 325.

investment in the United States. However, these benefits could also be achieved without sacrificing judicial deference to the executive on issues of national security, and without endangering American strategic assets. For example, a separate Article III court modeled after the Foreign Intelligence Surveillance Court (FISC) could review classified CFIUS material and tailor procedural protections on a case-by-case basis.

*A. What Process Is Due?: The D.C. Circuit's Misapplication of Mathews v. Eldridge*

The D.C. Circuit's opinion in *Ralls II* is a notable departure from traditional due process analysis. Rather than apply the standard three-part balancing test from *Mathews v. Eldridge*, the court analogized *Ralls II* to a series of FTO-designation cases.<sup>175</sup> Although the circuit court paid lip service to the *Mathews* test, it did not analyze the *Ralls* facts in light of the private interests affected by CFIUS's decision; the risk that the CFIUS procedures erroneously deprived Ralls of its private interests, as well as the added value of heightened safeguards; and the government's interest in deeming the Butter Creek project a national security threat. Instead, the D.C. Circuit inappropriately borrowed its due process analysis from another case—*NCRI*<sup>176</sup>—devoid of any of the CFIUS- or Ralls-specific context.<sup>177</sup>

The D.C. Circuit's failure to apply the *Mathews* test to the *Ralls* facts is perplexing, particularly because the *Ralls II* opinion emphasized the contextual and fact-specific nature of the due process inquiry.<sup>178</sup> Although due process generally requires notice and a hearing, the precise form and substance of these obligations can vary widely based on the particulars of a given case.<sup>179</sup> Accordingly, in a due process analysis, courts typically interrogate a case's evidence, categorize that evidence into one of the three *Mathews* factors, and then delicately balance those factors against each other.<sup>180</sup> In *Hamdi v. Rumsfeld*, for

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<sup>175</sup> See *supra* note 155 and accompanying text.

<sup>176</sup> *NCRI*, 251 F.3d 192 (D.C. Cir. 2001).

<sup>177</sup> See *Ralls II*, 758 F.3d at 318–20.

<sup>178</sup> See *id.* at 317 (“Unlike some legal rules, due process is not a technical conception with a fixed content unrelated to time, place and circumstances. To the contrary, due process is flexible and calls for such procedural protections as the particular situation demands.” (citations and internal quotation marks omitted)).

<sup>179</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333–35 (1976).

<sup>180</sup> *E.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

example, the Supreme Court noted that an enemy combatant detained at Guantanamo Bay had a substantial interest in being free from physical detention, that the government had a sizable interest in preventing an enemy combatant from returning to the battlefield, and that there was a considerable risk of error if an enemy combatant was not given a hearing before a neutral decision maker.<sup>181</sup> Thus, as *Hamdi* illustrates, the *Mathews* test is contingent on express facts in an individual case.

This fact-specific inquiry shapes the amount of procedural safeguards that are constitutionally required in a particular circumstance. Again, *Hamdi* is instructive. Rather than grant enemy combatants blanket access to notice and a hearing, the Supreme Court tailored the amount of due process to the exigencies of the situation.<sup>182</sup> Thus, in light of the government's robust national security concerns, the Court allowed the executive to give detainees in the War on Terror a relaxed form of procedural due process, wherein hearsay is admissible and the defendant bears the burden of proof.<sup>183</sup> As *Hamdi* demonstrates, the Fifth Amendment's protections are not stationary, but can vary widely based on individual circumstances.

In *Ralls II*, the court of appeals engaged in none of the fact-specific inquiries that are the hallmarks of due process. To the contrary, the D.C. Circuit asserted that *NCRI* was controlling precedent, and required the government to give CFIUS reviewees an identical level of process as is required of the State Department when it designates a group as an FTO.<sup>184</sup> This analogical extension of the *NCRI* analysis, however, improperly conflates administrative similarity with factual congruence, and thus erodes the Fifth Amendment's timeworn standard. Instead, the D.C. Circuit should have emulated the district court's due process analysis, applying the *Mathews* balancing factors to the *Ralls* facts.<sup>185</sup> Although the *Mathews* analysis does not dictate that the D.C. Circuit reach the same conclusion as the D.C. District Court, the D.C. Circuit, at a minimum, should have scrutinized the facts within the *Mathews* framework.

Moreover, even if it was appropriate to shoehorn *NCRI*'s analysis into an unrelated case, the factual differences between *Ralls* and *NCRI* make this kind of analogical extension impossible. Unlike *Ralls*, the

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<sup>181</sup> *Id.* at 528–33.

<sup>182</sup> *Id.* at 533–34.

<sup>183</sup> *Id.*

<sup>184</sup> See *Ralls II*, 758 F.3d at 318–19.

<sup>185</sup> See *supra* notes 112–26 and accompanying text.

State Department's interpretation of AEDPA only provided for post-deprivation relief.<sup>186</sup> For the *NCRI* court, the temporal aspect of due process was crucial; although strong government interests like national security can justify relaxing the due process standard, such interests do not warrant providing a party with post-deprivation relief instead of pre-deprivation relief.<sup>187</sup> As a result, the court held in *NCRI* that the State Department must provide all necessary due process before depriving a party of a property interest.<sup>188</sup> By contrast, in *Ralls*, CFIUS provided Ralls with pre-deprivation notification of an impending national security review, asked Ralls questions prior to any property deprivation, and received a presentation from Ralls on the Butter Creek transaction before rescinding the transaction.<sup>189</sup> Thus, because CFIUS provided Ralls with pre-deprivation safeguards, the D.C. Circuit's analogy to *NCRI* was flawed.

### *B. Ralls II: Simultaneously Overly Broad and Overly Narrow*

From a policy perspective, the D.C. Circuit's approach in *Ralls II* is at once both overly broad and overly narrow. First, it is too broad in the sense that it overreaches onto what are customarily executive branch prerogatives in a way that potentially jeopardizes U.S. national security. In this way, *Ralls II* severely undercuts both the President's inherent authority as Commander in Chief, as well as American strategic interests at-large. Second, it is too narrow because its protections will likely be rendered meaningless in the real world. Although the D.C. Circuit's opinion could theoretically increase CFIUS's transparency and encourage foreign investment in the United States, the routine over-classification of national security evidence will stymie any efforts to give CFIUS applicants meaningful notice. Thus, *Ralls II*'s procedural safeguards are unsatisfactory to both sides of CFIUS review.

#### *1. Disrupting the Balance: Ralls II's Impact on Judicial Deference*

*Ralls II* casts a constitutional shadow far beyond *Mathews*. In addition to straying from the traditional framework for procedural due

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<sup>186</sup> *NCRI*, 251 F.3d 192, 207 (D.C. Cir. 2001).

<sup>187</sup> *See id.* (stating that although the government's strong national security interest affects "the 'what' of the due process . . . [i]t is not . . . apparent how [national security] affects the 'when' of the process").

<sup>188</sup> *Id.* at 208.

<sup>189</sup> *See supra* notes 81–87 and accompanying text.

process, the D.C. Circuit's opinion also upsets the balance of executive and judicial war powers. By divorcing the government's interest in national security from the context of specific threats, the D.C. Circuit superseded the President's threat calculations with its own, manufactured legal reasoning. Accordingly, *Ralls II* disrupts the separation of powers and signals a substantial departure from the judiciary's typical deferential posture on issues of national security.

Courts rarely intrude on the President's authority to protect national security, particularly where, as in *Exon-Florio*, Congress has expressly delegated such decision making to the executive branch.<sup>190</sup> This deference stems from the President's inherent and plenary powers under Article II, as well as his authority as Commander in Chief.<sup>191</sup> Thus, in *United States v. Curtiss-Wright Export Corp.*, the Supreme Court held that the President is the "sole organ" of the government in international affairs and must be afforded a considerable amount of "discretion and freedom" when conducting the nation's foreign relations.<sup>192</sup> Accordingly, courts are hesitant to second-guess executive decisions on issues of national security; as the Court noted in *Egan*, "courts traditionally have been reluctant to intrude upon the authority of the executive in military and national security affairs."<sup>193</sup> In particular, judicial deference to presidential decision-making is especially strong where "Congress has authorized the President to protect the nation's security."<sup>194</sup>

Judicial deference to the President on national security matters is appropriate because the executive branch has more national security competence than the judiciary, and because the President is more democratically accountable than judges.<sup>195</sup> From an institutional competency perspective, the executive is better-suited to make national security decisions because unitary and decisive actions are more

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<sup>190</sup> See *Dep't of Navy v. Egan*, 484 U.S. 518, 529–30 (1988); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1101–02 (2008) (finding that courts defer to the executive 78.5% of the time when a statute implicates national security, and 100% of the time when super-deference to executive national security interpretations is invoked).

<sup>191</sup> See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936).

<sup>192</sup> *Id.* at 320.

<sup>193</sup> *Egan*, 484 U.S. at 530.

<sup>194</sup> Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2664 (2005) (citing *Dames & Moore v. Regan*, 453 U.S. 654 (1981)).

<sup>195</sup> See Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 882–83 (2013) (surveying academic literature on national security deference).

effective, because the executive has heightened expertise, and because the executive has the ability to act quickly and in secret.<sup>196</sup> The judiciary, by contrast, does not have access to the kinds of information needed to evaluate national security arguments.<sup>197</sup> Moreover, judges lack political accountability to make difficult national security decisions.<sup>198</sup> Unlike unelected judges, voters can voice their displeasure at the polls when a president makes a specific policy choice.<sup>199</sup> As a result of these advantages, national security determinations are best left to executive branch officials, not judges.

Although the DPA does not bar judicial review of constitutional claims related to CFIUS,<sup>200</sup> *Ralls II* is considerably less deferential to the executive than other national security-related decisions. Without regard to either the CFIUS context or the specific national security threat determined by the President, the *Ralls II* decision manufactured a baseline of procedural protections for all CFIUS reviewees. If the court had deferred to and evaluated the government's interest in *Ralls*, the D.C. Circuit could have developed a personalized procedural standard for the Butter Creek projects. Instead, the court of appeals refused to take the executive at its word that the Oregon windfarms jeopardized national security, and imposed the kind of one-size-fits-all test that *Mathews* specifically disowns. By requiring the President to turn over all nonclassified materials that informed a CFIUS decision, the D.C. Circuit created a mechanism through which foreign companies can second-guess the President's national security decisions. Correspondingly, *Ralls II* restrained the President's ability to swiftly and decisively shut down foreign transactions that imperil U.S. interests. Because courts traditionally afford substantial deference to the President on national security decisions, this case is both striking and unprecedented.

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (Military and foreign policy judgments “are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.”).

<sup>199</sup> Deeks, *supra* note 195, at 883.

<sup>200</sup> See *Ralls II*, 758 F.3d 296, 307–12 (D.C. Cir. 2014).

## 2. *Unknown Unknowns: Ralls II's Destabilizing Effect on U.S. Strategic Interests*

The D.C. Circuit's opinion is also overbroad in the sense that it could jeopardize American strategic interests. Although several commentators have praised CFIUS reform as a way to bolster foreign investment in the United States,<sup>201</sup> *Ralls II* could potentially embolden U.S. adversaries to use foreign business ventures as a cover for military espionage. The D.C. Circuit opinion will encourage both legitimate and subversive foreign investment, all while weakening CFIUS's ability to identify national security red flags.

*Ralls II* potentially makes it easier for foreign governments to use shell companies to spy on U.S. military secrets. Since 2008, numerous Chinese investment projects near U.S. defense installations have been scuttled due to counterintelligence concerns.<sup>202</sup> Among other examples, in 2009, the White House forced a Chinese mining company to withdraw its CFIUS application for the acquisition of a Nevada mine near a naval base.<sup>203</sup> In encouraging the mining company to pull out of the transaction, the Obama administration cited the potential national security consequences of having Chinese-owned assets near sensitive military facilities, as well as concerns that that the mine would be a boon to Chinese missile development.<sup>204</sup> Similarly, in 2012, a second Chinese company voluntarily divested its assets in another U.S. mining operation after CFIUS pointed to regulatory alarms arising from the mine's proximity to a U.S. Naval Air Station.<sup>205</sup> Both of these decisions were motivated by continuing "espionage concerns related to

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<sup>201</sup> See *infra* notes 206–09 and accompanying text.

<sup>202</sup> Thilo Hanemann & Daniel Rosen, *Ralls v. CFIUS: What Are the Implications for Chinese Investment?*, COUNCIL ON FOREIGN RELATIONS (Oct. 5, 2012), <http://blogs.cfr.org/renewing-america/2012/10/05/ralls-vs-cfius-what-are-the-implications-for-chinese-investment/>.

<sup>203</sup> Benjamin A. Powell, *Committee on Foreign Investment in the United States (CFIUS) Concerns Cause Parties to Abandon Transaction*, WILMERHALE LLP (July 7, 2010), <https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=90034#4>; see also Eric Lipton, *Questions on Security Mar Foreign Investments*, N.Y. TIMES (Dec. 18, 2009), [http://www.nytimes.com/2009/12/18/business/18invest.html?\\_r=0](http://www.nytimes.com/2009/12/18/business/18invest.html?_r=0).

<sup>204</sup> Stephanie Kirchgaessner, *White House Scuppers Encore Deal Over National Security Fear*, FIN. TIMES (June 30, 2010, 3:00 AM), <http://www.ft.com/intl/cms/s/0/76196da2-83dd-11df-ba07-00144feabdc0.html#axzz3UVg0tT1t>; Lipton, *supra* note 203.

<sup>205</sup> Form 8-K, HK Battery Tech. Inc., Current Report, to U.S. Sec. and Exch. Comm'n (June 11, 2012), [http://www.getfilings.com/sec-filings/120615/Nevada-Gold-Holdings-Inc\\_8-K/](http://www.getfilings.com/sec-filings/120615/Nevada-Gold-Holdings-Inc_8-K/).

geographic proximity of [Chinese investment] assets to defense installations.”<sup>206</sup>

After *Ralls II*, foreign companies are less likely to voluntarily cancel an American acquisition because of CFIUS concerns.<sup>207</sup> Instead, with guaranteed procedural protections in hand, these corporations will be more likely to challenge the Committee’s national security determinations and force a presidential veto.<sup>208</sup> *Ralls II*’s increased transparency will attract both genuine foreign investment opportunities as well as Trojan horses, which will make CFIUS’s screening role more difficult. In particular, U.S. adversaries will have an incentive to swamp the Committee with applications because, by requiring the disclosure of unclassified evidence, *Ralls II* raises the risk of involuntary disclosure of U.S. intelligence operations.<sup>209</sup> In essence, the D.C. Circuit’s opinion will open the floodgates to all types of foreign investment, while watering down the executive branch’s ability to monitor such transactions for national security threats.

### 3. *Over-Classification: Ralls II’s Impact on Foreign Investment*

The D.C. Circuit’s opinion is also overly narrow because its procedural protections are unlikely to provide parties with notice and a hearing in a meaningful way. Several commentators have been quick to applaud the *Ralls II* decision as a way to increase CFIUS’s transparency, thus bolstering foreign investment in the United States.<sup>210</sup> Despite the 2007 FINSA reforms, many believe that CFIUS’s opaqueness has continued to deter international investment and chill foreign trade.<sup>211</sup> Because foreign companies and their legal

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<sup>206</sup> Hanemann & Rosen, *supra* note 202.

<sup>207</sup> See Stewart Baker & Stephen Heifetz, *Ralls May Give Foreign Investors More Leverage with CFIUS*, LAW360 (Dec. 11, 2014, 11:21 AM), <http://www.law360.com/articles/603312/ralls-may-give-foreign-investors-more-leverage-with-cfius> (arguing that *Ralls II* will bolster investors’ bargaining position with CFIUS and incentivize foreign companies to hold out for due process review).

<sup>208</sup> *Id.*

<sup>209</sup> See THEODORE H. MORAN, AM. ENTERPRISE INST., US GOVERNMENT SURVEILLANCE REGULATIONS FOR IT COMPANY NETWORKS: TOWARD A GLOBAL FRAMEWORK 11 (Dec. 2014), <http://www.aei.org/wp-content/uploads/2014/12/US-government-surveillance-regulations-for-IT-company-networks.pdf>.

<sup>210</sup> See generally Josselyn, *supra* note 154, at 1368–70 (surveying literature regarding CFIUS’s negative impact on foreign trade).

<sup>211</sup> See, e.g., LARSON & MARCHICK, *supra* note 20, at 17–18 (documenting how foreign countries have erected barriers to U.S. trade as a result of CFIUS-related backlash); James F.F. Carroll, Comment, *Back to the Future: Redefining the Foreign Investment and National*

advisors are largely unaware of the specific factors that CFIUS uses to evaluate international transactions, CFIUS can create investor uncertainty.<sup>212</sup> Such ambiguity discourages investors from acquiring assets in the United States.<sup>213</sup> In recent years, the uncertainty surrounding the American investment climate has likely increased as a result of the Obama administration's more active use of CFIUS to block or hinder specific foreign acquisitions.

As a counter to decades of impenetrable U.S. trade policy, the *Ralls II* decision could potentially boost CFIUS's transparency by providing a clear procedural standard for review.<sup>214</sup> Foreign investors, long deterred by CFIUS's vague national security language, could be buoyed by the prospect of reviewing some of the Committee's evidence and the opportunity to rebut the executive branch. Lawyers who specialize in cross-border transactions and who are repeat players in front of the Committee, for example, could study upcoming CFIUS decisions, decipher CFIUS's orders, and make predictions about how the Committee will view a particular transaction's national security consequences. In this way, by establishing minimum procedural protections, *Ralls II* could demystify the CFIUS review process, reduce regulatory uncertainty, and spur future foreign investment.

Despite its supporters, however, *Ralls II*'s implications on international trade are likely to be minimal. First, as a result of FINSA's annual reporting requirements, CFIUS's transparency is at a historic high.<sup>215</sup> Second, because the D.C. Circuit only required the government to turn over its unclassified evidence, the executive branch will likely systematically over-classify all of its CFIUS evidence. Rather than risk turning over potential state secrets, CFIUS could instead mark all of its national security evidence as classified in order to keep it out of adversarial hands.<sup>216</sup> Although CFIUS applicants would receive notice and a hearing, they could not adequately rebut evidence that they are not allowed to see. Over-classification would

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*Security Act's Conception of National Security*, 23 EMORY INT'L L. REV. 167, 187–88 (2009) (arguing that CFIUS's vague national security mandate has led to a chilling effect on international investment).

<sup>212</sup> Carroll, *supra* note 211, at 188.

<sup>213</sup> *Id.*

<sup>214</sup> Josselyn, *supra* note 154, at 1378.

<sup>215</sup> See *supra* notes 68–73 and accompanying text.

<sup>216</sup> For a general discussion of the way the U.S. national security community responds to potential embarrassments through over-classification, see Erin M. Stimp, Comment, *The Military and State-Secrets Privilege: The Quietly Expanding Power*, 55 CATH. U. L. REV. 831, 842–45 (2006).

essentially render *Ralls II*'s safeguards meaningless. Thus, somewhat ironically, the *Ralls II* decision has the potential to increase the amount of secrecy surrounding CFIUS. Third, even if the executive branch does not alter the classification of its CFIUS documents, the required disclosure of unclassified evidence is unlikely to lead to many practical protections for companies like Ralls. Sensitive information that lies at the heart of CFIUS's threat determinations will remain classified and away from the eyes of foreign investors and their attorneys. Finally, to the extent that parties ask for relevant national security evidence, the government could simply claim that such documents are covered by executive privilege.<sup>217</sup> For these reasons, although *Ralls II* theoretically could incentivize foreign trade by providing additional safeguards to investors, its real world effect on CFIUS transparency is likely to be minimal.

*C. Due Process in a Dangerous World: Special Article III Courts as a Solution to the CFIUS Quandary*

Simply put, traditional Article III courts are the improper forum to review national security decisions of CFIUS's magnitude. As argued above, this kind of judicial oversight is unlikely to lead to concrete improvements in CFIUS's transparency, but will undermine the executive branch's constitutional authority to make national security decisions. There is, however, a way forward. Rather than subject the United States to unnecessary security risks, Congress should create a specialized Article III court that can oversee the CFIUS review process. Modeled after the FISC, the CFIUS court could independently review classified national security evidence and tailor procedural safeguards to the intricacies of a specific foreign transaction.<sup>218</sup> In this way, the CFIUS court could defer to the national security determinations of the President, while still providing foreign investors with the requisite amount of due process.

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<sup>217</sup> In *Ralls II*, the D.C. Circuit declined to address whether the disclosure of unclassified CFIUS evidence is covered by executive privilege. *Ralls II*, 758 F.3d 296, 319–20 (D.C. Cir. 2014).

<sup>218</sup> For more information on the FISC, see Kate Poorbaugh, Note, *Security Protocol: A Procedural Analysis of the Foreign Intelligence Surveillance Courts*, 2015 U. ILL. L. REV. 1363, 1370–72 (2015).

In 1978, Congress passed the Foreign Intelligence Surveillance Act (FISA),<sup>219</sup> in order to, amongst other things, provide judicial supervision of warrantless wiretaps.<sup>220</sup> FISA created the FISC, which exclusively authorizes national security-related electronic surveillance.<sup>221</sup> FISC was intended to provide judicial review of electronic surveillance in a way that could protect basic civil liberties while also allowing for the kind of flexible executive discretion that is necessary in national security decisions.<sup>222</sup>

FISC is composed of eleven U.S. district court judges, who are appointed by the Chief Justice.<sup>223</sup> The government applies to FISC for electronic surveillance warrants, which a FISC judge reviews in highly-secure hearings.<sup>224</sup> If the Attorney General signs a sworn affidavit stating that an adversarial hearing would harm U.S. national security, this hearing is conducted in camera and ex parte.<sup>225</sup> Under the standards laid out in FISA, a FISC judge determines whether electronic surveillance is justified.<sup>226</sup> Any appeals from the denial of a warrant go to a three-judge panel of federal appellate judges, also designated by the Chief Justice.<sup>227</sup>

Pursuant to Congressional action, a CFIUS court could easily be modeled after the FISC. First, the Chief Justice could appoint a pool of federal judges who are experts in national security law to the CFIUS court, much like FISC. If CFIUS chose to initiate an independent review, both the Committee and the affected company could submit their initial briefing and evidence—including the government's classified intelligence evidence—to the CFIUS court. The court could then review the relevant evidence and conduct a fact-specific procedural due process analysis based on the parties' filings. After determining the size of the of the CFIUS applicant's property interest, as well as the magnitude of any national security threats posed by the

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<sup>219</sup> Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. § 1801 (2000 & Supp. II 2002)).

<sup>220</sup> Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 794 (1989).

<sup>221</sup> *Id.* at 811.

<sup>222</sup> Nola K. Breglio, Note, *Leaving FISA Behind: The Need to Return to Warrantless Foreign Intelligence Surveillance*, 113 YALE L.J. 179, 187 (2003).

<sup>223</sup> USA PATRIOT Act, 50 U.S.C. § 1803(a)(1).

<sup>224</sup> *Id.* §§ 1803, 1804, 1805.

<sup>225</sup> *Id.* § 1806(f).

<sup>226</sup> Cinquegrana, *supra* note 220, at 816.

<sup>227</sup> 50 U.S.C. § 1803(b).

application, the CFIUS court could tailor a hearing that would properly balance these two interests. For example, the CFIUS court could turn over classified pieces of evidence to the applicant if the applicant's interest in reviewing that evidence exceeded the government's national security reason for keeping it secret. The CFIUS court could also devise a hearing for the two parties, and then decide whether to uphold or reverse CFIUS's recommendation that the President veto a particular transaction.

Creating a special Article III CFIUS court would preserve presidential war powers and still allow for executive discretion in matters of national security. Because the court would evaluate the specific national security threat posed by a transaction, the executive branch would not be pigeonholed into providing blanket procedural protections across the board. Instead, CFIUS would retain the flexibility to adjust its review process based on the magnitude of a particular threat. Although the CFIUS court would conduct an independent analysis of a national security threat, this analysis would be largely deferential to the executive branch. Moreover, the CFIUS court could protect vulnerable U.S. strategic assets. By highly scrutinizing a company's application materials, the court could deter adversarial shell companies from applying and could smoke out illegitimate enterprises. Finally, by carefully screening government evidence before turning it over to the other side, the CFIUS court could prevent the inadvertent disclosure of sensitive information.

Additionally, to the extent that CFIUS is plagued with opacity, a special court would depoliticize the CFIUS process and restore transparency to national security reviews. Independent judicial supervision would make CFIUS review more predictable, thus decreasing the uncertainty that can surround foreign investments. By taking the CFIUS review process out of the sole purview of the executive branch, a special court could also help the Committee avoid the political theater of decisions like *DP World*. Furthermore, by tailoring a fact-specific hearing, the CFIUS court could ensure that applicants receive meaningful due process and access to all relevant, non-sensitive evidence. Each of these steps would improve investors' perception of CFIUS by making the Committee more accountable.

A CFIUS court, modeled after the FISC, is the best hope to balance foreign-owned property interests with U.S. national security. As the *Ralls* saga illustrates, the CFIUS system is currently in a state of judicial limbo, which tarnishes the investment credibility of the United

States while also subjecting American strategic assets to serious risks. Although further exploration is needed, an independent Article III court could provide parties with the judicial review and constitutional protections they need, without sacrificing national security.

#### CONCLUSION

Globalization has made international markets increasingly interdependent, but it has also made potential security threats more diffuse, proximate, and clandestine. As foreign capital pours into U.S. assets, there are more opportunities than ever for American adversaries to infiltrate the nation's critical infrastructure and spy on its military capabilities. In this context, CFIUS's role in identifying national security threats in foreign transactions has taken on a heightened importance. From port terminals in New York City to green energy development in rural Oregon, the federal government must assess international mergers and acquisitions for risk. But, as the *Ralls Corp.*'s attempted purchase of four wind farms demonstrates, the complexities of international trade can pit the protections of the U.S. Constitution against the executive branch's national security prerogatives.

The D.C. Circuit's opinion in *Ralls II*, however, fails to adequately address this core conflict. By creating minimum due process standards for CFIUS review without reference to specific threats, the *Ralls II* decision intrudes on presidential authority, yet in a way that makes additional CFIUS transparency improbable. Rather than allow the judiciary to erode executive discretion and reflexively lurch from one decision to the next, Congress should create a special court of national security judges to review foreign transactions. This court would impartially supervise executive national security assessments in a way that affords due process to affected parties. In attempting to balance the fundamental tension between liberty and security, a special CFIUS court is the best way to bring certainty and equilibrium to foreign transactions.