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Ralls v. CFIUS: The Long Time Coming Judicial Protection of Foreign Investors' Constitutional Rights Against Government and President's National Security Review

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RALLS V. CFIUS: THE LONG TIME COMING JUDICIAL PROTECTION OF FOREIGN INVESTORS' CONSTITUTIONAL RIGHTS AGAINST GOVERNMENT'S NATIONAL SECURITY REVIEW

By Chang Liu[*]

I. INTRODUCTION

Accompanied by the sweeping wave of globalization, foreign direct investment (FDI) is playing an important role in the contemporary U.S. economy.[1] These investments not only provide strong stimulation for economic development, but also create many employment opportunities.[2] While traditional investors such as United Kingdom, Japan, Netherlands and Canada still hold the majority of the shares in the U.S. market, the emerging and fast-growing economic entities, such as China, also show interest in expanding the market.[3] However, the U.S. government is not always friendly to foreign investors; especially fearing that they may exert influence on domestic politics and national security.[4] Hence regulators have set up several "check-points", among which the most powerful one is the Committee of Foreign Investment of United States ("CFIUS" or the "Committee").

Most investors choose to comply with the authorities, and only a few of them challenge the federal government in U.S. courts.[5] Ralls Corporation ("Ralls"), a Delaware company owned by two Chinese nationals, is among the disputers; in fact, it is the first foreign investor that rejected CFIUS's executive order.[6] Ralls primarily claimed that its constitutional rights were violated by CFIUS and President Barack Obama and sought that the

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[1] *See* ORG. FOR INT'L INV., FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 2013 REPORT 1 (2013), http://www.ofii.org/sites/default/files/FDIUS_2013_Report.pdf ("Foreign Direct Investment . . . is equivalent to about 16 percent of U.S. gross domestic product").

[2] *Id.* Foreign companies provided 5.6 million American jobs with average pay of around $77,000 in 2011. *Id.* at 1.

[3] *Id.* at 3, 5. China's investment in U.S. increased by 163% between 2011-2012. *Id.* at 6.

[4] *See* Matthew R. Byrne, *Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance*, 67 Ohio St. L.J. 849, 857-858 (2006) (describing that Congress enacted Omnibus Trade and Competitiveness Act of 1988, in response to "the serious decline in United States competitiveness and the rapid growth in our trade deficit"); *see also* PROCTOR P. REID & ALAN SCHRIESHEIM, FOREIGN PARTICIPATION IN U.S. RESEARCH AND DEVELOPMENT: ASSET OR LIABILITY? 75-76 (1996).

[5] See generally, Yiheng Feng, "We Wouldn't Transfer Title to the Devil": Consequences of the Congressional Politicization of Foreign Direct Investment on National Security Grounds, 42 N.Y.U. J. INT'L L. & POL. 253, 271-281 (2009); Byrne, supra note 4, at 870-880.

[6] *See* WHITE & CASE, GENERAL TRADE REPORT – JETRO 6 (2014), https://www.jetro.go.jp/ext_images/theme/wto-fta/news/pdf/w_c_monthly_report-201405.pdf; *see also* BUSINESS LAWS INC., CORPORATE COUNSEL'S GUIDE TO INTERNATIONAL ANTITRUST, Chap. 4-9 (2014-2015 ed.).

executive order be removed.[7] No other foreign investor has ever made similar claims in U.S. courts.[8]

While there is wide range of controversial topics involving regulation and disputes over foreign investment, this Note will narrow in on the scope of constitutional issues reflected in the Ralls cases, including three D.C. District Court cases, a D.C. Circuit Court reversal, and a D.C. Circuit Proceeding (collectively as the "Ralls cases").[9] This Note has four parts. First, it will briefly introduce CFIUS's background and history, including its origin, development and amendments, as well as some recent case examples. Second, this Note will illustrate CFIUS's current administrative procedure of national security and how the President could take over the review. Third, it will fully analyze the facts and merits of the Ralls cases, discussing (i) Ralls's procedural and substantive due process rights under the Fifth and Fourteenth Amendment; (ii) Ralls's equal protection rights under the Fourteenth Amendment; and (iii) the President's possible executive privilege claim against Ralls in future proceedings. Finally, this Note will address the importance and influence of the Court of Appeals' decision on future investors as well as the regulators, as well as examine the policy argument in favor of or against CFIUS's national security review.

II. BACKGROUND

A. Development and Legislative History of CFIUS

The tradition of regulating foreign commerce goes back to early days of U.S. history.[10] Congress has passed numerous laws on regulation and control of transactions with foreign counties; for example, in 1789 the First U.S. Congress passed the Tariff Act to impose high taxes on imported goods, and the tariff constituted 80 to 95% of the federal revenue at the time.[11] In the more modern era, in response to the Great Depression, the Congress passed the Smoot Hawley Tariff Act of 1930 to dramatically raise the tariffs on importation.[12] The

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[7] Christina E. Holzer, Committee on Foreign Investment in the United States and Judicial Review, 13 J. INT'L BUS. & L. 169, 184 (2014).

[8] *See* Marcelo Moscogliato, *Foreign Direct Investment in Corporations: Restrictions in the United States and Brazil on the Grounds of National Defense*, 9 OR. REV. INT'L L. 67, 84 (2007) ("Despite both being very important instruments connected to the foreign direct investment in the United States, the Exon-Florio Amendment and the CFIUS have not been tested in court."); *see also Ralls Ruling Could Open Door To Other CFIUS Challenges,* LAW 360 (Jul. 18, 2014, 10:59 AM), http://www.law360.com/articles/558853/ralls-ruling-could-open-door-to-other-cfius-challenges.

[9] Ralls Corp. v. Terna Energy USA Holding Corp., 920 F. Supp. 2d 27 (D.D.C. 2013); Ralls Corp. v. Comm. on Foreign Inv. in the U.S., 926 F. Supp. 2d 71 (D.D.C. 2013); Ralls Corp. v. Comm. on Foreign Inv. in the U.S., 987 F. Supp. 2d 18 (D.D.C. 2013); Ralls Corp. v. Comm. on Foreign Inv., 758 F.3d 296 (D.C. Cir. 2014); Ralls Corp. v. Comm. on Foreign Inv., 2014 U.S. Dist. LEXIS 177868 (D.D.C. 2014).

[10] *See generally*, EMORY RICHARD JOHNSON ET AL., HISTORY OF DOMESTIC AND FOREIGN COMMERCE OF THE UNITED STATES, VOLUMES 1-2, at 241-243 (2012), https://ia802702.us.archive.org/0/items/historyofdomesti01john/historyofdomesti01john.pdf.

[11] *See* Duties on Merchandise imported into the United States; Chapter II, 1 Stat. 24 (the Tariff Act, 1789); *see also* Ben Baack, Robert A. McGuire, & T. Norman Van Cott, *Constitutional Agreement during the Drafting of the Constitution: A New Interpretation*, 38 J. LEGAL STUD. 533, 554 (2009).

[12] See Donna L. Bade, Corporate Responsibility and U.S. Import Regulations Against Forced Labor, 8 TULSA J. COMP. & INT'L L. 5, 7-8 (2000).

Commerce Clause of the Constitution also provides that the federal government has the exclusive jurisdiction over interstate commerce, which includes regulation of importation, exportation and foreign investments in U.S.[13] However, traditional regulatory measures did not involve direct government intervention on investments, but rather focused more on controlling international trade, until the emergence of the perception that foreign investment, and its influence over domestic politics and security derived therefrom, may present a threat to the U.S. national interests.[14] It is not until 1975 that President Ford formally established CFIUS to specifically review foreign investments, originally in response to concerns arising from oil-producing Middle Eastern countries' investments.[15] At this time, however, there is no clear standard for the committee to apply in its reviews.[16] Further, CFIUS possesses little actual authority to restrict or block foreign investments.[17] Its powerlessness was especially reflected in two cases: (i) the unsuccessful attempt by British financier Sir James Goldsmith to take over Goodyear Tire and Rubber Co.; and (ii) Fujitsu Ltd.'s failed attempt to take over Fairchild Semiconductor International, Inc.[18] In both cases, the CFIUS, as well as other executive branch committees of the government, found that they had no means to legally prevent these private transactions, despite that fact that there were widely spread opposing opinions against the investments.[19]

In response to these situations, Congress made three significant amendments later on, although CFIUS's basic function have always remained the same. The first and the most important amendment is the Exon-Florio Amendment to the Omnibus Trade and Competitiveness Act of 1988, which provides for Presidential review of the acquisitions of U.S. companies by foreign persons, and gives the President authority to block the transaction for national security reasons.[20] The Act provides three categories of "national security": (i) domestic production needed for national defense requirements; (ii) domestic industries'

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[13] U.S. CONST. art. 1, §§ 8-10.; *see also* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 49 (1st Cir. 1999) ("The Constitution's foreign affairs provisions have been long understood to stand for the principle that power over foreign affairs is vested exclusively in the federal government."); Yaman v. Yaman, 730 F.3d 1, 18 (1st Cir. 2013).

[14] *See* Mihir A. Desai, et al., Foreign Direct Investment And The Domestic Capital Stock 1 (Jan. 2005).

[15] ALAN P. LARSON & DAVID M. MARCHICK, FOREIGN INVESTMENT AND NATIONAL SECURITY: GETTING THE BALANCE RIGHT 7 (Jul. 2006); *see also* Edith Tilton Penrose, *Foreign Investment and the Growth of the Firm*, 66 THE ECO. J. 220, 233 (1956) (mentioning the political fear of "exploitation" and domination of foreign investments), http://www.jstor.org/stable/2227966.

[16] Exec. Order No. 11858, 3 C.F.R. § 990 (1971-1975) (mentioning vaguely that the committee may interfere with the transactions that "might" have implications with national security), https://www.treasury.gov/resource-center/international/foreign-investment/Documents/EO-11858-Amended.pdf.

[17] See Paul I. Djurisic, The Exon-Florio Amendment: National Security Legislation Hampered by Political and Economic Forces, 3 DEPAUL BUS. L.J. 179, 182-83 (1991).

[18] See Jose E. Alvarez, Political Protectionism and United States Investment Obligations in Conflict: The Hazards of Exon-Florio, 30 VA. J. INT'L L. 1, 56 (1989).

[19] See Christopher R. Fenton, U.S. Policy Towards Foreign Direct Investment Post-September 11: Exon-Florio in the Age of Transnational Security, 41 COLUM. J. TRANSNAT'L L. 195, 202 (2002).

[20] Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425 (1988) (codified as amended at 50 U.S.C. § 2170 (2000)); *see* 50 U.S.C. § 2170(a) (2000).

ability to meet these requirements; and (iii) the effect of foreign control on U.S.'s capability and capacity to meet national security requirements.[21]

The second amendment is the National Defense Authorization Act for Fiscal Year 1993.[22] This amendment made three changes. First, the amendment made it mandatory for CFIUS to investigate any transaction involving a foreign government, if that transaction could affect national security.[23] Second, it requires the President to report to Congress the results of any CFIUS investigation, regardless of whether the president decided to take action.[24] Finally, the amendment added two new factors that the President could consider in determining whether a transaction posed a threat: (i) the potential effect on military-related sales to a country identified under the Export Administration Act as one that supports terrorism, is of concern regarding proliferation of missiles or chemical and biological weapons, or is listed as a "special country" under the Nuclear Non-Proliferation Act; and (ii) the potential effect on U.S. "international technological leadership" in areas affecting national security.[25]

The third and most recent amendment is the Foreign Investment and National Security Act of 2007 ("FINSA"), which (i) further expanded the definition of "national security" to include homeland security and critical infrastructure; (ii) added more mandatory investigation requirements; (iii) codified the mitigation process; and (iv) added to CFIUS's Congressional reporting duties.[26] FINSA requires CFIUS to conduct a full investigation of all foreign government-controlled transactions or ones that would result in the control of any "critical infrastructure," whether or not an initial review shows these transactions pose a national security concern.[27] At this time, the scope of CFIUS's reviewing power has become much more expansive, as to include "any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States".[28] Furthermore, under FINSA the committee also has the discretion to determine what constitutes "foreign control" (except for those transactions involving foreign government-controlled corporations, which are expressly covered by the statutory language).[29] The definition of "control" is not otherwise defined in case law.[30]

B. Examples of CFIUS Blocking FDI Transactions

Since the establishment of CFIUS, it has prevented many foreign investments. One early example is that on February 1, 1990, China International Trust & Investment Corporation ("CATIC"), a company alleged to be closely connect to Chinese military,

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[21] See Byrne, supra note 4, at 857; see also W. Robert Shearer, The Exon-Florio Amendment: Protectionist Legislation Susceptible to Abuse, . 1729, 1739 (1993).

[22] Pub. L. No. 102-484, § 837, 106 Stat. 2315, 2463-65 (1992) (codified at 50 U.S.C. § 2170(b) (2000)).

[23] Pub. L. No. 102-484, § 837(a), 106 Stat. 2464.

[24] Pub. L. No. 102-484, § 837, 106 Stat. 2315.

[25] *Id.*

[26] 50 U.S.C. § 2170(a)(5), (f)(11), (l), (m) (2012).

[27] *Id.*

[28] 50 U.S.C. § 2170(a)(3).

[29] 50 U.S.C.A. § 2170(a)(2), (4) (2012).

[30] *Id.*

acquired MAMCO Manufacturing, an American aircraft parts manufacturer based in Seattle, Washington.[31] CATIC submitted a voluntary notice to CFIUS before the initiation of the transaction, but the acquisition was finalized before the CFIUS had completed its review.[32] After investigation, President George H.W. Bush issued "Order on the China National Aero-Technology Import and Export Corporation Divestiture of MAMCO Manufacturing, Inc.".[33] The Bush Administration also rejected efforts by CATIC to sell MAMCO to another Chinese company which had similar ties to the Chinese government.[34] Similarly, on July 24, 1992, CFIUS prevent another transaction related to a U.S. aviation company.[35] LTV Aerospace and Defense Company ("LTV") went bankrupt and three companies cast bids for its assets of the aircraft and missiles divisions, one of which was Thomson-CSF, S.A., a company owned by the French government by sixty percent its shares.[36] Thomson withdrew its bid after CFIUS intervened and initiated an investigation.[37]

Following the 1990s, CFIUS's interventions on FDI have greatly increased through the years. In 2005, China National Offshore Oil Corporation ("CNOOC") made a large bid to purchase Unocal Corporation, a U.S. oil company that was in process of being purchased by Chevron Corporation.[38] CFIUS immediately started review and CNOOC subsequently withdrew the offer.[39] In 2008, Huawei proposed to invest in 3Com (A U.S. network security company), and withdrew following a CFIUS's intervention.[40] In March 8, 2006, CFIUS intervened in an acquisition of Peninsular and Oriental Steam Navigation Company ("P&O") by Dubai Ports World ("DPW"), a state owned company from the United Arab Emirates ('UAE").[41]In this case, CFIUS actually unanimously approved the transaction, but Congress nevertheless expressed strong concern on national security and the media also turned over

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[31] *See* THE U.S. HOUSE OF REPRESENTATIVES SELECT COMM. ON U.S. NAT'L SEC., PRC ACQUISITION OF U.S. TECHNOLOGY 44-45 (1999), http://www.house.gov/coxreport/pdf/det.pdf [hereinafter "Cox Committee Report"]; *see also* George Bush, *Order on the China National Aero-Technology Import and Export Corporation Divestiture of MAMCO Manufacturing*, Inc., 1 PUB. PAPERS 143 (Feb. 2, 1990), http://www.presidency.ucsb.edu/ws/?pid=18108; Matthew D. Riven, *Recent Development, The Attempted Takeover of LTV by Thomson: Should the United States Regulate Inward Investment by Foreign State-Owned Enterprises?*, 7 EMORY INT'L L. REV. 759, 766 (1993).

[32] Cox Committee Report, *supra* note 31.

[33] Id.

[34] *Id.* at 45-46.

[35] See Deborah M. Mostaghel, Dubai Ports World Under Exon-Florio: A Threat to National Security or A Tempest in A Seaport?, 70 ALB. L. REV. 583, 599 (2007).

[36] *In re* Chateaugay Corp., 973 F.2d 141, 143 (2nd Cir.1992).

[37] *In re* Chateaugay Corp., 155 B.R. 633, 645 (Bankr.S.D.N.Y.1993).

[38] Ben White, *Chinese Drop Bid To Buy U.S. Oil Firm*, WASH. POST (Aug. 3, 2005),http://www.washingtonpost.com/wp-dyn/content/article/2005/08/02/AR2005080200404.html; Joshua W. Casselman, *China's Latest "Threat' to the United States: The Failed Cnooc-Unocal Merger and Its Implications for Exon-Florio and Cfius*, 17 IND. INT'L & COMP. L. REV. 155, 161 (2007).

[39] *See* Peter G. Peterson Inst. for Int'l Econ., US-China Trade Disputes: Preview Chapter 5, 48, http://www.piie.com/publications/chapters_preview/3942/05iie3942.pdf.

[40] *See* Steven R. Weisman, *Sale of 3Com to Huawei is derailed by U.S. security concerns*, N.Y. TIMES (Feb. 21, 2008), http://www.nytimes.com/2008/02/21/business/worldbusiness/21iht-3com.1.10258216.html?pagewanted=all&_r=0.

[41] Mostaghel, *supra* note 35 at 606, *citing* Press Release, Dep't of the Treasury, CFIUS and the Protection of the National Security in Dubai Ports World Bid for Port Operations (Feb. 24, 2006),https://www.treasury.gov/press-center/press-releases/Pages/js4071.aspx.

negative reactions.[42] As a result, DPW withdrew from the acquisition during the extended forty-five day review period.[43] Many commentaries opine that the major reason for the strong negative reception was the impression that the UAE had been funding Islamic extremists and terrorists and the public connected the image of the UAE with the terrorist attack of 9/11.[44] In the same month, an Israeli technology company, Check Point Software Technologies, also dropped its proposal to acquire Sourcefire, Inc., after concluding that it could not obtain approval from CFIUS.[45] There are also companies that sell their already acquired U.S. Companies to avoid post-transaction intervention by CFIUS; for example, in December 2006, a Venezuelan company, Smartmatic, after CFIUS's allegations that it may be "secretly controlled" by former Venezuelan President Hugo Chavez, decided to sell a U.S. company it acquired in March 2005, Sequoia Voting Systems.[46]

In the past decade, however, the major concern of CFIUS seems to be particularly focused on investments from China. In 2008, a Chinese telecommunications company, Huawei Technologies Co. Ltd. ("Huawei"), attempted to make an offer to purchase a U.S. computer-equipment manufacturer, 3Com Corp.[47] After CFIUS initiated an investigation that raised concerns that this Chinese company may obtain anti-hacking technology used by the Defense Department, Huawei dropped the attempt.[48] In 2011, Huawei dropped its third attempt to acquire U.S. business, in which the target company was 3Leaf, a server technology company, based on CFIUS's suggestion that it divest its assets.[49] In 2010, Aviation Industry

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[42] Id.

[43] Id.

[44] *Id.*

[45] Robert S. LaRussa, Lisa Raisner, & Thomas B. Wilner, *New Law Heightens Scrutiny of Foreign Acquisitions of U.S. Companies*, 4 N.Y.U. J. L. & BUS. 285, 290 (2007).

[46] *Id.*; *Sequoia Alleged to Have Ties to Venezuela's Chavez*, PROCON.ORG (Jan. 15, 2009), http://votingmachines.procon.org/view.additional-resource.php?resourceID=000279; Stephanie Kirchgaessner, *CFIUS Probe Blamed for Sale of Voting-Machine Company*, FIN. TIMES 4 (Dec. 22, 2006), http://www.ft.com/cms/s/0/9c0a81ac-922a-11db-a945-0000779e2340.html#axzz46ku3FYjL.

[47] *See* Serena Saitto and Jeffrey McCracken, *Huawei Said to Have Failed in U.S. Takeover Bids*, BLOOMBERG.COM (Aug. 2, 2010), http://www.bloomberg.com/news/articles/2010-08-02/huawei-said-to-be-stymied-in-purchase-of-u-s-assets-on-security-concerns.

[48] *Id.*; *see also* Peter S. Goodman, *Huawei Founder Ren Zhengfei Dismisses Chinese Military Connections*, INT'L BUS. NEWS (Jan. 22 2015), http://www.ibtimes.com/huawei-founder-ren-zhengfei-dismisses-chinese-military-connections-1791228 (illustrating that despite Huawei's objections, western observers and governments believe that Huawei is closely affiliated with Chinese government, mainly based on the fact that the founder, Ren Zhengfei was a former military official of Chinese Army).

[49] *See* Sinead Carew & Jessica Wohl, *Huawei backs away from 3Leaf acquisition*, REUTERS.COM (Feb. 19, 2011), http://www.reuters.com/article/2011/02/19/us-huawei-3leaf-idUSTRE71I38920110219; *see also* Shayndi Raice & Andrew Dowell, *Huawei Drops U.S. Deal Amid Opposition*, WALL ST. J. (Feb. 22, 2011), http://online.wsj.com/articles/SB10001424052748703407304576154121951088478. In 2010, Huawei tried to pull out another deal to purchase two U.S. wireless equipment manufacturing companies, 2Wire Inc. and Motorola Inc., but because the sellers doubted Huawei's ability to obtain CFIUS's approval, the parties failed to reach an agreement despite that Huawei offered at least $100 million for each company.*See* Serena Saitto & Jeffrey McCracken, *Huawei Said to Have Failed in U.S. Takeover Bids*, BLOOMBERG.COM (Aug. 30, 2010), http://www.bloomberg.com/news/articles/2010-08-02/huawei-said-to-be-stymied-in-purchase-of-u-s-assets-on-security-concerns).

Corporation of China (AVIC) successfully got approved by CIFUS to purchase Teledyne Continent, a U.S. general aviation engine manufacture company.[50]

CFIUS did, however, recently approve some FDI deals from China. In 2013, Shuanghui Group (also known as Shineway Group), a Chinese food company, tried to acquire a Smithfield Foods, Inc., the largest pork producer and processor in the United States.[51] CFIUS reviewed and investigated this $4.7 billion transaction and ultimately approved the transaction.[52] In 2014, Lenovo Group Ltd., a Chinese computer and electronics manufacturer, successfully passed CFIUS review on its purchase of the computer-server business from International Business Machines Corp.[53] In the same year, Lenovo also acquired Motorola Mobility Holdings, Inc. from Google Inc. and successfully passed CFIUS review.[54]

With the brief overview of the history of CFIUS, we can conclude that most foreign investors voluntarily submit their investment proposals to CFIUS and when CFIUS either expressly disapproves the transactions or implicitly indicates that there would be lengthy and in-depth investigations involved, the foreign investors usually back off from these tough deals. Few outside restrictions were imposed on the regulatory power of CFIUS, and the courts were never involved in these examples.

C. CFIUS's Current Review Procedure

The current Committee is chaired by the Department of Treasury, while the members include eight other departments and five observatory offices that also participate in the review process.[55] According to the current statutes, the core purpose and role of CFIUS is to protect national security from influence of foreign investment.[56] But there are similar definitions in other statutes that may be considered; for example, tax law mandates a 50

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[50] *See* Carew & Wohl, *supra* note 49.

[51] *See* Rich-Joseph Facun, *U.S. clears Smithfield's acquisition by China's Shuanghui*, REUTERS.COM (Sep. 6, 2013), http://www.reuters.com/article/2013/09/07/us-usa-china-smithfield-idUSBRE98513I20130907; *see also* Shruti Date Singh & Bradley Olson, *Smithfield Receives U.S. Approval for Biggest Chinese Takeover*, BLOOMBERG BUS. (Sept. 6, 2013), http://www.bloomberg.com/news/articles/2013-09-06/smithfield-receives-u-s-regulator-approval-for-shuanghui-deal.

[52] *See* Facun, *supra* note 51.

[53] *See* Spencer E. Ante, *IBM, Lenovo Tackle Security Worries on Server Deal*, WALL ST. J. (June 25, 2014), http://www.wsj.com/articles/ibm-lenovo-tackle-security-concerns-over-server-deal-1403733716; *see also* Alex Barinka & David McLaughlin, *IBM Obtains U.S. Approval for Sale of Server Business to Lenovo*, BLOOMBERG.COM (Aug. 15, 2014), http://www.bloomberg.com/news/articles/2014-08-15/ibm-gets-u-s-approval-for-sale-of-server-business-to-lenovo.

[54] *Lenovo Completes Acquisition of Motorola Mobility from Google*, LENOVO (Oct. 30, 2014), http://news.lenovo.com/article_display.cfm?article_id=1860.

[55] *Composition of CFIUS*, U.S. DEPT. OF TREASURY, http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx. The other eight members are Department of Justice, Department of Homeland Security, Department of Commerce, Department of Defense, Department of State, Department of Energy, Office of the U.S. Trade Representative, and Office of Science & Technology Policy. *Id.* The observatories include Office of Management & Budget, Council of Economic Advisors, National Security Council, National Economic Council, and Homeland Security Council. The Director of National Intelligence and the Secretary of Labor are non-voting, ex-officio members of CFIUS with roles as defined by statute and regulation. *Id.*

[56] *See generally* 50 U.S.C. § 2170(a)(5), (f)(11), (l), (m) (2012).

percent threshold of ownership in order to determine whether a person or corporation that "control[s] or is controlled by foreign corporation" is subject to tax.[57]

The first step is the national security review. The parties may voluntarily submit their transactions to CFIUS for review.[58] CFIUS may also initiate a review unilaterally.[59] The statute provides a wide range of factors for the Committee to consider, including influence on U.S. economic, energy, technology, and national security interests and the Committee or the President can consider other factors they deem necessary "in connection with a specific review or investigation".[60]

The second step is the Committee's national security investigation. The second step is triggered under three circumstances: (i) if a national security threat found during the Review was not mitigated, either prior to the Review or through a mitigation agreement; (ii) if the transaction results in U.S. assets being controlled by a foreign government; or (iii) if the transaction involves the transfer of a U.S. asset that is deemed to be any form of "critical infrastructure" without mitigations for the risk.[61]

Presidential Intervention, which appears in Ralls case, is the final step of the whole process. CFIUS is required to report to Congress or the President its findings from the investigation.[62] When extraordinary measures are required, it must be the President—not the CFIUS—that acts and does so on the advice of the Committee through the power granted in section 721 of the Defense Production Act of 1950 ("Section 721").[63] The "extraordinary measures" include: (i) suspending or prohibiting any Covered Transaction; and (ii) further directing the Attorney General of the United States "to seek appropriate relief, including divestment relief" in federal courts.[64] Also, only measures and findings by the President are exempt from judicial review.[65]

There are many controversies over the current CFIUS proceedings. The supporters of CFIUS argue that the government should retain full control of the foreign investment regulation based on its inherited power to protect national security and some further propose that the Committee should have more discretion and secrecy in the process.[66] The main functions of CFIUS, as the supporters pointed out, may include (i) detection and prevention of espionage; (ii) protection of sensitive industries; (iii) minimization of foreign governmental control over U.S. economy; and (iv) having the means for boycotting other countries.[67]

The critics of the process, on the other hand, focus on the lack of transparency, effective protection, and recourse for investors. Their arguments are that such protectionism will (i) discourage investors' interest in the U.S. market; (ii) harm bilateral relationship with

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[57] 26 U.S.C.A. § 954(d)(3) (2012); *see also* Brown Grp., Inc. v. C.I.R., 77 F.3d 217, 221 (8th Cir. 1996).

[58] 50 U.S.C. § 2170(b)(1)(C)(i) (2012); *Filing Instructions*, U.S. DEPT. OF TREASURY, http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-filing-instructions.aspx.

[59] 50 U.S.C. § 2170(b)(1)(D).

[60] 50 U.S.C. § 2170(f)(9), (11).

[61] Holzer, *supra* note 7, 178-79.

[62] 50 U.S.C. § 2170(b)(3)(B).

[63] 50 U.S.C. § 2170(c).

[64] 50 U.S.C. § 2170.

[65] Id.

[66] Casselman, *supra* note 38, at 186;

[67] See generally, Paul Connell & Tian Huang, An Empirical Analysis of Cfius: Examining Foreign Investment Regulation in the United States, 39 YALE J. INT'L L. 131, 150 (2014).

foreign countries and cause retaliation; and (iii) be abused by domestic companies who seek unfair competition in the M&A market, therefore discrimination against foreign companies needs to be justified more explicitly.[68] Some of these predictions are already reflected in the real world. For example, China has responded to U.S. regulation by setting up its own foreign investment regulation process, including antitrust claims against multi-national corporations.[69]

D. Background of *Ralls v. CFIUS*

Ralls is a domestic corporation registered in Delaware in 2010.[70] Two Chinese nationals, Dawei Duan and Jialiang Wu Duan, own the company.[71] They are also CFO and a Vice President of the Sany Group ("Sany"), a Chinese heavy machinery manufacture company.[72] In March 2012, Ralls purchased four American owned limited liability companies associated with the development of a five-turbine windfarm in central Oregon (the "Project Companies").[73] Before being taken over by Ralls, the Project Companies were already traded twice, including a sale to Terna Energy USA Holding Corporation ("Terna"), a Delaware corporation owned by a Greek company in December 2010.[74] The sites of the windfarm are located near or within a Navy restricted airspace and bombing zone.[75]

In June 2012, Ralls and Terna submitted a voluntary notice to CFIUS with regard to the acquisition of the LLCs pursuant to CFIUS's voluntary submission rules.[76] Several weeks after, CFIUS and Ralls had a meeting in which CFIUS did not disclose any evidence in connection with its national security review.[77] CFIUS launched its investigation on July,

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[68] *See* Paul Rose, *Sovereigns As Shareholders*, 87 N.C. L. REV. 83, 117 (2008) ("FINSA may also have the unintended effect of discouraging active sovereign investors and perhaps even some passive sovereign investors, unless experience with the CFIUS process eases SWF concerns that CFIUS will be politicized."); *see also* Thomas W. Soseman, *International Law-the Exon-Florio Amendment to the 1988 Trade Bill: A Guardian of National Security or A Protectionist Weapon?*, 15 J. CORP. L. 597, 621 (1990) ("the possible use of the Exon-Florio amendment as a protectionist weapon is too great to go unchecked"); Jonathan C. Stagg, *Scrutinizing Foreign Investment: How Much Congressional Involvement Is Too Much?*, 93 IOWA L. REV. 325, 359 (2007) ("...[o]ur leadership in this area will suffer greatly if Congress fails to amend FINSA to remove its intrusive and burdensome regulation of foreign investment."); Henry J. Graham, *Foreign Investment Laws of China and the United States: A Comparative Study*, 5 J. TRANSNAT'L L. & POL'Y 253, 258 (1996) ("Nevertheless, while the intent of Exon-Florio is laudable, the process can easily be abused by an American company facing a hostile takeover by a foreign company"); Deborah M. Mostaghel, *Dubai Ports World under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?*, 70 ALBANY L. REV. 583, 589 (2007) ("Foreign investors may think twice about investing in the United States if by doing so they run the risk of being branded as terrorist supporters.").

[69] Jeffrey K.D. Au, The Hopes and Fears of Foreign Direct Investment: A Comparative Evaluation of Fdi Regulation in the People's Republic of China and Taiwan, 2 J. CHINESE L. 359, 359-60 (1988).

[70] Ralls, 926 F. Supp. 2d 71, 77-78.

[71] Id.

[72] *Id.*; *see also Corporate Overview*, SANY GROUP, http://www.sanygroup.com/group/en-us/about/group.htm.

[73] Ralls, 926 F. Supp. 2d 71, 78. The four LLCs are Pine City Windfarm, LLC; Mule Hollow Windfarm, LLC; High Plateau Windfarm, LLC; and Lower Ridge Windfarm, LLC. *Id.*

[74] *Id.*

[75] Id.

[76] *Id.* (citing 50 U.S.C. app. § 2170(b)(1)(C) and 31 C.F.R. § 800.402(c)).

[77] Id.

2012.[78] In August, 2012, CFIUS issued the "Amended Order Establishing Interim Mitigation Measures" (the "CFIUS Order"), which provided that (i) Ralls should cease its construction; (ii) Ralls should remove all the items remaining on the cites; (iii) Ralls, Sany, and their employees or affiliates shall be prohibited to obtain access to the sites; (iv) Ralls, Sany and its subsidiaries shall be prohibited from selling or transferring the LLCs to any third party; and (v) Ralls shall be prohibited from selling the LLCs.[79]

In September, 2012, President Barack Obama issued a Presidential Order (the "Presidential Order", collectively with the CFIUS Order, the "Orders") with regard to the transaction.[80] The Presidential Order recognized that the Ralls transaction imposed a national security risk to the United States and imposed that (i) the Covered Transaction was prohibited; (ii) Ralls should divest all its interest in the Project Companies; (iii) Ralls should remove all its structures and items in the sites; (iv) Ralls, Sany and their employees and personnel were prohibited from accessing the sites of Project Companies; (v) Ralls was banned from selling the Project Companies and their assets to any third party; (vi) Ralls was required to report to CFIUS monthly of its compliance to the Presidential Order; and (vii) CFIUS was authorized to implement appropriate measures to verify Rall's compliance, including inspection of Rall's records, equipment, facilities and interviewing Rall's employees and officers.[81]

Ralls filed complaint against the CFIUS in September, 2012. It amended the complaint and joined the President into the lawsuit after the issuance of the Presidential Order.[82] The complaint alleges that (i) CFIUS exceeded its statutory authority; (ii) the Presidential Order was ultra vires; (iii) the Orders violated Rall's due process rights under the Fifth Amendment of the Constitution; and (iv) the Orders violated Rall's equal protection rights.[83] Defendants moved to dismiss Ralls's complaint for lack of subject matter jurisdiction.[84] In February, 2013, the District Court granted the motion to dismiss all claims except for Rall's due process claim against the President.[85] Neither the CFIUS nor the President disclosed to Ralls the evidence or information that the Orders relied upon.[86]

Ralls timely filed an appeal against District Court's dismissal of its due process challenge to the Presidential Order and its challenges to the CFIUS Order.[87] In July 2014, the Circuit Court reversed on the due process claim, and remanded it to the District Court, granting Ralls access to unclassified evidence that the President relied upon in issuing the Presidential Order.[88] The appellate division also found insufficient evidence to support the

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[78] Id.

[79] *Id.* at 79.

[80] *Id.* at 79-80.

[81] *Id.* at 80-81.

[82] *Id.* at 81.

[83] *Id.*

[84] *Id.* at 82.

[85] *Id.* at 99-100.

[86] Ralls, 758 F.3d 296, 325.

[87] *Id.* at 307.

[88] *Id.* at 325.

District Court's dismissal of Rall's challenge of CFIUS's Order on jurisdictional grounds, leaving the District Court to re-consider based on merits.[89]

In November, 2014, the District Court followed the instruction of the Circuit Court and ordered that (i) the Presidential Order remained effective; (ii) Ralls should have access to all unclassified material, record, factual findings and evidence of CFIUS and its recommendation to the President; (iii) the defendants must disclose all unprivileged material, and if they claim executive privilege; and (iv) there will be a subsequent proceeding for Ralls to respond to the disclosed information, and for the President to make the final decision.[90]

III. RALL'S PROCEDURAL DUE PROCESS CLAIMS

Rall's primary claim is that its rights to have due process in the national security review under the Fifth Amendment and Fourteenth Amendment were violated by CFIUS and the President.[91] This is the strongest constitutional argument for Ralls, and the Circuit Court did accept this argument. However, this Note will also address the substantive due process issue that Ralls could have raised in the courts, and argue that there could be a persuasive argument to protect property interest as a fundamental right under the Fourteenth Amendment.

A. Ralls's Property Rights

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be...deprived of life, liberty, or property, without due process of law."[92] Similarly, the Fourteenth Amendment to the United States Constitution prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law."[93] To make out a claim for a violation of procedural due process, the plaintiff has the burden of showing that (i) he had a life, liberty, or property interest protected by the Due Process Clause; (ii) he was deprived of this protected interest; and (iii) the state did not afford him adequate procedural rights prior to depriving him of the property interest.[94]

Whether a person has a "property" interest is traditionally a question of state law.[95] The Supreme Court has decided that if government officials may grant or deny a benefit at their discretion, then such a benefit is not an entitled right.[96] The question in *Ralls*, therefore, is whether or not the federal government had complete discretion in approving the purchase

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[89] *Id.*

[90] Ralls Corp. v. Comm. on Foreign Inv., 2014 U.S. Dist. LEXIS 177868, 10, 36 Int'l Trade Rep. (BNA) 1010 (D.D.C. Nov. 6, 2014).

[91] *See supra* note 84.

[92] U.S. CONST. amend. V.

[93] U.S. CONST. amend. XIV, §1.

[94] EJS Properties, LLC v. City of Toledo, 698 F.3d 845, 855 (6th Cir. 2012) (citing Braun v. Ann Arbor Charter Twp., 519 F.3d 564, 573 (6th Cir.), cert. denied, 555 U.S. 1062, 129 S.Ct. 628, 172 L.Ed.2d 639 (2008)).

[95] *Id.*; Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 756 (2005); Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

[96] *Town of Castle Rock*, 545 U.S. at 94.

of the wind farms. The District Court concluded that Ralls's state law property interests were not constitutionally protected because Ralls (i) acquired its property interests "subject to the known risk of a Presidential veto" and (ii) "waived the opportunity...to obtain a determination from CFIUS and the President before it entered into the transaction."[97] The Circuit Court rejected this decision, deciding that there is nothing "contingent" about Rall's property rights, and that the federal government cannot evade due process simply by announcing possible future deprivations.[98]

The Circuit Court further distinguished the procedure in *Ralls* from *Dames & Moore v. Regan*, which is the primary case relied upon by the federal government in its rebuttal.[99] In *Dames*, as the result of the negotiation with the Iranian government after the 1979 hostage crisis, President Carter nullified the previous Executive Orders issued by himself that attached all Iranian government's assets located within U.S.[100] The petitioner were private parties who had interests granted to by the courts in certain Iranian assets.[101] One of the central issues was whether such nullification violated the private parties' procedural property rights and the Supreme Court held that these rights were not because the property (frozen Iranian governmental assets in U.S. banks) at issue were special product created by congressional authorization and thus contingent upon the political change.[102] This rule is also followed by federal courts when there is other "explicit understanding" of contingency upon the property rights that the grantor may legally rescind the property.[103]

In *Ralls*, however, the property was acquired through normal state law course of business.[104] The acquisition of the wind farms, the Target Companies' real property, equipment, etc., is wholly governed by the Oregon state law.[105] Therefore, the normal due process for traditional property interest should apply.[106] Such reasoning is also supported by other cases in determination of "property rights" in procedural due process. For example, in *Bd. of Regents of State Colleges*, an assistant professor claims that the state university's decision to terminate his tenure violated his procedural due process rights; the court states that the nature of property interest in employment is arising from the statute regulate such employment.[107]

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[97] *Ralls*, 987 F.Supp.2d, at 27; *Ralls*, 2013 WL 5565499, at 7.

[98] *Ralls*, 758 F.3d 296, at 316.

[99] *Id.*; 453 U.S. 654 (1981).

[100] *Id.* at 654.

[101] *Id.*

[102] *Id.* at 673-674 (citing Propper v. Clark, 337 U.S. 472, 493 (1949)).

[103] Jackson v. Sedgwick Claims Mgmt. Servs., Inc., 731 F.3d 556, 576 (6th Cir. 2013) ("Federal due process law therefore recognizes a property interest in benefits that have not yet been awarded if the party asserting the property entitlement can "point to some policy, law, or mutually explicit understanding that both confers the benefits and limits the discretion of the [other party] to rescind the benefit."); R.S.W.W., Inc. v. City of Keego Harbor, 397 F.3d 427, 435 (6th Cir. 2005) (held that liquor license permitting certain open hours is contingent upon government's issurance); Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 756 (2005) (held that a benefit is not a right if the government can choose to grant or deny it); Bowers v. Whitman, 671 F.3d 905, 913 (9th Cir. 2012) (held that real property rights were not vested as it is contingent to regulate taking by eminent domain).

[104] *Ralls*, 758 F.3d 296, at 315.

[105] Or.Rev.Stat. Ann. § 63.239 ("A membership interest [in an Oregon LLC] is personal property.").

[106] *Ralls*, 758 F.3d 296, at 316-17.

[107] Bd. of Regents of State Colleges, 408 U.S. 564, at 578.

B. CFIUS's Insufficient Procedure

Since we determined that Ralls should have a protect property interest right, the next issue then is whether the government afforded sufficient procedure to such rights.[108] Ralls waived its rights before it entered into the transaction.[109] The government claims that Ralls waived its procedural due process rights by not seeking pre-approval from the government.[110] The district court agreed with this claim, stating that Ralls could have submitted written notice to CFIUS before entering into the transaction, but it did not do so and thus waived its rights.[111] The Supreme Court has established the rule that due process needs to at least provide *one* method or access for the private party in opposition to the government action.[112] However, the Supreme Court did not have a specific standard for political process as for what "process" is sufficient, so the lower courts would have to make decisions based on the nature of the cases, and engage in a balance of interest test.

The government asserted that it gave Ralls sufficient due process, because Ralls had the ability to submit written arguments, meet with CFIUS officials in person, answer CFIUS's questions, and obtain advance notice of CFIUS's intended action.[113] The Circuit Court rejected this argument based on its previous decisions in several Foreign Terrorist Organization (FTO) cases: *People's Mojahedin Org. of Iran v. U.S. Dep't of State*[114], *Chai v. Dep't of State*[115], and *Nat'l Council of Resistance of Iran v. Dep't of State*[116]. These cases established the standard that organizations have the right to be heard "at a meaningful time and in a meaningful manner" before being deprived of their due process rights and are entitled to be provided with unclassified evidence supporting the agency's decision.[117] The government argues that these cases are different from *Ralls* because in the FTO cases the decision would eventually become public record, whereas the CFIUS review would remain undisclosed to the public.[118] The Circuit Court correctly rejected this argument because due process itself does not require disclosure of confidential government records, but only unclassified information sufficiently showing evidence of a national security threat.[119] Furthermore, it is irrelevant whether the eventual outcome is public record here in *Ralls* because its property rights are already at stake; one could argue that this post-decision disclosure of unclassified information does not protect private rights in any way because the harm is already done, unless the government agrees to compensate, which, from general

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[108] Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999) ("...after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process").

[109] *Ralls*, 758 F.3d 296, at 316.

[110] *Id.*

[111] *Ralls*, 987 F. Supp. 2d 18, at 28.

[112] Bartlett v. Bowen, 816 F.2d 695, 703 (D.C. Cir. 1987) ("We have little doubt that such a "limitation on the jurisdiction of both state and federal courts to review the constitutionality of federal legislation ... would be [an] unconstitutional" infringement of due process.").

[113] *Ralls*, 758 F.3d 296, at 319.

[114] 613 F.3d 220, 227 (D.C. Cir. 2010).

[115] 466 F.3d 125, 132 (D.C. Cir. 2006).

[116] 251 F.3d 192, 208 (D.C. Cir. 2001).

[117] *Chai*, 466 F.3d 125, at 132.

[118] *Ralls*, 758 F.3d 296, at 319.

[119] Id.

experience, is highly impossible or extremely difficult when there is national security is involved.[120]

The government's final defense is the political question argument, which asserts that national security is beyond the authority of judicial review.[121] The political question exception to judicial review is applicable under six situations set forth by the Supreme Court in *Baker v. Carr*[122]: (i) under textually demonstrable constitutional commitment of the issue to a coordinate political department; (ii) a lack of judicially discoverable and manageable standards for resolving it; (iii) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; (iv) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (v) an unusual need for unquestioning adherence to a political decision already made; or (vi) the potential of embarrassment from multifarious pronouncements by various departments on one question.[123] This rule is generally followed, such as in *Vieth v. Jubelirer*, in which the Supreme Court held that political gerrymander was non-judiciable because of the lack of judicially determinable standard.[124] However, when the court has subject matter jurisdiction and the situation is not clear as for whether these standards are met, then the court is required to make an independent determination of the due process claim and set aside the political doctrine issue.[125] As the Second Circuit has pointed out in *Khulumani v. Barclay Nat. Bank Ltd.*, "[m]ere executive fiat cannot control the disposition of a case before a federal court. Our principle of separation of powers not only counsels the judiciary to conduct an independent inquiry—it requires us to do so."[126] More specifically, the *Baker* standard is further clarified by the *First Circuit in Ungar v. Palestine Liberation Org.*, in which the court held that merely because the controversy is about foreign affairs does not make it a political question.[127] This is also true for CFIUS's national security review. The courts have examined the issue of national security in many constitutional cases, such as *Toyosaburo Korematsu v. United States*, in which the court made a thorough independent determination of the wartime emergency situation, although the ultimate determination was that it was a political question.[128] Therefore, in *Ralls*, because there was determinable standard (such as the FTO cases regarding the disclosure of non-classified information), the doctrine of political question should not bar the court from reviewing the constitutionality of CFIUS's proceedings.[129]

Moreover, the *Baker* standard may be not absolute; after all, the courts have the ultimate say in what kind of the question it could answer under the Constitution.[130] The

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[120] *See id.* at 654; *see generally supra* note 31, 38, 39, 40, 41.

[121] *Ralls*, 758 F.3d 296, at 312.

[122] 369 U.S. 186, 209 (1962).

[123] Id.

[124] 541 U.S. 267 (2004).

[125] 504 F.3d 254, 292 (2d Cir. 2007).

[126] 504 F.3d 254, 292 (2d Cir. 2007).

[127] 402 F.3d 274, 280 (1st Cir. 2005).

[128] 323 U.S. 214, 216 (1944).

[129] *See supra* note 113-15.

[130] See Marbury v. Madison, 5 U.S. 137 (1803); Nat Stern, The Political Question Doctrine in State Courts, 35 S.C. L. REV. 405, 423 (1984); J. Fickes, Private Warriors and Political Questions: A Critical Analysis of the Political Question Doctrine's Application to Suits Against Private Military Contractors, 82 TEMP. L. REV. 525,

balance of the separation of power will be seriously undermined if the political question doctrine is not rigorously restricted.[131] As the Circuit Court stated in *Ralls*, "the judiciary is the ultimate interpreter of the Constitution [and,] in most instances [,] claims alleging its violation will rightly be heard by the courts."[132] There are many scholars who also propose a narrower political question exception to constitutional judicial review.[133] Therefore, such argument would be subject to a close analysis of the special facts and circumstances to the case, for the court to determine whether it can decide the case.[134]

In conclusion, both prongs of the procedural due process have been met: the property interest is vested in the state property law, the notice was insufficient for Ralls, and the political question exception does not apply. However, one should see that besides the notice and lack of disclosure of non-classified evidence, all the other parts of the CFIUS review procedure associated with the merits of the Orders, are completely outside the scope of judicial review.[135] It would be constitutional, and in fact very likely, for the government to only provide a small fraction of the information and mark the other as classified. Meanwhile, even if Ralls is given another chance to answer or persuade the President or the Committee (which is unlikely), the White House and its officers still have the say at the end of the day, and Ralls may very well have to bear the loss of its business decisions.

IV. THE SUBSTANTIVE DUE PROCESS CLAIM

The due process claim is purely procedural in the *Ralls* cases, as it is based on the Fifth Amendment of the Constitution.[136] However, Ralls could also have raised a substantive due process claim against the Orders. Substantive due process is a doctrine that allows courts to protect certain fundamental rights from government interference under the Fourteenth

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560 (2009) (proposes that private military contractor's liability should be judiciable even if they are associated with military actions approved by the executive branch); Shawn M. LaTourette, Global Climate Change: A Political Question?, 40 RUTGERS L.J. 219, 284 (2008) (proposes that environmental issues should not be barred from judicial review for political question doctrine, even if there is a lot of ambiguity as for the judicially determinable standard).

[131] *Baker*, 369 U.S. 186, at 210 ("The nonjusticiability of a political question is primarily a function of the separation of powers."); Scott Birkey, *Gordon v. Texas and the Prudential Approach to Political Questions*, 87 CAL. L. REV. 1265, 1266 (1999); Gordon v. State of Tex., 153 F.3d 190, 193 (5th Cir. 1998); Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard Tanker Dauntless Colocotronis, 577 F.2d 1196, 1203 (5th Cir. 1978); Elrod v. Burns, 427 U.S. 347, 351 (1976).

[132] *Ralls*, 758 F.3d 296, at 313 (citing El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 841 (D.C. Cir. 2010)).

[133] *See* Gwynne Skinner, *The Nonjusticiability of Palestine: Human Rights Litigation and the (Mis)application of the Political Question Doctrine*, 35 HASTINGS INT'L & COMP. L. REV. 99, 128 (2012); there are, however, opposing views that the executive branch of the government should have more power on constitutional issues, *see* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 320 (2002) ("The Constitution's structure and the limited powers of the judiciary require political actors to decide constitutional questions in many instances and, "[i]n such instances, they have the same authority to make this decision as the Supreme Court itself has in other instances.").

[134] *See* Lane v. Halliburton, 529 F.3d 548, 560 (5th Cir. 2008) (distinguished "direct challenge" to a government agency and other normal claims under tort law).

[135] *Ralls*, 758 F.3d 296, 319.

[136] *Id.*, at 302.

Amendment of the Constitution, regardless of fairness of the procedures used.[137] The Supreme Court has recognized that fundamental rights include (i) rights expressly addressed in the Bill of Rights; and (ii) traditional protected fundamental liberty rights, such as reproduction, family privacy, other personal interests and the rights of criminal defendants.[138] Apparently none of these categories apply to Ralls. The only substantive due process that Ralls could argue here is its property interests in the Project Companies and their assets.

The Supreme Court never formally extended the notion of "fundamental rights" to property rights, despite the constant advocacy of scholars to do so.[139] There are, however, some lower federal court cases opining that property rights should be protected by substantive due process.[140] Some scholars also advocate that certain type of property rights should be treated as fundamental and other property rights should receive more protection as well.[141] The government would claim that property rights are not fundamental rights protected under the Fourteenth Amendment. Some scholars believe that property rights are not fundamental because it serves to achieve other more fundamental rights such as wealth-maximization, personal privacy, or individual self-realization, and that it is not a traditional type of rights that has been long recognized even out of the courts.[142]

CFIUS's other argument would be that even if Rall's property interest is a fundamental right, the government will still have a compelling interest in protecting national security, thus overrule the substantive due process.[143] This would be similar to our previous analysis in the procedural due process, where we concluded that the political question doctrine does not apply. Here, although the government has a compelling interest in national security, such an interest itself does not automatically overrule the court's assessment of

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[137] Rosalie Berger Levinson, Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process, 16 U. DAYTON L. REV. 313 (1991); Rosalie Berger Levinson, Reining in Abuses of Executive Power Through Substantive Due Process, 60 Fla. L. Rev. 519 (2008); Daniels v. Williams, 474 U.S. 327, 331 (1986).

[138] *See* Moore v. City of E. Cleveland, 431 U.S. 494, 499-500 (1977); Roe v. Wade, 410 U.S. 113, 163 (1973); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965); *see also* Lisa A., *The Reemergence of Substantive Due Process As A Constitutional Tort: Theory, Proof, and Damages*, 24 NEW ENG. L. REV. 1129, 1130 (1990).

[139] Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555 (1997) (*citing* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 223 (1985) (assuming for the sake of decision the existence of a property interest in being a medical student and suggesting that arbitrary or irrational abridgment of that property interest by the state would violate substantive due process)); Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 199 (1979) (per curiam) (holding that in the absence of a fundamental property or liberty interest, a state need only act rationally to satisfy the requirements of substantive due process); *cf.* Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1410-14 (9th Cir. 1989) (holding that substantive due process protects property interests, whether or not "fundamental," from arbitrary government action), *cert. denied*, 494 U.S. 1016 (1990), overruled by Armendariz v. Penman, 75 F.3d 1311, 1326 (9th Cir. 1996) (en banc).

[140] *See* Sinaloa Lake Owners Ass'n, 882 F.2d 1398.

[141] Krotoszynski, Jr., *supra* note 114, at 560.

[142] Gregory S. Alexander, *Property as a Fundamental Constitutional Right? The German Example*, CORNELL L. FACULTY WORKING PAPERS 7 (Mar. 2003), http://scholarship.law.cornell.edu/clsops_papers/4; *see also* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) ("[O]ur established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition...").

[143] *NCRI*, 251 F.3d 192, at 207 ("...the Secretary rightly reminds us that 'no governmental interest is more compelling than the security of the nation.'").

substantive due process.[144] Furthermore, CFIUS also has to prove that the method it used to achieve this goal comprises of the least restrictive means.[145] It is hard to argue that outright banning of Ralls's transactions is "least restrictive". Therefore, Ralls would have a good likelihood to prevail on the compelling interest argument if the court recognizes its property rights as fundamental.

To conclude, Ralls's procedural due process rights in the Target Companies are clearly supported by the case law. The substantive due process claim, however, would depend on the court's wiliness to recognize corporate property rights as a "fundamental right". Although it is unlikely for the court to make such decision at this point, once this right is recognized, foreign (and domestic) investors would have much greater constitutional protection against the government.

V. THE EQUAL PROTECTION CLAIM

The equal protection argument is another constitutional challenge that Ralls could have used. The Constitution provides that the states cannot deny any person equal protection of the law and through the incorporation of the Fifth Amendment this provision also applies to the federal government.[146] Here Ralls could argue that CFIUS and the President discriminated against it based on national origin, or alienage, by depriving its purchase of property without providing adequate notification and justified procedures.

The District Court dismissed Rall's equal protection challenge to the Presidential Order, finding that such challenge, along with Rall's ultra vires claim, is barred by the finality clause of section 721.[147] Ralls did not appeal this decision.[148] Indeed, federal and state governments' discrimination against foreign corporations has received much less attention from the judicial realm than the discrimination against individual alien natural persons.[149] Nevertheless, this section will discuss the District Court's holding on this issue and explore possible counter-arguments for Ralls should it have appealed the issue to the higher court.

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[144] Chavez v. Martinez, 538 U.S. 760, 775 (2003) ("[T]he Due Process Clause also protects certain 'fundamental liberty interests' from deprivation by the government ... unless the infringement is narrowly tailored to serve a compelling state interest. Only fundamental rights and liberties which are 'deeply rooted in this Nation's history and tradition' ... qualify for such protection.").

[145] Olsen v. Nebraska ex rel. Western Reference & Bond Association, Inc., 313 U.S. 236, 246-47 (1941). *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963); Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949); *cf.* Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 48 (1966) ("We cannot say that the legislature acted unconstitutionally when it determined that only by imposing the relatively drastic 'no higher than the lowest price' requirement of § 9 could the grip of the liquor distillers on New York liquor prices be loosened.").

[146] U.S. Const. amend. XIV, S 1, cl. 2.

[147] *Ralls*, 926 F. Supp. 2d 71, 92.

[148] *Ralls*, 758 F.3d 296, 307.

[149] Hartwin Bungert, Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for A Quasi-Suspect Classification, 59 MO. L. REV. 569, 572 (1994).

The Supreme Court has established three levels of judicial review for equal protection claims: rational basis, strict scrutiny, and intermediate scrutiny, and this Note will discuss their applicability to *Ralls* below.[150]

A. Equal Protection for Foreign Corporations or Domestic Corporations Controlled By Aliens

For equal protection claims, a plaintiff would prefer the court to apply strict scrutiny or intermediate scrutiny, as under rational basis review the court usually recognizes government's great discretion and it is virtually impossible for the plaintiff to prevail.[151] Strict scrutiny and intermediate scrutiny require that the alleged discrimination (i) be based on a suspect class or (ii) breach certain fundamental right.[152] We will come back to discuss the fundamental rights argument later in this article. Here, we first inquire the possibility for Ralls to bring a claim under a suspect class, which it did not allege in its brief.[153] The most feasible suspect classification here for Ralls is alienage. Therefore, the first question is whether Ralls can be determined as a protected "alien" under the Constitution.[154]

The notion of "nationality," "citizenship," or "alienage" for corporations was denied by the Supreme Court historically.[155] However, modern U.S. law has firmly accepted the concept of corporate nationality.[156] In, *Pembina Mining Company v. Pennsylvania*, the Supreme Court decided that equal protection applies not only to U.S. citizens, but to aliens and alien juridical persons (corporations) as well[157]. The idea that corporations (at least closely held companies) have same constructional rights as individuals is further affirmed by the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*[158] In *Hobby Lobby*, the Supreme

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[150] 16B C.J.S. Constitutional Law § 1140; Although there is also minority view that for equal protection there are only two tiers of scrutiny: rational basis and heighten scrutiny (which includes strict and intermediate), *see* Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 743 (2014).

[151] Richard B. Saphire, Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc., 88 KY. L.J. 591, 599 (2000).

[152] *Id.*, at 610; Benjamin S. Harner, *Cloaking A Challenge to Missouri's Marriage Amendment with A Challenge for Survivor Benefits*, 77 MO. L. REV. 1201, 1208 (2012) ("As with fundamental rights and suspect classes under the equal protection clause, statutes affecting fundamental rights under the substantive due process clause receive strict scrutiny."); BLACK'S LAW DICTIONARY (9th ed. 2009) (defining the "rational basis test" as "[t]he criterion for judicial analysis of a statute that does not implicate a fundamental right or a suspect or quasi-suspect classification under the Due Process or Equal Protection Clause...).

[153] *Ralls*, 926 F. Supp. 2d 71, 92.

[154] The other existing suspected groups, such as discrimination based on race, national origin, religion, etc., do not apply to Ralls and is also unlikely to apply to any other foreign companies that may challenge CFIUS decisions.

[155] See Carl J. Mayer, Personalizing the Impersonal: Corporations and the Bill of Rights, 41 HASTINGS L.J. 577, 578 (1990).

[156] Detlev F. Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise*, 74 HARV. L. REV. 1489, 1524-26 (1961); Providence Bank v. Billings, 29 U.S. 514 (1830) (Chief Justice Marshall opnied: "The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men.").

[157] 125 U.S. 181, 188 (1888).

[158] 134 S. Ct. 2751, 2768 (2014). Note that Hobby Lobby is decided after Ralls, and this may be the reason why Ralls did not allege suspect classification in its 2013 district court case.

Court held that "persons" protected by the Religion Clause of the Constitution include closely held corporations.[159] Similarly, equal protection for "alien persons" should apply to foreign corporations as well. We can therefore conclude that foreign corporations are able to allege suspected class under the equal protection.

The second question (and possible objection of defendant) pertains to the fact, however, that Ralls is not a foreign corporation; it is incorporated in the State of Delaware.[160] It is better understood as a domestic corporation controlled by aliens. There are several arguments for the application of at least a rational basis and intermediate scrutiny for such corporations. First, the court may view the nationality of corporations by their shareholders, rather than its location of incorporation.[161] Second, the court may review equal protection based on certain key individuals relevant to the facts of the case, not the corporations themselves.[162] Third, there is scholarly view that if the court does not apply the same standard to individual aliens, they may choose to form domestic corporations to circumvent this and get same level of protection.[163]

In summary, this article argues that because Ralls is a domestic corporation controlled by foreign aliens, and because the court and the government expressly distinguished Ralls from other domestic corporations, Ralls should be viewed as at least a quasi-suspect class and should be subject to at least intermediate standard of review. However, in the next section, we will start from the district court's rational basis analysis.

B. Rational Basis Test

We start from this test used by the district court in its decision.[164] In a rational basis test, the government has great discretion in its action, and is only overruled by the court when such action is viewed as "irrational" or "arbitrary".[165] The courts also give great deference to statutes, regulations and legislative materials; if there are no expressly stated arguments from the government, the courts will further interpret the implied intent of the legislative body.[166]

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[159] Id.

[160] *Ralls*, 926 F. Supp. 2d 71, 75.

[161] See Fred L. Morrison, Limitations on Alien Investment in American Real Estate, 60 MINN. L. REV. 621, 633-644 (1976); see also Michael Kuzow, Comment, Corporate Aliens and Oklahoma's Alien Landownership Restrictions, 16 TULSA L.J. 528, 542 (1981); Santa Clara County v. Southern Pacific Railroad, 118 U.S. 394 (1886) (Court stated that no doubt that the Equal Protection Clause was applicable to corporations and thus would not discuss the question).

[162] *See* Kuzoe, *supra* note 133, at 542.

[163] Samuel R. Berger & Mark S. McConnell, Limitations Imposed by the Constitution and Treaties of the United States on the Regulation of Foreign Investment in Manual of Foreign Investment in the United States 9 (J. Eugene Marans et al., eds., 1984 & Supp.)

[164] *Ralls*, 926 F. Supp. 2d 71, 92.

[165] *See general*, Gusewelle v. City of Wood River, 374 F.3d 569 (7th Cir. 2004); Brian B. ex rel. Lois B. v. Com. of Pennsylvania Dept. of Educ., 230 F.3d 582, 148 ED. LAW REP. 98 (3d Cir. 2000).

[166] *See* David B. Edwards, *Out of the Mouth of States: Deference to State Action Finding Effect in Federal Law*, 63 N.Y.U. ANN. SURV. AM. L. 429, 448 (2008) ("[rational basis] requires that courts examine state legislation that finds effect outside its usual bounds..."); United States v. Sharpnack, 355 U.S. 286, 293 (1958).

In *Ralls*, the District Court cited the finality provision of section 217 and held that the rule precisely barred judicial review on the Presidential Order.[167] The statute provides that the Presidential Order is excluded from courts' jurisdiction if (i) there is credible evidence that leads the President to believe foreign control may impair national security and (ii) provisions of the law other than the statute itself and the International Emergency Economics Power Act do not provide adequate authority for the President to protect the national security.[168] The statute also provides a long laundry list of factors that the President has to consider when making the determinations, with a catch-all provision stating "such other factors as the President or the Committee may determine to be appropriate".[169]

The district court also found that "historical" and "structural" factors in the ultra vires analysis showed the same congressional intent to preclude judicial examination of the CFIUS reviewing process.[170] The court did not specify which historical or structural factors showed such intent, but we can assume from the analysis in the ultra vires section of the decision. The District Court relied mainly on *Dart v. United States*[171], in which the Supreme Court upheld the Secretary of the State's overruling of an administrative law judge's decision.[172] However, *Dart* is fundamentally different from *Ralls* in the statute language. The statute in *Dart*, section 13 of Export Administration Act (EAA) provides that: "The Secretary shall, in a written order, affirm, modify, or vacate the decision of the administrative law judge within 30 days after receiving the decision. The order of the Secretary shall be final and is not subject to judicial review."[173]

We can see that the language of EAA is unconditional in precluding judicial review. On the other hand, the statute at issue in Ralls provides that: "The actions of the President under paragraph (1) of subsection (d) of this section and the findings of the President under paragraph (4) of subsection (d) of this section shall not be subject to judicial review." [174]

This statute clearly requires that a preclusion of judicial review is limited to the executive order under certain conditions, here namely the paragraph (4) of the subsection (d), which provides that the President needs (i) credible evidence of foreign interest that may impair national security, and (ii) judgment of law, *other than this section and the International Emergency Economic Powers Act*, in the view of the President, would not provide adequate or appropriate authority for the President to protect the national interest (emphasis added).[175] Note that at least one could argue that the judgment of law needs to undergo judicial review of section (d) itself and the International Economic Powers Act (IEEPA).[176] The latter is completely ignored by the District Court in *Ralls*. Therefore, the

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[167] 50 U.S.C. § 2170(e) (2012).

[168] *Id.*

[169] Id.

[170] *Ralls*, 926 F. Supp. 2d 71, 100.

[171] *Dart v. United States*, 848 F.2d 217, 227 (D.C. Cir. 1988).

[172] Id.

[173] 50 U.S.C. § 2412(c) (Supp. III 1985).

[174] 50 U.S.C.A. § 2170.

[175] Id.

[176] The former is a circular statement; it sets preemption requiring reviewing itself. However, the second requirement, apparently requires the court to review the IEEPA.

court at least erred in failing to review the possible preemption of IEEPA required by the statute.

The next argument addressed by the District Court is the separation of power argument. The court claimed that this equal protection argument asked the court to review the "wisdom" of the Presidential Order and that was not a purely legal issue.[177] However, this argument is flawed, as nearly all constitutional questions require the court to review the government's policies.[178] Throughout the history of constitutional law, we can find that almost all important cases are tied up closely with political questions, from slavery, segregation, birth rights, and other issues.[179] The court should not just defer to the government without even looking at the basic rationale and logic of the government's decisions; as such attitude will result in removal of safeguard of people's fundamental rights. Even under the rational basis review, the court should still touch the merits of the case.[180]

Finally, the District Court tried to distinguish Ralls' equal protection claim from its ultra vires challenge to the finality clause, arguing that the question is not about the statute itself but the content of the Presidential Order.[181] However, if we look to the statute, we can find that the statute itself requires the court to make a preliminary determination of whether the President's act is within the bounds of the statute.[182] Therefore, it is not possible for parties to challenge the statute without referring to the executive branch's decision, even under the rational basis review. Thus, as the court conceded, there must be higher standard of burden of proof for the government to strip the court's jurisdiction of the rational basis test.[183]

In conclusion, even the rational basis test is the most unlikely-to-prevail argument for Ralls because the courts usually defer heavily to the government but the District Court nevertheless failed to adequately follow the requirement of the statute and failed to see the difference between *Dart* and this case.

C. Strict Scrutiny Test

The second test is the strict scrutiny test. The government can only pass under this test if it has a compelling government interest and the method used to achieve this interest is the least burdensome to the private party.[184] It is applied when (i) the government uses

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[177] *Ralls*, 926 F. Supp. 2d 71, 91.

[178] *See* Plaut v. Spendthrift Farm, 514 U.S. 211, 242 (1995); *see also* Service v. Chadha, 462 U.S. 919, 960-62 (1983). The concurring opinion of these two cases pointed out that the Legislature Branch of the government cannot be trusted to impose burden on particularly identified individuals; such determination must be made by the judicial branch for its political neutrality. *Id.*

[179] *See general*, et. al., Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); Reed v. Reed, 404 U.S. 71 (1971); Lawrence v. Texas, 539 U.S. 558 (2003); Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

[180] See William D. Araiza, The Trouble With Robertson: Equal Protection, The Separation Of Powers, And The Line Between Statutory Amendmentand Statutory Interpretation, 48 CATH. U.L. REV. 1055, 1137 (1999).

[181] *Ralls*, 926 F. Supp. 2d 71, 82-83.

[182] 50 U.S.C. app. § 2170 (2012).

[183] *Ralls*, 926 F. Supp. 2d 71, 93.

[184] *See general*, Gratz v. Bollinger, 539 U.S. 244 (2003); Adarand, 515 U.S. at 227 (Noting that both of these requirements need to be satisfied. In Regents of the Univ. of Cal. v. Bakke, the Supreme Court held that (i)

suspect classification showing discriminatory intent, such as those based on race, national origin or religion[185], or (ii) the government's act impairs fundamental rights such as right to vote or access to courts.[186] Thus for Ralls (and other foreign investors who would like to challenge CFIUS on constitutional grounds) to persuade the court to apply this test, it needs to argue that either the corporation falls into a suspect class or that the government harmed some fundamental rights.

First, Ralls could argue that it falls into a suspect class. The Supreme Court has defined a suspect class as a group that "suffers from the traditional indicia of suspectness: whether a class is saddled with disabilities, whether it has been subject to a history of unequal treatment, whether the group has been relegated to positions of political powerlessness as to command extraordinary protection from the majoritarian political process."[187] Ralls may argue that its owners are within the class of alienage. The courts and the government in the Ralls cases themselves have repeatedly described Ralls Corporation as "a company held by two Chinese nationals", thus impliedly distinguished Ralls from other normal U.S. corporations in both political and judicial review.[188]

However, Ralls did not make such allegation[189]; indeed, there are three major difficulties to persuade the court to recognize Ralls as being in the same level of scrutiny as unprotected aliens. First, the government may allege that federal government is inherently entitled to the power to regulate foreign affairs by the Constitution.[190] The Supreme Court has long affirmed the rule that states regulations over aliens are under strict scrutiny review, while federal regulations are usually reviewed under rational basis.[191] Exceptions include many cases where the Supreme Court held that undocumented aliens were a suspect class, but for state government only.[192] Second, the alienage in Ralls is indirect. As previously mentioned, Ralls Corp. is a domestic corporation itself; the "alienage" in this case is indirectly associated with the owners and their control over the company. The alien owners are Dawei Duan and Jialiang Wu. Duan, do not have any claims themselves.[193] In contrast, all the previous Supreme Court holdings are focused on alien individuals and it will take an extra step for the court to "pierce the corporate veil" here. Finally, the government may argue that even if strict

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there was a compelling government interest in benefiting racial minority in high education, and (ii) the program was closely tailored because race is not the only one factors considered. 438 U.S. 265, 265 (1978)).

[185] *See general* Korab v. Fink, 748 F.3d 875, 891 (9th Cir. Haw. 2014). This test, however, will not be applied simply because a law is, in its effect, prejudicial against a suspect classification or regarding a fundamental right. Rather, this high standard is intended to be a means by which particularly invidious or prejudicial discriminatory purposes, if it exists, can be brought to light. *See also* U.S. v. Carolene Products Co., 304 U.S. 144, 153 (1938).

[186] *Id.*; Skinner v. State of Okl. ex rel. Williamson, 316 U.S. 535, 539 (1942).

[187] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 19 (1973).

[188] *See general Ralls* 926 F. Supp. 2d 71 and *Ralls* 758 F.3d 296.

[189] *Ralls*, 926 F. Supp. 2d 71, 92.

[190] See Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs, 81 TEX. L. REV. 1, 284 (2002)

[191] *Korab*, 748 F.3d 875, at 882.

[192] *See general*, Plyler v. Doe, 457 U.S. 202, 250 (1982); Bolanos v. Kiley, 509 F.2d 1023, 1025 (2nd Cir. 1975).

[193] *Ralls*, 758 F.3d 296 at 304.

scrutiny applies, the government still has a compelling interest in national security and its review is narrowly tailored to the specific case.[194]

Alternatively, Ralls may argue that a fundamental right is violated by CFIUS and the Presidential Order.[195] Similarly to the previously discussed due process issue, here the most feasible fundamental right would be Ralls; property. However, because there is no modern Supreme Court case holding that property rights are a fundamental substantive due process right, this argument is unlikely to prevail.

In conclusion, although foreign corporations or domestic corporations controlled by aliens could argue that they belong to the suspect class of alienage under equal protection and are entitled to strict scrutiny test, because the federal government has the plenary power in foreign affairs, it is unlikely for the courts to adopt this standard.

D. Intermediate Scrutiny

The last equal protection test is intermediate scrutiny, or sometimes referred to as heightened scrutiny.[196] Under this standard, the challenged law or government action must further an important government interest by means that are substantially related to that interest.[197] This standard has been used by the Supreme Court when dealing with gender discrimination, legitimacy, free speech, and other rights that are "important but not fundamental".[198] This article proposes that this standard should be adopted by the court in *Ralls*; as discussed above, the equal protection rights of foreign corporations or corporations controlled by aliens are hard to justify as fundamental but are nevertheless too important to completely leave to the government's discretion.

Again, because the primary argument of CFIUS and the President (which was accepted by the district court) is the government's authority in national security, we first examine this argument under intermediate scrutiny.[199] Some scholars think that the objective of the protection of national interests does not meet the requirement of intermediate or heightened scrutiny, as it is ultimately similar to the concept of protection against alien control.[200] Such concept, they argue, is pure protectionism and lacks rational relationship between the criterion of differentiation and the goal of differentiation. This standard, they allege, also lacks the specification and narrowness required by the intermediate scrutiny and

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[194] *See general*, Hirabayashi v. United States, 320 U.S. 81 (1943) and Korematsu v. United States, 323 U.S. 214 (1944) (In these two cases, the Supreme Court held that even racial classification could be justified by national security at the time of World War II. However, Ralls may argue that these two cases should be distinguished, as the emergency international situation (time of war) does not exist here).

[195] Berger, *supra* note 160.

[196] 124 L. Ed. 2d 703; Constructors v. Pena, 515 U.S. 200, 237 (1995).

[197] Clark v. Jeter, 486 U.S. 456, 461 (1988).

[198] United States v. Virginia, 518 U.S. 515, 533 (1996); Ramos v. Town of Vernon, 331 F. 3d 315, 321 (2d. Cir. 2003).

[199] *Ralls*, F. Supp. 2d 71, at 93.

[200] In Graham v. Richardson, 403 U.S. 365, 375 (1971), the Supreme Court refused to acknowledge the special public interest of preferable treatment of state citizens in allocating rare resources proffered for state discriminations against alien natural persons. Recently, the Supreme Court stated even under the rational basis test that an openly declared state policy to discriminate by the incriminated regulations against alien persons, particularly corporations, can never alone be a reasonable justification for differentiated treatment. *Id.*

is therefore over-inclusive. Moreover, corporations controlled by U.S. citizens may also impair U.S. national security. Lastly, the differentiation is more appropriate when there is a clear dangerous circumstance (such as time of war[201] or against terrorism) whereas the current international relationship with countries like China does not provide enough support for such argument.

Another possible argument from the government is to protect certain key industries, which in Ralls would be the energy industry. Historically, there are certain industries, such as weapon manufacturing, that are excluded from the judicial equal protection, and restrictions on alien participation in domestic corporations have been permitted.[202] For example, the Supreme Court has permitted protection against foreign corporations in banking industry,[203] telecommunications,[204] and insurance.[205] Nevertheless, under intermediate scrutiny, these rules still have to be closely tailored to achieve specific government goals.[206] In *Ralls*, Ralls Corp. may argue that CFIUS's review is not specific enough to cover the wind energy industry, as many other wind farms had already existed before and the government gave no explanation why Ralls is particularly a threat to the U.S. electricity generating industry.[207]

Finally, there is economic policy argument for CFIUS and the President. They may argue that because Ralls is controlled by aliens, their operation may conflict certain U.S. policy, such as an embargo against certain countries, or prohibition of certain valuable technologies required by the federal government.[208] However, there are also counter-arguments that other existing laws, such as the Export Administration Act of 1979 and U.S. export controls in general, have already placed severe restrictions and control on the exportation for either domestic or foreign corporations in U.S.[209] Therefore, economic policy argument would not justify the extra burden and political interventions on normal corporate activities such as Ralls' acquisitions.

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[201] *See* Shipping Act of 1916 S 2, 39 Stat. 728, 729 (1917); 46 U.S.C. S 802 (Requires seventy-five per cent of the shares must be owned by U.S. persons and the president or chief executive officer as well as chairman of board of directors must be U.S. citizens). These regulations are motivated by concerns of 'national security.' They were introduced during or after World War I, when people had realized that during the time of war or a national emergency the merchant marine signifies an essential support of the navy, therefore alien control of the merchant fleet would present a threat to national security. *Id.*

[202] According to Merchant Marine Act of 1920 section 27, merchant vessels being operated between two points in the United States, directly or via a foreign port, must be owned by persons who are either U.S. citizens or U.S. corporations. Merchant Marine Act, 1920., 41 Stat. 988 (Pub. L. No. 66-261), Section 27, codified as amended at 46 U.S.C. section 883.

[203] Northeast Bancorp, Inc. v. Board of Governors, 472 U.S. 159, 178 (1985).

[204] Alien persons may not own more than 20 per cent of the shares of Communications Satellite Corporation, 47 U.S.C. S 734(d) (West 1991 & 1993 Supp.); *See* Campos v. FCC, 650 F.2d 890 (7th Cir. 1981), in which the Seventh Circuit applied rational basis to justify federal government's regulation.

[205] United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

[206] Lehr v. Robertson, 463 U.S. 248, 266 (1983).

[207] *Ralls*, 758 F.3d 296, at 325 ("Ralls's complaint alleges that Oregon Windfarms, LLC, has developed nine other windfarm projects (Echo Projects) in the same general vicinity as the Butter Creek projects and that all nine use foreign-made wind turbines. According to Ralls, seven turbines used by the Echo Projects are located within the restricted airspace and one of the nine Echo Projects—Pacific Canyon—is currently owned by foreign investors.")

[208] John C. Reitz, The Rising Tide of Reverse Flow: Would a Legislative Breakwater Violate U.S. Treaty Commitments?, 72 MICH. L .REV. 551, 555-556 (1974).

[209] Bungert, *supra* note 149, at 646.

E. Summary of Equal Protection

The District Court simply erred by only considering the rational basis test. The discrimination against corporations controlled by aliens, should have at least received intermediate or heightened scrutiny. Under these two tests, the court cannot just refuse to review any substantive part of the CFIUS and Presidential Order. It is impossible to determine the constitutionality of a government action without looking into its basic evidence and rationale. Here, because the government did not provide any rational evidence at all, it is inappropriate for the court to defer to the government's national security argument; any other corporations controlled by U.S. citizens may equally and similarly impair national security.

VI. THE PRESIDENT'S EXECUTIVE PRIVILEGE CLAIM

The government asserted executive privilege for the President's executive order's constitutionality, but was remanded by the Circuit Court as this argument was not raised in the government's brief.[210]

The Supreme Court first expressly acknowledged executive privilege as a prerogative of the President of United States in *United States v. Nixon* (however the court held in this case that the executive privilege in confidentiality of communication was outweighed by "demonstrated, specific evidence in a pending criminal trial").[211] Before *Nixon*, historically, the presidents also had invoked such privilege when having a conflict with the Congress.[212] Based on the separation of powers doctrine, courts generally recognize that the President needs some degree of secrecy in order to perform executive duties, including advice and information from executive subordinates and advisers. [213]

The Supreme Court particularly recognized that one applicable situation of executive privilege was "need to protect military, diplomatic, or sensitive national security secrets" and the President should be given "utmost deference" for these purposes.[214] Under these situations, the President is exempt to disclose any related information to the Congress.[215] Analogously, in *Ralls*, the President may assert executive privilege based on the fact the review is based on national security and military factors are involved.[216]

Ralls' counter argument against the national security claim could be that the President's allegation of national security is not supported by any evidence, and thus cannot be verified.[217] By only looking at the evidence presented in the *Ralls* cases, one cannot find

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[210] *Ralls*, 758 F.3d 296, at 320-321.

[211] 418 U.S. 683, 706 (1974); Nixon v. Sirica, 487 F.2d 700, 731 (D.C. Cir. 1973) (MacKinnon, J., dissenting) (listing twenty-seven instances of presidents refusing to comply with congressional requests for information).

[212] *Id.*; *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress,* DEP'T OF JUSTICE 751-81 (Dec. 14, 1982) (George Washington invoked executive privilege against Congress's investigation), http://www.justice.gov/sites/default/files/olc/opinions/1982/12/31/op-olc-v006-p0751.pdf.

[213] Randall K. Miller, Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege, 81 MINN. L. REV. 631, 692; Nixon, 418 U.S. at 705.

[214] *Nixon*, 418 U.S. 683, at 706.

[215] United States v. Reynolds, 345 U.S. 1, 10 (1953).

[216] *Ralls*, 926 F. Supp. 2d 71, at 76.

[217] Phillip J. Cooper, By Order of the President: The Use & Abuse of Executive Direct Action 29 (2002).

any necessary concerns of national security in connection with the purchase of the wind farms. The only relevant fact is that the wind farms are geographically close to a navy base; however, as Ralls pointed out, there are several existing windfarms owned by foreign companies located even closer to the same military base.[218] There is also no evidence showing that there is secret military technology or other sensitive intellectual property involved. Finally, Ralls Corp.'s parent company, Sany, is a privately owned company in China, and is not affiliated or controlled by the Chinese government.[219] If the court is willing to examine the merits of the national security issue, it should find that the present evidence is not enough to justify the President's allegations.

However, as the Circuit Court pointed out, absent proof of the contrary, the judicial branches are often not in the position to assess whether the President's findings are based on credible evidence, or whether the findings are rational at all.[220] It seems that the courts want to withdraw from the discussion entirely when the President waves the "national security" flag. Unless the other branch of the government (e.g. the Congress) is also involved, or there are some serious issues such as criminal charges against the President, the courts sometimes do not even touch the merits.[221] Furthermore, as this article discussed earlier, the District Court also held that the section 721 finality clause provided that the President's action was excluded from judicial review.[222]

Even if the court thinks that the President has met the above-mentioned standards for executive privilege, there is still an exception: legitimate needs of the judicial process may outweigh Presidential privilege. [223] But again this exception is "absent a claim of need to protect military, diplomatic, or sensitive national security secrets"; so the question will eventually be dragged back to whether there is a genuine issue of national security.

Another perspective of executive privilege is deliberate process privilege, which allows the government to withhold documents and other materials that would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." There are two requirements for this privilege: it has to be "deliberate" and "procedural" and the purpose is to prevent "injury to the quality of agency's decisions."

The "deliberative process" privilege is central among the privileges protected by Exemption 5. However, as with all exemptions under FOIA, the deliberative process privilege must be construed as narrowly as is consistent with efficient government operation.[224] It will

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[218] *Ralls,* 926 F. Supp. 2d 71, at 100.

[219] Nin-Hai Tseng, *Sany's Bold U.S. Move*, FORTUNE.COM (June 17, 2013), http://fortune.com/2013/06/17/sanys-bold-u-s-move (states that Sany is a private company, though benefited from the government's investment).

[220] *Ralls,* 758 F.3d 296, at 311.

[221] Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069, 1126 (1999); *Nixon*, 418 U.S. 683, at 713 ("When the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.").

[222] *Ralls*, 926 F. Supp. 2d 71, at 87-88.

[223] *Nixon*, 418 U.S. 683, at 707.

[224] Army Times Pub. Co. v. Dep't of Air Force, 998 F.2d 1067, 1069 (D.C. Cir. 1993).

also be doubtful if Ralls will raise a counter-argument against executive privilege under the FOIA statute. The ultimate goal of Ralls at this point is at least preserve its property that has already been purchased, because furthering the investment would probably be met by more obstacles from the government, which is unpredictable.

VII. CONLCUSION

The first conclusion can be drawn from the *Ralls* cases is that, after all, the court still recognizes a basic degree of constitutional protection for private property, even if the owners of the property are non-citizens. The baseline is that the government should disclose unclassified information that it relied on to prohibit foreign acquisitions. However, this is not to say that Ralls' property in Oregon is 100% secure. The government could (i) claim that it relied on some classified evidence that could not be disclosed to the public and (ii) assert executive privilege as the Presidential Order was made based on national security. As this Note discussed, it is likely for the court to grant these two claims, although Ralls may be able to negotiate on some of the terms of the Presidential Order to mitigate its loss from the termination of the transaction.

Second, inferring from Ralls' lengthy litigation process, other foreign investors, or potential investors should realize that the judicial protection of FDI in the United States is not so secure; it is constantly exposed to the risk of political review and may be taken by the government giving unclear explanations or even no evidence at all. Therefore, for self-protection, the investors should (i) consider other ways to structure their investment in U.S., such as forming an off-shore venture with U.S. entities and (ii) ensure sufficient communication with CFIUS before making any FDI decisions, and avoid investment or acquisition before CFIUS approval to avoid potential losses. From a business point of view these two strategies both have drawbacks. The complex structuring of business organization may increase the cost of the business and make small or medium-sized FDI infeasible, and the long time period and uncertainty of pre-investment CFIUS disclosing procedure may increase time and opportunity cost to the investment.

From the government perspective, CFIUS and the Congress may re-consider their review process on foreign investors. In *Ralls*, the CFIUS and the President could have provided at least some of the information or evidence for its decision. If the CFIUS and the President do not possess any valid evidence and rational basis at all, then they should not be permitted to intervene with Ralls' acquisition of the Project Companies. After all, Ralls' business operation will be under close and complete regulation, inspection and surveillance in U.S. territory, and the government should have reasonable administrative capacity to ensure that normal business such as wind farms do not conflict with public policy or military activity, such as the operation of the Navy base in *Ralls*.

Outside of the judicial realm, the regulators must also consider economics, politics, and international relations when imposing restrictions on foreign investment. The government must realize that harsh regulations on FDI may invoke retaliation from particularly discriminated countries.[225] For example, China is now requiring U.S. technology companies

[225] W. Robert Shearer, The Exon-Florio Amendment: Protectionist Legislation Susceptible to Abuse, 30 HOUS. L. REV. 1729, 1769 (1993); Au, supra note 67.

to turn over source code, submit to invasive audits and build backdoors in the hardware and software.[226] In November, 2014, the Chinese government also prohibited several new industries from foreign investments, including production of genetically modified seeds, processing of petroleum and coking, Chinese legal consulting, etc.[227] Such negative responses may in return make U.S. government to set more restrictions on Chinese investments and this vicious circle of protectionism and hostility will only hurt both countries' economic and political interests.

Finally, on the domestic side, the power of the President and the executive branch to intrusively interfere with private business operation may also cause harmful effects on the national economy. Today's U.S. economy is closely tied with foreign investors and international capital.[228] The modern complexity of corporate structure will also make the distinction between "domestic" and "foreign" obscure, and if the government is to have broad power to halt any transaction based on national security reasons, it will inevitably harm the private economy. Therefore, a more transparent and friendly system of national security is recommended for non-sensitive industries, and those sensitive industries should be given clear guidelines of determination by the Congress for the courts to determine the legitimacy of the executive actions.

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[226] Paul Mozur, *New Rules in China Upset Western Tech Companies*, N.Y. TIMES (Jan. 28, 2015), http://www.nytimes.com/2015/01/29/technology/in-china-new-cybersecurity-rules-perturb-western-tech-companies.html?_r=0.

[227] *Catalogue for the Guidance of Foreign Investment Industries*,MINISTRY OF COMMERCE PEOPLE'S REPUBLIC OF CHINA (Feb. 21, 2012) http://english.mofcom.gov.cn/article/policyrelease/aaa/201203/20120308027837.shtml; *New PIIE Study Says U.S.-China FTA Would Bring Benefits But Also Big Job Losses*, INSIDE US-CHINA TRADE (October 22, 2014) ("The study describes foreign direct investment between the U.S. and China as "abnormally low," with the U.S. investing about $50 billion in China, and China investing about $36 billion in the U.S.").

[228] *See generally* ORG. FOR INT'L INVESTMENT, *supra* note 1.

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