NATIONAL SECURITY AT ALL COSTS: WHY THE CFIUS REVIEW PROCESS MAY HAVE OVERREACHED ITS PURPOSE

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INTRODUCTION

In March 2012, the Ralls Corporation ("Ralls"), a Delaware corporation owned by two Chinese nationals, purchased four small American-owned windfarms in north-central Oregon.[1] Ralls' plan was to build new wind turbines within the farms to "demonstrate their quality and reliability" as compared to competitors in the region, as well as to "create clean, renewable energy and provide jobs to American workers."[2]

Just over one year later, in May 2013, China's Shuanghui International Holdings, Ltd. ("Shuanghui") announced its plans to acquire Smithfield Foods ("Smithfield"), the world's largest pork processor and hog producer.[3] According to the Chief Executive Officer of Shuanghui, the merger would create a leading international food enterprise, and both companies are "look[ing] forward to moving ahead together as one company."[4]

So what do windfarms and pig farms have in common? They are both examples of a growing trend of foreign investment in the United States, which plays an important role in the vitality of the U.S. economy.[5] Both examples also involve investment specifically from China, reflecting the growing "internationalization" of Chinese multinational corporations and

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1 Ralls Corp. v. Comm. on Foreign Inv. in the United States (*Ralls I*), 926 F.Supp. 2d 71, 77-78 (D.D.C. 2013).

2 *Id.* at 78; Jeremy Zucker & Hrishikesh Hari, *Gone With the Wind: The Ralls Transaction and Implications for Foreign Investment in the United States*, 8 GLOBAL TRADE AND CUSTOMS J. 182, 183 (2013).

3 Rossella Brevetti, *Smithfield, Chinese Suitor, Say CFIUS Clears Way for Proposed Acquisition*, 30 INT'L TRADE REP. 1411, 1411 (2013).

4 *Id.* (internal quotation marks omitted).

5 ALAN P. LARSON & DAVID M. MARCHICK, FOREIGN INVESTMENT AND NATIONAL SECURITY: GETTING THE BALANCE RIGHT 7 (2006).

their outward foreign direct investment strategy.[6] However, both stories have very different endings for reasons many Americans would not suspect.

Both transactions were reviewed by the Committee on Foreign Investment in the United States ("CFIUS") because of potential national security concerns.[7] CFIUS is comprised of nine voting member agencies within the executive branch, chaired by the secretary of the treasury.[8] CFIUS reviews investment transactions that could result in foreign ownership or control of a U.S. business to determine the potential effect of that transaction on national security.[9] To make this assessment, CFIUS considers factors like a foreign company's potential access to sensitive technology or possible interference with industries that support defense requirements.[10]

Information about CFIUS reviews and rationales is kept confidential, so companies and commentators are left to glean what they can from what little information is publicly available.[11] In the case of the Ralls windfarm project, the driving factor for the CFIUS review was most likely that the turbine sites were near a U.S. Navy restricted airspace and bombing zone, causing concerns about potential surveillance by the Chinese.[12] In the case of the Smithfield pig farm acquisition, Congress pressured CFIUS to scrutinize the deal because of concerns over food safety and security.[13]

CFIUS ultimately concluded that Chinese ownership of pig farms was not a sufficient national security threat to prohibit the transaction,[14] but Chinese ownership of windfarms was a sufficient threat.[15] In fact, President

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6 Syed Tariq Anwar, *CFIUS, Chinese MNCs' Outward FDI, and Globalization of Business*, 44 J. WORLD TRADE 419, 421 (2010).

7 *Ralls I*, 926 F.Supp. 2d at 79; Brevetti, *supra* note 3, at 1411.

8 Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 3, 121 Stat. 246 (2007); Exec. Order No. 13,456, 73 Fed. Reg. 4677 (Jan. 23, 2008). The other eight voting members of CFIUS are the following officials (or their designee): the secretary of homeland security, the secretary of commerce, the secretary of defense, the secretary of state, the attorney general, the secretary of energy, the U.S. trade representative, and the director of the office of science and technology policy. The director of national intelligence and the secretary of labor are non-voting members. Foreign Investment and National Security Act § 3. The president has designated the following officials, as appropriate, to observe, participate in, and report on CFIUS activities: the director of the office of management and budget, the chairman of the council of economic advisers, the assistant to the president for national security affairs, the assistant to the president for economic policy, and the assistant to the president for homeland security and counterterrorism. Exec. Order No. 13,456, 73 Fed. Reg. at 4677.

9 Zucker & Hari, *supra* note 2, at 184.

10 *Id.*

11 Daniel B. Pickard et al., *The Ralls Case: Why CFIUS and the Court Got It Right*, 8 GLOBAL TRADE AND CUSTOMS J. 192, 193 (2013).

12 *Ralls I*, 926 F.Supp. 2d at 78.

13 Press Release, U.S. Senate Comm. on Agric., Nutrition & Forestry, Bipartisan Group of Senators Urge Appropriate Oversight of Proposed Smithfield Purchase (Jun. 20, 2013), http://www.ag.senate.gov/newsroom/press/release/senators-urge-oversight-smithfield.

14 Brevetti, *supra* note 3, at 1411.

15 *Ralls I*, 926 F.Supp. 2d at 79.

Barack Obama's order in September 2012 for Ralls to divest itself of the windfarms, based on the CFIUS finding, marked only the second time in history that a president exercised his authorities to prohibit a foreign investment transaction on national security grounds.[16] The public may never know the full rationale behind these two decisions. However, it is clear that political considerations played a role in leading CFIUS to include food safety and proximity to military installation in the scope of its national security review.[17]

But the story of the Ralls windfarms did not end there. The same month the president ordered Ralls to divest itself, Ralls became the first company to challenge CFIUS and the president in federal court.[18] Ralls claimed the CFIUS order was both a violation of statutory authority and an unconstitutional taking without due process.[19] In February 2013, the U.S. District Court for the District of Columbia dismissed the majority of Ralls' claims, citing specific statutory language barring judicial review of presidential decisions and finding that the claims against CFIUS were made moot by the president's order.[20] However, the district court did not initially dismiss Ralls' due process claim, electing instead to receive further briefings from the parties.[21]

The court ultimately dismissed Ralls' due process claim in October 2013, finding that Ralls did not successfully allege the government deprived the company of a protected interest, nor did it show the government deprived it of sufficient process.[22] Ralls appealed this judgment to the Court of Appeals for the District of Columbia Circuit.[23] On July 15, 2014, the court of appeals reversed the dismissal of Ralls' due process claim, finding that Ralls had a constitutionally protected property interest in the windfarm project and was therefore entitled to access the unclassified evidence on which the president relied, as well as an opportunity to rebut that evidence.[24] The court of appeals also reversed the dismissal of Ralls' claims against CFIUS, finding that CFIUS orders fall under an exception to the mootness doctrine.[25] The claims will return to the district court, but the gov-

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16 David N. Fagan et al., *The Ralls Case: Lessons for Foreign Investors*, 8 GLOBAL TRADE AND CUSTOMS J. 198, 198 (2013).

17 Zucker & Hari, *supra* note 2, at 187.

18 *Id.* at 185.

19 *Id.*

20 *Ralls I*, 926 F.Supp. 2d at 94, 99.

21 *Id.* at 95.

22 Ralls Corp. v. Comm. on Foreign Inv. in the United States (*Ralls II*), No. 1:12-cv-01513-ABJ, 2013 WL 5565499, at *1 (D.D.C. Oct. 9, 2013).

23 Corrected Brief for Appellant Ralls Corp. at 2, Ralls Corp. v. Comm. on Foreign Inv. in the United States, No. 1:12-cv-01513-ABJ (D.D.C. Oct. 16, 2013).

24 Ralls Corp. v. Comm. on Foreign Inv. in the United States (*Ralls III*), No. 13-5315, 2014 WL 3407665, at *13-16 (D.C. Cir. July 15, 2014).

25 *Id.* at *18-21.

ernment likely will appeal the court of appeals' findings. Therefore, it remains to be seen whether Ralls' challenge will create an opportunity for a major administrative change to the CFIUS review process and the secrecy in which it is currently shrouded.

This Comment analyzes the current balance between foreign investment and national security in light of recent CFIUS decisions and questions whether further administrative changes such as judicial review would prevent the counterproductive politicization of the process. Part I describes how the CFIUS process has evolved over time, including the powers given to the president under the 2007 Foreign Investment and National Security Act ("FINSA"). Part II analyzes recent cases reviewed by CFIUS under FINSA, including those involving "non-traditional" security concerns such as "persistent co-location" and food safety, as well as the impact new CFIUS actions are having on foreign direct investment and international trade. Part III recommends an improved statutory and administrative regime that would bolster foreign investors' confidence in pursuing transactions while reserving an appropriate level of review within the executive branch.

I. THE CFIUS PROCESS AND RECENT CHANGES

This Part discusses the history of the CFIUS review process and why it plays an important role in protecting key industries that have a national security role. It also addresses how the CFIUS process has changed since September 11, 2001 under FINSA.

A. *History and Purpose of the CFIUS Review Process*

Since World War I, Congress has limited foreign ownership and investment in certain industries due to national security concerns.[26] Congress placed restrictions on specific sectors like broadcasting, civil aviation, and shipping because legislators perceived that foreign ownership of these industries posed a national security threat.[27] Many of these restrictions remain in place today.[28] However, several more sectors have been added to the list of potential security concerns, broadly covering the manufacturing, finance, information, service, mining, utilities, construction, wholesale, retail, and transportation industries.[29]

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26 LARSON & MARCHICK, *supra* note 5, at 4.

27 *Id.*

28 *Id.*

29 DEP'T OF TREASURY, COMMITTEE OF FOREIGN INVESTMENT IN THE UNITED STATES: ANNUAL REPORT TO CONGRESS 4 (2013), *available at* http:// http://www.treasury.gov/resource-center/international/foreign-investment/Documents/2013%20CFIUS%20Annual%20Report%20PUBLIC.pdf.

In the 1970s, national security concerns about foreign investment shifted to "petrodollar investments" from oil-producing Arab nations.[30] Policymakers were concerned these nations would use their wealth to gradually take over key U.S. industries.[31] In response, President Ford issued an executive order in 1975, creating CFIUS to monitor the impact of foreign investment in the United States.[32] Congress also enacted the International Economic Emergency Powers Act ("IEEPA") in 1977, which allowed the president to investigate and potentially prohibit any acquisition or transaction involving a foreign country or foreign national and any U.S. property.[33] However, to exercise this power under the IEEPA, the president needed to declare a national emergency in response to an "unusual and extraordinary threat" posed by the country or transaction in question.[34] Presidents were initially reluctant to use this power to block foreign acquisitions because it would amount to a hostile declaration against the country involved.[35]

In the following decade, foreign investment concerns shifted again to American competitiveness in emerging technology sectors.[36] Specifically, U.S. policymakers viewed the rise of Japan and the corresponding influx of Japanese investment in American-owned companies as a significant threat.[37] When the Fujitsu Corporation, a Japanese company, attempted to acquire the Fairchild Semiconductor Corporation, an American company, the Reagan administration was surprised to learn there was no statute allowing the president to block a foreign acquisition without declaring a national emergency.[38]

In response, Congress passed the Exon-Florio Amendment as part of the Omnibus Trade and Competitiveness Act of 1988.[39] The Exon-Florio Amendment changed Section 721 of the Defense Production Act of 1950 ("Section 721"), giving the president similar powers as those under the IEEPA to investigate the national security implications of transactions with foreign entities that could result in foreign control of a U.S. business.[40]

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30 LARSON & MARCHICK, *supra* note 5, at 4.

31 *Id.*

32 Exec. Order No. 11,858, 3 C.F.R. § 990 (1971-1975). In 1975, CFIUS was chaired by the secretary of the treasury and included the secretary of state, secretary of defense, secretary of commerce, U.S. trade representative, chairman of the council of economic advisers, attorney general, and director of the office of management and the budget. *Id.*

33 International Emergency Economic Powers Act, Pub. L. No. 95-223, §§ 202-03, 91 Stat. 1625, 1626 (1977) (codified as amended at 50 U.S.C. § 1701 (2011)).

34 *Id.* § 202.

35 Jonathan C. Stagg, *Scrutinizing Foreign Investment: How Much Congressional Involvement Is Too Much?*, 93 IOWA L. REV. 325, 334 (2007).

36 LARSON & MARCHICK, *supra* note 5, at 4.

37 *Id.*

38 Stagg, *supra* note 35, at 335.

39 LARSON & MARCHICK, *supra* note 5, at 4.

40 Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021(a), 102 Stat. 1107, 1425 (1988) (codified as amended at 50 U.S.C. § 2170) (amended 1992 and 2007).

However, unlike the IEEPA, the Exon-Florio Amendment gave the president the power to suspend or prohibit these transactions without first declaring a national emergency.[41] To take such action, the statute required the president to find "credible evidence" that the foreign interest might threaten national security and that other provisions of law, including the IEEPA, do not otherwise provide adequate authority to act.[42] Importantly, the statute also states the president's findings in this regard are not subject to judicial review.[43]

The Exon-Florio Amendment provided three factors that the president and/or CFIUS could consider in determining a threat to national security: (1) domestic production needed for national defense requirements; (2) domestic industries' ability to meet these requirements; and (3) whether foreign control of these industries would affect the capability and capacity of the U.S. to meet national security requirements.[44] The statute specifically stated that the president could consider these among "other factors," so this was not an exclusive list of possible national security concerns.[45] However, the way the factors focus on national defense requirements, along with the fact that the authorization was included within a larger statute related to defense production, suggests that Congress was focused primarily on protecting U.S. companies related to the defense industry from potential foreign control and manipulation.[46]

In the 1990s, Congress increased its oversight and involvement in the CFIUS process.[47] In 1992, Congress passed another amendment to Section 721 as part of the National Defense Authorization Act for Fiscal Year 1993.[48] This amendment made it mandatory for CFIUS to investigate any transaction involving a foreign *government*, if that transaction could affect national security.[49] It also required the president to report to Congress the results of any CFIUS investigation, regardless of whether the president decided to take action.[50]

The amendment also added two new factors that the president could consider in determining whether a transaction posed a threat: (1) the potential effect on military-related sales to a country identified under the Export

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41 *Id.* § 2170(d).

42 *Id.*

43 *Id.* § 2170(e).

44 *Id.* § 2170(f).

45 *Id.*

46 Zucker & Hari, *supra* note 2, at 184.

47 Nikul Patel, *Suggesting a Better Administrative Framework for the CFIUS: How Recent Huawei Mergers Demonstrate Room for Improvement*, 38 N.C. J. INT'L L. & COM. REG. 955, 962 (2013).

48 National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2315, 2463-65 (1992) (amending 50 U.S.C. § 2170 (1988)) (amended 2007).

49 *Id.* § 837(b).

50 *Id.* § 837(c).

Administration Act as one that supports terrorism, is of concern regarding proliferation of missiles or chemical and biological weapons, or is listed as a "[s]pecial [c]ountry" under the Nuclear Non-Proliferation Act; and (2) the potential effect on U.S. "international technological leadership" in areas affecting national security.[51] Like the original factors under the Exon-Florio Amendment, these expanded factors still suggest Congress was focused on controlling foreign investment in sectors affecting the defense industry, but with a broadened scope to include all technologies related to weapons development and proliferation.[52]

B. *Post-9/11 Concerns and FINSA*

Congress has taken an increasingly active and direct role in the CFIUS review process in recent years, starting with its intervention in two high-profile foreign acquisitions,[53] and culminating in the passage of FINSA in 2007.[54] The first case that sparked Congressional intervention started in 2005, when the China National Offshore Oil Corporation ("CNOOC") offered to buy the California-based energy company Unocal.[55] CNOOC was 70 percent owned by a state-owned Chinese company, which was subsidizing over a third of the offered purchase price, and a state-owned bank was loaning CNOOC another third.[56] This raised concerns that the offer was motivated not just by China's need for energy supplies but also the Chinese government's desire to control the American oil industry.[57]

CNOOC voluntarily filed notice of this transaction with CFIUS for review,[58] but Congress moved to preempt the transaction before the executive branch had a chance to act.[59] At the end of the Energy Policy Act of 2005, Congress added a provision that required the executive branch to complete a four-month study of China's energy requirements before concluding a national security review of any proposed Chinese investment in any U.S. energy corporation.[60] CNOOC withdrew its bid to buy Unocal one month

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51 *Id.* § 837(b).

52 *Id.* § 837.

53 LARSON & MARCHICK, *supra* note 5, at 5.

54 Pickard et al., *supra* note 11, at 192-93.

55 Joshua W. Casselman, Note, *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, 161-62 (2007).

56 *Id.* at 162.

57 *Id.*

58 *Id.* at 163.

59 LARSON & MARCHICK, *supra* note 5, at 5.

60 Energy Policy Act of 2005, Pub. L. No. 109-58 § 1837, 119 Stat. 594, 1141-42 (2005).

after it filed notice with CFIUS, citing political opposition and a level of uncertainty that made the transaction too risky.[61]

The second high-profile case in which Congress felt compelled to intervene was the proposed acquisition by Dubai Ports World ("DPW") of the P&O Steam Navigation Company ("P&O"), a British company that manages port operations worldwide, including many U.S. ports.[62] DPW is controlled by the government of Dubai (United Arab Emirates or "UAE"), a key importer of U.S. goods and an ally in the war on terror.[63] Both DPW and P&O voluntarily notified CFIUS of the proposed transaction, held two pre-filing briefings for CFIUS members, and formally filed notice in December 2005.[64] CFIUS investigated the proposal and unanimously decided there was no security threat, and President Bush approved the deal in January 2006.[65]

However, when the U.S. media reported news of the deal the following month, it led to public outcry over the fact that an Arab government-controlled company would be managing operations at U.S. ports.[66] Critics pointed out that the UAE had been an "operational and financial base" for the 9/11 hijackers and argued that putting DPW in charge of U.S. port operations was like "putting the fox in charge of the henhouse."[67] The president's approval of the deal sparked a number of emotional responses from members of Congress, accompanied by proposed legislation from both houses—sponsored by Republicans and Democrats alike—that would ban foreign ownership of ports and other critical infrastructure altogether.[68] In response, CFIUS agreed to initiate the 45-day investigation process it had previously foregone.[69] However, while the investigation was still pending, DPW appeased Congress's concerns by promising to break off P&O's U.S. port operations and sell those interests to a U.S. company.[70]

The DPW case prompted Congress to pass FINSA in 2007.[71] FINSA replaced large sections of the Exon-Florio Amendment with more extensive and specific provisions regarding which transactions CFIUS should investigate, how investigations should be conducted, and how the results should

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61 Casselman, *supra* note 55, at 164.

62 Press Release, Dep't of Treasury, CFIUS and the Protection of the National Security in the Dubai Ports World Bid for Port Operations (Feb. 24, 2006), http://www.treasury.gov/press-center/press-releases/Pages/js4071.aspx.

63 Stagg, *supra* note 35, at 344.

64 Press Release, Dep't of Treasury, *supra* note 62.

65 Stagg, *supra* note 35, at 344.

66 *Id.*

67 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, 606, 610 (2007).

68 *Id.* at 611.

69 *Id.* at 606.

70 Stagg, *supra* note 35, at 344.

71 Pickard et al., *supra* note 11, at 192-93.

be reported to Congress.[72] FINSA clarifies that "national security" includes issues related to homeland security and critical infrastructure, which it defines as infrastructure so vital that its destruction "would have a debilitating impact on national security."[73] It also specifies that CFIUS must review *all* "covered transaction[s]" for national security concerns.[74]

Unlike the Exon-Florio Amendment, 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.[75] This provision would seem to be motivated by the DPW case, although FINSA contains an exception that investigations are not required if the secretary of the treasury and the head of the lead agency for the CFIUS review jointly determine there is no national security concern.[76]

FINSA also added several new factors that CFIUS may take into account when determining national security concerns.[77] FINSA added a provision that CFIUS should consider the potential effect of military-related sales to countries posing a potential regional military threat to U.S. interests.[78] FINSA also added five new factors: (1) the potential effects on critical infrastructure, including energy assets; (2) the potential effect on U.S. critical technologies; (3) whether the transaction is foreign government-controlled; (4) the subject country's adherence to non-proliferation control regimes, cooperation with the U.S. in counterterrorism efforts, and potential for passing military-related technologies on to third parties; and (5) the long-term projection of U.S. requirements for energy and other critical resources.[79] The references to critical infrastructure and energy requirements also appear to be motivated by the CNOOC and DPW cases.[80]

C. *Overview of the CFIUS Review Process Under FINSA*

The CFIUS review process begins either when a party to a transaction notifies CFIUS in writing about the transaction or if the president or a

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

73 *Id.* § 2(a)(5)-(6).

74 *Id.* § 2(b). A "covered transaction" is defined under FINSA as any that "could result in foreign control of any person engaged in interstate commerce in the United States." *Id*. § 2(a)(3).

75 *Id.* § 2(b).

76 *Id.* The "lead agency" is a CFIUS member agency designated by the secretary of the treasury to lead an investigation of a transaction and/or monitor a completed transaction. *Id.* § 3(k)(5).

77 Foreign Investment and National Security Act § 4.

78 *Id.*

79 *Id.* "Critical technologies" is defined as technology or components essential to national defense. *Id.* § 2(a)(7).

80 Pickard et al., *supra* note 11, at 192-93.

CFIUS member unilaterally decides to initiate a review.[81] Unilateral reviews can include re-reviews of prior cases in the event that any party previously submitted false or misleading information or if any party intentionally and materially breaches a mitigation agreement or condition resulting from that prior review.[82] These reviews use the factors outlined in FINSA, along with any others the president or CFIUS feels are appropriate to the case, to determine whether there are national security concerns that warrant a more extensive investigation.[83] This initial review must be completed within 30 days of when CFIUS either receives written notice of the transaction or unilaterally initiates the review.[84]

If, as a result of this initial review, CFIUS determines there is no national security concern and no need for a further investigation, the CFIUS chairperson must transmit a certified notice of this determination to specific members of Congress outlined in FINSA.[85] However, if CFIUS identifies a potential concern, the transaction moves into a 45-day investigation period in which CFIUS determines specific effects the transaction would have and takes any "necessary" actions to protect national security.[86] CFIUS must also notify Congress of its determinations resulting from these investigations.[87]

Under FINSA, the director of national intelligence ("DNI") is a nonvoting member of CFIUS but is directed to coordinate with the intelligence community to analyze intelligence related to national security concerns posed by the transaction.[88] The DNI is designated as an "independent" member of CFIUS who can provide input and analysis but not participate in policy decisions or determinations.[89]

CFIUS has the authority to negotiate, impose, and enforce mitigation agreements or conditions on any parties involved in the transaction to protect national security.[90] CFIUS must conduct a risk-based analysis of national security concerns before entering into any mitigation agreement or

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81 Foreign Investment and National Security Act § 2(b)(1).

82 *Id.* § 2(b)(1)(D).

83 *Id.* § 2(b).

84 *Id.* § 2(b)(1)(E).

85 *Id.* § 2(b)(3). These members of Congress are the majority leader and minority leader of the Senate, the chair and ranking member of the Senate Committee on Banking, Housing, and Urban Affairs, the speaker and minority leader of the House of Representatives, the chair and ranking member of the House Committee on Financial Services, and any committee in either the House or Senate having oversight over the lead agency. *Id.* § 2(b)(2).

86 Foreign Investment and National Security Act § 2(b)(2).

87 *Id.* § 2(b)(3).

88 *Id.* § 2(b)(4).

89 *Id.*

90 *Id.* § 5.

imposing a condition.[91] CFIUS must also designate a lead agency to monitor and enforce any such agreement or condition.[92]

CFIUS must submit an annual report to Congress on all of the reviews and investigations of covered transactions.[93] The report must contain a list of all notices, reviews, and investigations; basic information on each party; the nature of the business or products involved; any decision or action by the president; analysis of trends in filings, investigations, decisions, and business sectors involved; mitigation agreements and conditions; and the potential adverse effects of the proposed transactions.[94] CFIUS provides a classified version of the report that details all this information.[95] The unclassified version provides general statistics on transactions by business sector and by country, as well as examples of mitigation measures and national security concerns considered.[96] The unclassified version also provides limited data on trends related to foreign investment in critical technologies, as well as data related to investment from countries that boycott Israel or do not ban terrorist organizations.[97]

As with the previous provisions of the Exon-Florio Amendment, the president has the power to suspend or prohibit any transaction that threatens national security.[98] However, the president can only take such action after finding that (1) there is credible evidence that the foreign interest might take action to impair national security, and (2) there are no other provisions of law that would adequately ensure national security.[99] The president also must announce this decision within 15 days of the completion of a CFIUS investigation.[100] The president's findings and actions under this section are not subject to judicial review.[101]

The following section will discuss examples of transactions reviewed by CFIUS under the FINSA process, including those that appear to fall outside the traditional scope of national security concerns. It will also discuss the impact these reviews, and the actions taken based on them, are having on foreign direct investment, international trade, and the CFIUS process itself.

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91 *Id.*
92 Foreign Investment and National Security Act § 5.
93 *Id.* § 7(b).
94 *Id.*
95 DEP'T OF TREASURY, *supra* note 29, at 2.
96 *Id.* at 3-24.
97 *Id.* at 24-33.
98 Foreign Investment and National Security Act § 6.
99 *Id.*
100 *Id.*
101 *Id.*

II. FOREIGN INVESTMENT UNDER THE FINSA REGIME: RECENT CFIUS REVIEWS AND THEIR BROADER IMPACT

This Part examines recent cases reviewed by CFIUS since the enactment of FINSA, including cases dealing with issues of persistent co-location and critical infrastructure. It also analyzes the current and potential future impact of these cases on foreign investment and the CFIUS process itself.

A. *Recent Cases Reviewed by CFIUS*

CFIUS reviews less than 10 percent of all transactions involving foreign direct investment in the United States.[102] Between 2008 and 2012, CFIUS determined that 538 notices filed by companies were covered transactions under the revised FINSA guidelines.[103] Of these notices, only about 31 percent (168 notices) resulted in a full national security investigation.[104] Only one transaction (the Ralls windfarm project) resulted in a presidential decision to suspend or prohibit the transaction.[105] However, 70 notices were withdrawn either during the CFIUS review or investigation period,[106] likely due to the parties' belief that they could not mitigate CFIUS concerns or that mitigation measures would make the transaction undesirable.[107]

Using the law, the legislative history, the CFIUS Annual Report to Congress, and other public documents, economists and trade experts have analyzed the types of transactions that would raise national security concerns.[108] One useful analytic framework breaks these transactions into three categories of potential threats, most of which apply to the U.S. defense industrial base.[109] These three categories are (1) acquisitions that would make the U.S. dependent on a foreign supplier; (2) acquisitions that would allow the transfer of sensitive or dangerous technology to a third party; and (3) acquisitions that could allow a foreign entity to infiltrate, sabotage, or conduct surveillance on critical goods or services.[110] The first two categories are fairly straightforward and can be anticipated by applying antitrust and strategic trade theory, focusing on the "criticality" of the good or service

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102 Pickard et al., *supra* note 11, at 192.

103 DEP'T OF TREASURY, *supra* note 29, at 3.

104 *Id.*

105 *Id.*

106 *Id.*

107 Zucker & Hari, *supra* note 2, at 182.

108 *See, e.g.*, THEODORE H. MORAN, THREE THREATS: AN ANALYTICAL FRAMEWORK FOR THE CFIUS PROCESS 1 (2009).

109 *Id.*

110 *Id.*

involved (the potential cost of a supply disruption or a technology leak) in relation to the availability of alternate suppliers.[111]

The third category of threat—acquisitions that pose a risk of infiltration, sabotage, or surveillance—is more complex to evaluate and address because it is not as clearly defined in the law and because the risk is more difficult to quantify or anticipate.[112] Based on available information, the windfarm and pig farm cases fell into this third category, as did other recent cases involving persistent co-location and critical infrastructure concerns.[113]

1. "Persistent Co-location" Cases Prior to the Ralls Case

The first example of an issue that falls outside the traditional understanding of national security is the problem of "persistent co-location" or geographic "proximity" of a business or facility to a sensitive military facility.[114] This was likely the concern that caused the president to order Ralls to divest its interest in the Oregon windfarm project, as discussed above.[115] It is not one of the factors laid out in Section 721 (as revised by FINSA) for CFIUS to consider,[116] but the Ralls case was not the first time CFIUS cited this concern during the review process. In the 2013 annual report, CFIUS listed "[f]oreign control of U.S. businesses that . . . [a]re in proximity to certain types of [U.S. government] facilities" as one of the considerations it used during a national security review.[117]

In at least three other instances, CFIUS thwarted the acquisition of mining operations in California and Nevada, at least in part because they were too close to military bases.[118] In 2009, the Northwest Nonferrous International Investment Company ("Northwest Nonferrous"), a company controlled by the Chinese government, withdrew its bid to buy majority control of the Firstgold Corporation ("Firstgold"), a gold mining operation near the Fallon Naval Air Station in Nevada.[119] CFIUS was reportedly prepared to recommend that the president block the sale.[120] Although CFIUS

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111 *Id.* at 33-36.

112 *Id.* at 3-5.

113 Zucker & Hari, *supra* note 2, at 187; Press Release, U.S. Senate Comm. on Agric., Nutrition & Forestry, *supra* note 13.

114 Zucker & Hari, *supra* note 2, at 187; *see supra* note 12 and accompanying text.

115 Pickard et al., *supra* note 11, at 194.

116 50 U.S.C. app. § 2170(f) (Supp. V 2006).

117 DEP'T OF TREASURY, *supra* note 29, at 22.

118 Daniel B. Pickard et al., *CFIUS Forces Chinese Government-Backed Firm to Divest Interest in Canadian Mining Company With U.S. Operations*, WILEY REIN LLP (June 25, 2013), http://www.wileyrein.com/publications.cfm?sp=articles&id=8943; Eric Lipton, *Chinese Withdraw Offer for Nevada Gold Concern*, N.Y. TIMES, Dec. 22, 2009, at B3.

119 Lipton, *supra* note 118, at B3.

120 *Id.*

did not disclose its rationale from the investigation, Treasury officials emphasized during meetings with Northwest Nonferrous that the proximity of Firstgold's properties to the naval station and "other sensitive and classified security and military assets that cannot be identified" was a concern.[121]

Three years later, in 2012, CFIUS initiated a review of the 2010 acquisition by Far East Golden Resources Investment Limited ("FEGRI"), a Hong Kong-based company, of shares in Nevada Gold Holdings, Inc. ("Nevada Gold").[122] This time, CFIUS proposed measures to FEGRI specifically to mitigate the risks of Nevada Gold's proximity to the Fallon Naval Air Station.[123] FEGRI chose instead to divest all of its interests in Nevada Gold.[124]

Finally, in 2013, Procon Mining and Tunneling, Ltd. ("Procon") and its affiliate China National Machinery Industry Corporation, a Chinese state-owned enterprise, decided to divest its controlling shares of the Canada-based Lincoln Mining Corporation ("Lincoln") following a CFIUS review.[125] Lincoln's core mining operations are in California and Nevada, and some of its properties are near the Marine Corps Air Station Yuma (in California) and the Fallon Naval Air Station.[126] The parties had closed the transaction in November 2012 but decided to file notice with CFIUS in April 2013 to address potential proximity concerns.[127] As part of the divestiture agreement, Lincoln must provide CFIUS advance notice of the intended purchaser of Procon's shares and the structure of the sale, both of which will be subject to CFIUS review.[128]

2. The Ralls Case: A Recent Example of "Persistent Co-location"

The Ralls case is similar to these three mining operation cases because it involves a company owned by Chinese nationals that acquired a U.S. company with facilities near a military installation. Ralls' owners are also the vice presidents of the Sany Group ("Sany"), a Chinese company that manufacturers wind turbines.[129] Ralls' stated goal was to identify opportunities to construct windfarms within the United States to demonstrate the quality and reliability of Sany's turbines to U.S. customers.[130]

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121 *Id.*

122 Pickard et al., *supra* note 118.

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

128 Pickard et al., *supra* note 118.

129 Ralls Corp. v. Comm. on Foreign Inv. in the United States (*Ralls I*), 926 F.Supp. 2d 71, 77-78 (D.D.C. 2013).

130 *Id.* at 78.

a. *The Facts*

In March 2012, Ralls purchased interests in four windfarm projects in north-central Oregon known collectively as the "Butter Creek Projects," originally owned by Oregon Windfarms, a U.S. limited liability company.[131] When Ralls purchased these projects, their assets consisted of a bundle of easements, agreements, and permits with local landowners, power utilities, neighboring windfarms, and regulatory bodies, all of which would allow for the construction of wind turbines.[132] Three of the windfarm project sites were located within seven miles of restricted airspace and a bombing zone associated with the Naval Air Station Whidbey Island,[133] which is used for training related to airborne ordinance delivery, unmanned air systems, low-level tactical training, and surface-to-air counter tactics maneuvers.[134] The fourth site was within the restricted airspace.[135] The Federal Aviation Administration had granted permits and approvals to construct wind turbines at the four locations in 2010 and 2011.[136] This approval process included a review by the Department of Defense to ensure there were no adverse impacts on military operations in the area.[137]

Shortly after Ralls acquired the windfarm projects, the Navy raised concerns about the location of the fourth project within the restricted airspace.[138] Ralls agreed to move the project to a new location as long as it could get new permits, and the Navy wrote to the Oregon Public Utility Commission on Ralls' behalf, recommending the permits be granted.[139] However, the new location was still within the eastern portion of the restricted airspace,[140] and the Navy claimed it agreed to the site as a "last resort measure."[141]

Ralls began construction of the Butter Creek Projects in April 2012.[142] Around the same time, CFIUS approached Ralls and "invited" them to file a "voluntary" notice of the transaction.[143] CFIUS informed Ralls that if they did not file a notice, the Department of Defense would initiate the review

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131 *Id.*

132 Ralls Corp. v. Comm. on Foreign Inv. in the United States (*Ralls II*), No. 1:12-cv-01513-ABJ, 2013 WL 5565499, at *3 (D.D.C. Oct. 9, 2013).

133 *Ralls I*, 926 F.Supp. 2d at 78.

134 Pickard et al., *supra* note 11, at 193.

135 *Ralls I*, 926 F.Supp. 2d at 78.

136 Zucker & Hari, *supra* note 2, at 183.

137 *Id.*

138 *Id.*

139 *Id*.

140 *Ralls I*, 926 F.Supp. 2d at 78.

141 Pickard et al., *supra* note 11, at 193 (internal quotation marks omitted).

142 Zucker & Hari, *supra* note 2, at 183.

143 Ralls Corp. v. Comm. on Foreign Inv. in the United States (*Ralls II*), No. 1:12-cv-01513-ABJ, 2013 WL 5565499, at *3 (D.D.C. Oct. 9, 2013).

process instead.[144] Ralls filed the voluntary notice in June 2012.[145] During the 30-day review process, CFIUS issued Ralls an Order Establishing Interim Mitigation Measures requiring Ralls to take certain steps to lessen national security concerns, pending further action by the president.[146] One of the steps was for Ralls to halt all construction and operations on the Butter Creek Projects.[147]

CFIUS initiated the 45-day national security investigation process the following month and issued another mitigation order, this time requiring Ralls to immediately remove all items from the Butter Creek Projects and prohibiting Ralls from accessing the sites.[148] The order also restricted Ralls from selling the properties without CFIUS approval or before removing all items from the sites.[149] CFIUS made its recommendation on September 13, 2012, and two weeks later, President Obama issued an order requiring Ralls to divest its interest in the Butter Creek Projects.[150] The order also required Ralls to submit to government searches of its premises, documents, equipment, and software anywhere in the United States and allow the government to interview its officers, employees, and agents.[151]

b. *The District Court Decision*

The day before CFIUS made its recommendation, Ralls filed a complaint against CFIUS in the U.S. District Court for the District of Columbia.[152] The complaint challenged the second CFIUS mitigation order under the Administrative Procedure Act ("APA") and the Due Process Clause of the Fifth Amendment and asked the district court to invalidate the order and issue an injunction against its enforcement.[153] After the president issued his order, Ralls amended the complaint to add the president as a defendant, claiming his order was an *ultra vires* action that exceeded his statutory authority and also violated the Due Process Clause.[154] Ralls also claimed both the CFIUS and presidential orders unconstitutionally deprived Ralls of equal protection as compared to similarly situated companies.[155] For exam-

144 *Id.*
145 *Id.*
146 *Id.*
147 Zucker & Hari, *supra* note 2, at 185.
148 *Id.*
149 *Id.*
150 *Ralls II*, 2013 WL 5565499, at * 4.
151 Zucker & Hari, *supra* note 2, at 185.
152 Ralls Corp. v. Comm. on Foreign Inv. in the United States (*Ralls I*), 926 F.Supp. 2d 71, 81 (D.D.C. 2013).
153 *Id.*
154 *Id.*
155 *Id.*

ple, Ralls claimed that hundreds of completed wind turbines are located in or near the Whidbey Island restricted airspace, dozens of which are either foreign made or foreign owned.[156]

The district court dismissed all of Ralls' claims against CFIUS as moot because the presidential order revoked the CFIUS mitigation order.[157] In doing so, the court found that Ralls failed to establish it would likely be subjected to the same action in the future because even though Ralls planned to buy more windfarms in the United States, the CFIUS determination in this case was based on a particular set of facts that was unlikely to recur.[158] However, the court noted that "what ultimately prompted CFIUS to take action is unknown,"[159] stating in a few words the crux of Ralls' concern.

The district court also held that it lacked jurisdiction to review Ralls' *ultra vires* claim against the presidential order.[160] Ralls specifically contended that because the president's order did not merely "suspend or prohibit" a covered transaction but also placed restrictions on the sale of the properties or disposition of the turbines, the president exceeded the scope of his statutory authority under FINSA.[161] Ralls asserted, therefore, that the statute's "finality clause," precluding judicial review of the president's actions, did not apply because the president was not acting "under" the statute's provisions.[162] However, the court reasoned that to review the president's rationale for determining whether certain restrictions are appropriate would defeat the true effect of the finality clause because it would involve passing judgment on the substance of the president's decision and not merely whether it was within the scope of his authority.[163]

Similarly, the district court found that Ralls' equal protection claim was barred by FINSA's finality provision because to analyze this claim, the court would need to review the factual record to determine whether the disparate treatment was rationally related to a legitimate government purpose.[164] However, the court found it was not barred from reviewing Ralls' due process claim.[165] The court reasoned that the due process claim was a "pure legal question" that could be answered without reviewing the substance of the president's decisions, and merely by asking whether Ralls had received all the procedural protections that it was due.[166]

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156 *Id.* at 78.
157 *Ralls I*, 926 F.Supp. 2d at 95.
158 *Id.* at 97-98.
159 *Id.* at 99.
160 *Id.* at 76.
161 *Id.* at 88 (internal quotation marks omitted).
162 *Id.* at 86.
163 *Ralls I*, 926 F.Supp. 2d at 89-90.
164 *Id.* at 92.
165 *Id.* at 94-95.
166 *Id.* at 95.

In October 2013, the district court dismissed the last of Ralls' claims, finding Ralls had not successfully alleged a due process violation.[167] The court held that Ralls failed to establish a protected interest in the Butter Creek properties, primarily because Ralls "voluntarily" acquired those property rights subject to the "known risk" the president could suspend the transaction and "waived the opportunity" of a final determination from CFIUS before closing the transaction.[168] The court also held that Ralls failed to establish an "expectation interest" in due process, because the president's power under FINSA is discretionary, and Ralls did not have a legitimate, guaranteed entitlement to the Butter Creek properties in light of this discretion.[169]

Finally, the district court held that Ralls received sufficient process because the deprivation of a protected interest only requires "notice and opportunity for hearing *appropriate to the nature of the case*."[170] The court found that because Ralls "voluntarily" filed notice with CFIUS and participated in the CFIUS review and investigation process, Ralls had sufficient notice and opportunity to be heard before the divestment decision was made.[171] Nothing in this due process standard requires the president to provide Ralls the rationale or "credible evidence" on which his decision was based.[172]

c. *The Court of Appeals Decision*

Ralls immediately appealed the district court's decision.[173] On July 15, 2014, the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court's dismissal of Ralls' due process claim, as well as the dismissal of Ralls' claims against CFIUS as moot.[174] In doing so, the court of appeals called into question the secrecy with which CFIUS reviews had previously been conducted and created an opportunity for investors to

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167 Ralls Corp. v. Comm. on Foreign Inv. in the United States (*Ralls II*), No. 1:12-cv-01513-ABJ, 2013 WL 5565499, at *5 (D.D.C. Oct. 9, 2013).

168 *Id.* at *7.

169 *Ralls II*, 2013 WL 5565499, at *8 (citing Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005)).

170 *Id.* at *10 (quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S, 532, 542 (1985)) (internal quotation marks omitted).

171 *Id.* at *11.

172 *Id.* at *15.

173 Corrected Brief for Appellant Ralls Corp. at 2, Ralls Corp. v. Comm. on Foreign Inv. in the United States, No. 1:12-cv-01513-ABJ (D.D.C. Oct. 16, 2013).

174 Ralls Corp. v. Comm. on Foreign Inv. in the United States (*Ralls III*), No. 13-5315, 2014 WL 3407665, at *1 (D.C. Cir. July 15, 2014).

raise a meaningful challenge the government's decisions about foreign investment transactions.[175]

The court of appeals rejected the district court's finding that Ralls' state law property interests in the Butter Creek properties were too contingent for constitutional due process protections.[176] The court reasoned that *state law* property interests are not contingent on CFIUS approval, and that the CFIUS process only provides parties the *option* to file a notice with CFIUS, before or after the transaction is complete.[177] Therefore, Ralls acquired state-law property rights as soon as the Butter Creek transaction closed, and "due process protections necessarily attached."[178]

The court of appeals also found that Ralls' due process protections created a "right to know the factual basis for the [president's] action and the opportunity to rebut the evidence supporting that action."[179] The court of appeals analogized the CFIUS review process to the Secretary of State's determination that an entity is a Foreign Terrorist Organization (FTO).[180] The court previously held in three separate FTO cases that entities were entitled to receive all the unclassified evidence that supported this determination.[181] Therefore, the court reasoned, Ralls was entitled to the same in the CFIUS process.[182] The court acknowledged that the president would not necessarily need to disclose "his thinking on sensitive questions related to national security . . . ," but found that "adequate process at the CFIUS stage . . . would also satisfy the President's due process obligation."[183]

Finally, the court of appeals found that Ralls' claims were not moot because the CFIUS Order evaded review and was capable of repetition.[184] The court reasoned that CFIUS orders, by statutory definition, meet the "evading review" standard for a mootness exception because they can last no longer than ninety days before the president must make a decision, and therefore a party challenging a CFIUS order cannot obtain Supreme Court review.[185] In addition, Ralls clearly intended to enter into other windfarm investment transactions in the United States, and without knowing the reason behind CFIUS's disapproval of the Butter Creek transaction, there is at

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175 *Id.* at *16-17.

176 *Id.* at *13.

177 *Id.* at *13-14.

178 *Id.* at *13.

179 *Id.* at *15.

180 *Ralls III*, 2014 WL 3407665, at *15.

181 *Id.* (citing People's Mojahedin Org. of Iran v. Dep't of State, 613 F.3d 220 (D.C. Cir. 2010) (*per curiam*); Chai v. Dep't of State, 466 F.3d 125 (D.C. Cir. 2006); Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192 (D.C. Cir. 2001)).

182 *Id.*

183 *Id.* at *17.

184 *Id.* at *19-21.

185 *Id.* at *19.

least some likelihood that a future transaction would be similarly denied.[186] Therefore, the court of appeals ordered the district court to reconsider all of Ralls' claims against CFIUS (under the APA and the Due Process and Equal Protection clauses of the Fifth Amendment) on remand.[187]

The factual situation surrounding the Ralls case is unique, and it is unclear whether the court of appeals' decision will lead to significant administrative reform in the CFIUS review process, particularly because the government may still appeal the decision to the Supreme Court. At a minimum, the decisions by both courts highlight the uncertainty that the current process creates for parties to investment transactions and the associated legal problems.

3. The Smithfield Case: Adding Pig Farms to Critical Infrastructure?

The second example of CFIUS' recent expansion of the national security realm is its review of Shuanghui's proposed acquisition of Smithfield. Shuanghui is a privately-held company based in Hong Kong, and Smithfield, a U.S. company, is the world's largest pork processor and hog producer.[188] The two companies announced their proposed merger in May 2013, including a plan for Smithfield to become a wholly owned subsidiary of Shuanghui but continue operating under its existing brand name.[189] The transaction, valued at $4.7 billion, represents the "largest takeover of a U.S. company by a Chinese firm to date."[190]

At the same time, Smithfield and Shuanghui publicly announced they would file their transaction with CFIUS for review.[191] The following month, a bipartisan group from the Senate Committee on Agriculture, Nutrition and Forestry sent a letter to the secretary of the treasury to express their concerns about the transaction.[192] In their letter, the senators stated, "[w]e believe that our food supply is critical infrastructure that should be included in any reasonable person's definition of national security."[193] The letter also urged CFIUS to name the Department of Agriculture (which is not a statutory member of CFIUS) as one of the lead agencies in the review and to "look beyond" any direct impact to government operations posed by the transaction to the "broader issues of food security, food safety, and biosecu-

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186 *Ralls III*, 2014 WL 3407665, at *21.

187 *Id.* at *22.

188 Brevetti, *supra* note 3, at 1411.

189 *Id.*

190 *Id.*

191 Press Release, U.S. Senate Comm. on Agric., Nutrition & Forestry, *supra* note 13.

192 *Id.*

193 *Id.*

rity."[194] The letter suggested the "appropriate authorities" may not be involved in reviewing foreign acquisitions of American food and agriculture companies and that there needed to be a closer look at mitigation measures to ensure compliance with "American food safety and biosecurity standards" and safeguards for intellectual property resulting from "taxpayer supported" research and development efforts.[195]

The Senate Agriculture Committee held a hearing in July 2013 to question the "long-term economic motives" involved in Shuanghui's proposed acquisition of Smithfield.[196] Senators expressed concerns that China was "seeking to control the price of pork and take advantage of U.S. intellectual property."[197] Committee Chairwoman Senator Debbie Stabenow (D-MI) and Senator Mike Johanns (R-NE) also pointed to concerns that this type of investment was allowed in the United States but presumably would not be allowed in China.[198] In response to concerns about food safety, Smithfield's president and CEO told the panel that Smithfield would continue to "operate under the laws of the United States," including Department of Agriculture regulations and food inspections.[199]

A few days after the Senate hearing, CFIUS announced it would extend its review of the Smithfield acquisition into the 45-day investigation process.[200] This extension indicated that CFIUS had determined something in its review that would raise a national security concern, but the timing also suggested that the Senate hearing affected this decision.[201] However, Smithfield and Shuanghui announced in September 2013 that CFIUS had approved the transaction and they were moving forward with the merger, pending a shareholder vote.[202] Senator Stabenow released a statement following the decision saying, "[i]t remains unclear what factors [CFIUS] took into account in making its decision," and vowing the Senate Agriculture Committee would examine the review process and "take steps as needed to protect American interests."[203] This may be an early sign that Congress will again attempt to revise the CFIUS process to create more opportunities for oversight and involvement.[204]

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194 *Id.*

195 *Id.*

196 Rossella Brevetti, *Senate Agriculture Committee Members Raise Questions About Planned Smithfield Takeover*, 30 INT'L TRADE REP. 1115, 1115 (2013).

197 *Id.*

198 *Id.*

199 *Id.*

200 Rossella Brevetti, *U.S. Foreign Investment Panel Extends Review of Proposed Smithfield Acquisition*, 30 INT'L TRADE REP. 1199, 1199 (2013).

201 *Id.*

202 Brevetti, *supra* note 3, at 1411.

203 *Id.* (internal quotation marks omitted).

204 *See* EDWARD M. GRAHAM & DAVID M. MARCHICK, US NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 145-47 (2006) (stating that cases like the Dubai Ports World acquisition prompted

Although the Smithfield acquisition was ultimately approved by CFIUS, this case may nevertheless lead to uncertainty in future foreign investment transactions. The Department of Homeland Security ("DHS") is responsible for defining what constitutes "critical infrastructure."[205] In 2003, DHS identified twelve sectors that fall within the definition of critical infrastructure, the first of which is "agriculture and food."[206] If CFIUS begins to include agriculture and food security—or any of the other sectors defined by DHS as constituting critical infrastructure—in the national security review process, it could lead to an environment where essentially all foreign investment transactions are subject to review.[207] The following section will discuss some of the immediate implications of an expanded CFIUS review process.

B. *Potential Impact on Foreign Investment and Trade Under the Current CFIUS Regime*

Both international trade and legal experts have commented on precautions foreign investors will need to take in response to recent CFIUS reviews and decisions.[208] Likewise, many countries (including China) have enacted their own review processes and restrictions on U.S. investment in response to the expanded CFIUS regime.[209] Finally, the CFIUS process itself stands the risk of becoming overburdened and politicized if Congress, special interests, and even "jilted suitors" have the ability to influence the process, increase the number of cases filed, and force more cases into the 45-day investigation period.[210]

Commentators have pointed out that the Ralls case and transactions thwarted by CFIUS do not indicate that the United States is "closed to foreign investors, or even to investors from China."[211] However, the current situation does suggest that foreign investors will have to look more closely

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Congress to propose legislation (which eventually became FINSA) to increase their oversight of the CFIUS process).

205 *Id.* at 148.

206 *Id.* at 148-49. The other sectors include water, public health, emergency services, the defense industry, telecommunications, energy, transportation, banking and finance, chemicals, postal services and shipping, and information technology. *Id.*

207 *See id.* at 149 (stating that the sectors identified by DHS as "critical infrastructure" comprise 24.4 percent of the U.S. non-farm civilian workers).

208 *See, e.g.*, Fagan et al., *supra* note 16, at 198.

209 *See, e.g.*, Souvik Saha, Comment, *CFIUS Now Made in China: Dueling National Security Review Frameworks as a Countermeasure to Economic Espionage in the Age of Globalization*, 33 NW. J. INT'L L. & BUS. 199, 201-02 (2012).

210 *See, e.g.*, Richard Matheny & Gus Coldebella, *3 Things to Know About CFIUS' Recent Activism*, LAW360 (Oct. 3, 2013), http://www.law360.com/articles/477329/3-things-to-know-about-cfius-recent-activism.

211 *See, e.g.*, Fagan et al., *supra* note 16, at 199.

at proposed transactions and consider possible national security concerns among the many other investment risks. Experts have suggested consulting with an experienced CFIUS counsel before pursuing a transaction,[212] as well as developing a "Hill strategy" to address potential concerns from Congress.[213] Some have even suggested consulting "electoral schedules" before pursuing transactions to avoid a political climate in which it is advantageous to appear tough on countries like China, where public sentiment about investment is skeptical.[214] Although large multinational corporations may have the resources for this type of pre-transaction consultation, this is an additional burden on investors that may make investments less palatable, particularly in a difficult economic environment.

One unintended consequence of an expanded CFIUS review process is an increase in foreign protectionism against U.S. investment abroad. At least ten countries, including China, have established foreign investment review processes of their own.[215] China's review process was implemented in 2011, closely following the failure of key Chinese investment attempts in the United States due to CFIUS reviews, causing some to speculate that China's process was a form of retaliation.[216] The Chinese review process requires foreign investors to file with its inter-ministerial committee before pursuing a transaction that would result in control of a Chinese business.[217] The scope of the Chinese national security review is broader than the consideration factors laid out in FINSA for CFIUS and includes considerations such as effects on "basic social life and order" and non-defense sectors such as agriculture, energy, and transportation.[218] If the United States does not ensure its own foreign investment review process is transparent and consistent, it runs the risk of facing the same environment abroad, leading to not only domestic but also international politicization of foreign investment.

The current CFIUS process is also becoming overburdened as more cases are moving into the 45-day investigation period. CFIUS investigated only 4 percent of the transactions filed in 2007, but almost 40 percent of transactions filed in 2010, 2011, and 2012.[219] This trend is partly due to the politicization of the CFIUS process through pressure from Congress and the general public, as in the Smithfield case.[220] It is also due to pressure from

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212 *Id.* at 199-200.

213 Zucker & Hari, *supra* note 2, at 190.

214 *Id.* at 187.

215 *Id.* at 188.

216 Saha, *supra* note 209, at 216-17.

217 *Id.* at 217-18.

218 *Id.* at 219.

219 James D. Carlson et al., *National Security Law*, 47 YEAR REV. 453, 454 (2012); DEP'T OF TREASURY, *supra* note 29, at 2.

220 *See* Paul Marquardt, *Committee on Foreign Investment in the United States (CFIUS): Recent Developments*, CLEARY GOTTLIEB 13-15 (September 2013), https://www.americanbar.org/content/dam/

"jilted suitors"—both in the U.S. and abroad—who do not want the transaction to proceed.[221] As the review process becomes more unwieldy, foreign investors are more likely to pass on investing in U.S. companies altogether.[222] This is particularly true for sectors that have received a great deal of scrutiny—like energy and information technology—where the United States stands to gain from foreign partnership and innovation.[223] Chinese companies and the Chinese government have recently shown their frustration with the CFIUS review process as a whole and are starting instead to look for investment opportunities in places like Europe, where there have been less stringent national security reviews.[224]

The following section proposes three recommendations to improve the statutory provisions and administrative process for CFIUS reviews to address these concerns. These changes would more clearly define the scope of the CFIUS review process so that foreign investors can more confidently and proactively address the risks of a national security investigation, as well as provide limited opportunities for judicial review to ensure investors are given due process in these investigations.

III. RECOMMENDATIONS FOR STATUTORY AND ADMINISTRATIVE CHANGES TO THE CFIUS PROCESS

As discussed above, the CFIUS review process has already undergone several changes since its inception to broaden its scope, allow for greater congressional oversight, and make investigations of certain types of foreign investment transactions mandatory.[225] In light of the uncertainty and politicization present under the current review system, there are three ways in which the statutory provisions and administrative process could be revised to increase the CFIUS process's transparency and reduce risks for foreign investors, while at the same time preserving the executive branch's power to protect national security interests.

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aba/events/international_law/2013/09/china_inside_andout/CFIUS_Presentation.ppt (reporting recent Chinese investment transactions subjected to political or protectionist attacks).

221 *Id.* at 14 (reporting recent Chinese investment transactions subject to attacks from rival bidders).

222 *See* LARSON & MARCHICK, *supra* note 5, at 15 (arguing that the CFIUS process places more burdensome requirements on foreign companies than on similarly situated U.S. companies).

223 Stephen Paul Mahinka & Sean P. Duffy, *CFIUS Review Needs Greater Transparency*, INT'L FIN. L. REV. (2012).

224 Zucker & Hari, *supra* note 2, at 189.

225 *See supra* Part I.

A. *Congressional Efforts to Enact More Specific Statutory Language Defining the Scope of National Security Concerns Regarding Foreign Investment*

As discussed above, the Senate Committee on Agriculture, Nutrition and Forestry has already hinted at future efforts to revise the CFIUS process in light of the Smithfield acquisition to ensure its scope is broad enough to protect against perceived threats.[226] Section 721 (as revised by FINSA) already contains ten different factors CFIUS and the president may consider when conducting a national security review or investigation of a foreign investment transaction.[227] It is the eleventh provision, which allows consideration of "such other factors as the President or the Committee may determine to be appropriate, generally or in connection with a specific review or investigation,"[228] that led to current concerns about the transparency of the process and risk for foreign investors.

CFIUS publishes an annual report, and the public version contains a list of additional considerations used by CFIUS during their reviews.[229] However, these reports are not available until over a year after the reviews and investigations take place.[230] For example, the CFIUS annual report for calendar year 2011 ("CY2011") was not available until December 2012.[231] The consideration of "proximity to certain types of [U.S. government] facilities" was not included in the annual report until the CY2011 edition.[232] Therefore, an investor like Ralls purchasing windfarms in Oregon in March 2012 would not necessarily have been on notice that this type of transaction would cause a national security concern. Food and agricultural security has never been listed as a consideration in the CFIUS annual report, so unless Shuanghui recognized that pig farms and pork processing were part of U.S. "critical infrastructure," they too would not necessarily have been on notice that their transaction would cause a national security concern.

The issue of providing notice to foreign investors plays an important role in due process considerations, discussed in further detail in the third recommendation below. In the D.C. District Court's final decision in the Ralls case, the court found Ralls was not deprived of any protected property rights because it acquired the Butter Creek Projects "subject to the known

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226 Brevetti, *supra* note 3, at 1411; *see supra* Part II.A.3.

227 50 U.S.C. app. § 2170(f) (Supp. V 2006).

228 *Id.*

229 *See, e.g.*, DEP'T OF TREASURY, *supra* note 29, at 22-24.

230 *See* Reports and Tables (CFIUS), U.S. DEP'T OF THE TREASURY, http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-reports.aspx.

231 *Id.*

232 DEP'T OF TREASURY, COMMITTEE OF FOREIGN INVESTMENT IN THE UNITED STATES: ANNUAL REPORT TO CONGRESS 20 (2012), *available at* http://www.treasury.gov/resource-center/international/foreign-investment/Documents/2012%20CFIUS%20Annual%20Report%20PUBLIC.pdf.

risk of a Presidential veto."[233] The court emphasized that Ralls "waived the opportunity" to get a ruling from CFIUS before closing on the Butter Creek transaction, therefore "voluntarily" subjecting themselves to the risk they would be forced to divest if a national security concern was identified at some point in the future.[234] The court rejected Ralls' analogy to *Wilmina Shipping AS v. United States Department of Homeland Security*,[235] where the plaintiffs had been "granted a license that was within the government's discretion to grant, but then it had been revoked."[236] The court reasoned that Ralls was more like a permit applicant than a permit holder, because Ralls "was on notice that until it submitted a voluntary notice to CFIUS, or CFIUS decided to initiate its own review, and the project was cleared for approval, the President had the authority to prohibit any covered transaction at any time."[237]

In this holding, the district court appeared to assume that Ralls knew, or should have known, when it invested in the windfarm projects that this was a transaction that would trigger national security concerns.[238] But for the reasons discussed above, and as the D.C. Circuit Court of Appeals noted in its decision, this was not necessarily so.[239] Ralls might have been aware of the recent cases involving mining operations where CFIUS essentially blocked the transactions because of their proximity to military facilities.[240] However, Ralls was not a government-owned corporation or in any way affiliated with the Chinese government, unlike Northwest Nonferrous and Procon,[241] so a CFIUS investigation would not have automatically been triggered under Section 721. The Whidbey Island facility in Oregon was completely separate from the facilities involved in the mining transactions, and since the CFIUS rationale in those transactions was never released,[242] there was no way for Ralls to know whether the activities at Whidbey Island would lead to similar concerns. In addition, Ralls had already worked with the Navy to address their concerns about the location of one windfarm within the restricted airspace,[243] so they had reason to believe any security concerns were mitigated.

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233 Ralls Corp. v. Comm. on Foreign Inv. in the United States (*Ralls II*), No. 1:12-cv-01513-ABJ, 2013 WL 5565499, at *7 (D.D.C. Oct. 9, 2013).

234 *Id.*

235 934 F.Supp. 2d 1 (D.D.C. 2013).

236 *Ralls II*, 2013 WL 5583847, at *9 n.6.

237 *Id.*

238 *Id.* at *7.

239 Ralls Corp. v. Comm. on Foreign Inv. in the United States (*Ralls III*), No. 13-5315, 2014 WL 3407665, at *21 (D.C. Cir. July 15, 2014)

240 *See supra* Part II.A.1.

241 *See supra* Part II.A.1-2.

242 *See, e.g.*, Eric Lipton, *supra* note 115, at B3.

243 Zucker & Hari, *supra* note 2, at 183.

Despite all these factors, the district court found Ralls could not successfully allege a protected interest in the Butter Creek properties because there was always a chance CFIUS or the president could determine it was a covered transaction subject to review and ultimately prohibit or suspend it.[244] The logical extension of this holding, if it had not been reversed by the court of appeals, would be that no foreign investor has a protected interest in any transaction unless CFIUS has pre-determined there is no national security concern. Even then, there is always a chance CFIUS may reopen an investigation if it determines a party to the investigation submitted "false or misleading material information" or materially breached a mitigation agreement or condition.[245]

Providing notice also serves a practical purpose of reassuring foreign investors of the transparency and fairness of the CFIUS review process.[246] As a result of the Ralls case, many experts are advising foreign investors to file voluntary notice of their transaction with CFIUS regardless of whether they believe the transaction poses a national security concern.[247] However, filing notices takes time and resources that foreign investors may not be willing to commit, and waiting for a CFIUS response introduces risk into what may otherwise be an innocuous transaction.[248] As one commentator suggested, this creates an environment where a French private equity firm acquiring a U.S. popsicle stick manufacturer would have to go through the CFIUS review process to ensure the transaction does not pose a national security concern, just in case the manufacturer has a plant close to an undisclosed U.S. intelligence facility.[249]

Every foreign investment transaction presents a different factual situation, which is why the CFIUS review process is needed to ensure all possible national security concerns are considered from a number of perspectives.[250] National security threats are also constantly evolving, and it is therefore important to preserve the executive branch's power to take other national security factors into consideration that might not have been envisioned at the time CFIUS' statutory provisions were enacted.[251]

However, it is clear from the provisions of Section 721 that Congress did not intend for CFIUS to review every foreign investment transaction, nor did they intend for every foreign investor to have to file notice of their

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244 *Ralls II*, 2013 WL 5583847, at *9.

245 50 U.S.C. app. § 2170(b)(1)(D) (Supp. V 2006).

246 Zucker & Hari, *supra* note 2, at 186.

247 *See, e.g.*, Fagan et al., *supra* note 16, at 200; Matheny & Coldebella, *supra* note 210; Zucker & Hari, *supra* note 2, at 186.

248 Zucker & Hari, *supra* note 2, at 186.

249 Matheny & Coldebella, *supra* note 210.

250 LARSON & MARCHICK, *supra* note 5, at 9-10.

251 *Id.* at 19-22 (discussing post-9/11 security and economic concerns such as a focus on critical infrastructure including telecommunications and transportation; increased public skepticism about foreign ownership of U.S. businesses; and concerns about energy security).

transaction with CFIUS.[252] Creating an environment that essentially requires foreign investors to do this or risk being forced to divest their interest later would on the one hand overwhelm the CFIUS review process and on the other prevent valuable investments from taking place because they will be deemed too risky.[253] This environment also gives potential U.S. acquirers an edge over foreign acquirers, which negatively affects international economic and political relationships and leads to inefficient transactions.[254]

One way Congress can address these concerns is by expanding the definitions and factors for consideration listed in Section 721 to include more specific provisions about issues, such as geographic proximity and critical infrastructure, so that investors have a clearer sense of the transaction types that will trigger CFIUS concern. For example, the current definition of "critical infrastructure" is vague because it points to "systems and assets" so vital that their destruction would have a "debilitating impact" on national security.[255] From this definition alone, it is not clear that the destruction of pig farms and pork processing systems would be debilitating to national security. With regard to geographic proximity, this is obviously a factor that was involved in Ralls and other recent cases, but it is not currently included in Section 721.[256]

Congress should work with CFIUS members to create general guidelines about which types of facilities lead to proximity concerns and how investors can mitigate these concerns up front. More specific definitions and consideration factors, including a list of sectors (in the case of critical infrastructure) or facilities (in the case of geographic proximity) that are automatically subject to national security concerns, would help investors anticipate when filing notice with CFIUS what is necessary before pursuing a transaction. For example, Congress could provide a list of military facilities or other sensitive locations—at least those locations that can be disclosed publicly—that present geographic proximity concerns, as well as guidelines for how far facilities must be from these locations to mitigate these concerns.

B. *Executive Branch Disclosure of Considerations Used During CFIUS Reviews*

Once clearer statutory provisions are in place, the executive branch could significantly improve the CFIUS process's transparency and increase

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252 50 U.S.C. app. § 2170(f) (Supp. V 2006) (outlining the scope of CFIUS review and the factors that should be considered in determining a national security threat).

253 *See supra* Part II.0.

254 LARSON & MARCHICK, *supra* note 5, at 17-18.

255 50 U.S.C. app. § 2170(a)(6) (Supp. V 2006).

256 *Id.* § 2170.

investor confidence by providing better feedback to foreign investors on the specific considerations used in each CFIUS review. CFIUS would not need to disclose a lengthy report about the details of the review, but at a minimum, CFIUS should cite the relevant considerations outlined in Section 721. CFIUS should release this information even in cases where transactions are approved, as it does in the annual report,[257] so that investors can gain a better understanding of the types of concerns that can prompt a review or investigation in the first place.

If the proposed transaction involves a national security concern outside of the specific considerations identified by Congress, CFIUS should provide a general description of the issue, similar to how these emerging concerns are listed in the CFIUS Annual Report to Congress. Using a general analytic framework similar to the "three threat" formula discussed above would allow CFIUS to provide feedback in terms that investors should understand—antitrust and strategic trade theory—without having to get into the specific data or considerations used to make these calculations.[258] This framework would also help CFIUS identify more specific remediation measures that foreign investors can take to alleviate security concerns, especially for more complex threats like potential surveillance and infiltration.[259]

It already appears to be possible to discuss these considerations in an unclassified public setting, though in a very general manner, in the context of the annual report. The government also acknowledged that CFIUS and the President relied on both classified and unclassified evidence in their review of Ralls' Butter Creek transaction.[260] Commentators have suggested that more information about the security concerns themselves could be released, without compromising sensitive information.[261] However, releasing this information sooner after a review or investigation is completed would provide notice to both Congress and other investors about how national security reviews are evolving over time. For Congress, this provides assurances that CFIUS is taking emerging areas of concern into consideration and allows them to add these considerations to the list in Section 721, if desired. For investors, this provides more timely notice of factors that may impact reviews of future transactions.

Establishing a system where the executive branch routinely provides notice to investors of the considerations used in CFIUS reviews will also help combat the problem of politicization of the CFIUS process. The Smithfield case suggests that congressional members attempted to influence the

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257 DEP'T OF TREASURY, *supra* note 29, at 22-24.

258 MORAN, *supra* note 108, at 34-36.

259 *Id.* at 37-38.

260 Ralls Corp. v. Comm. on Foreign Inv. in the United States (*Ralls III*), No. 13-5315, 2014 WL 3407665, at *16 n.19 (D.C. Cir. July 15, 2014).

261 Zucker & Hari, *supra* note 2, at 190.

CFIUS deliberations, and they may take further action to revise the CFIUS process, precisely because CFIUS provided little information about the considerations they used in the review process.[262] If CFIUS provided more regular feedback to both investors and Congress, there would be less need for Congress to intervene in the process. If this feedback was explicitly tied to the considerations outlined in Section 721, it would also be more difficult for Congress to find fault with CFIUS decisions, or at least it would provide further incentive for Congress to revise or supplement these considerations if Congress determines they are insufficient.

Finally, providing this feedback will position the U.S. government to successfully defend itself against due process claims from foreign investors when transactions are denied. As discussed in the following section, courts may continue to use a balancing test, as the D.C. District Court did in the Ralls case, to determine whether the private interest outweighs the government's interest.[263] The government would have a much stronger case at the outset if it could show that it provided the investor an explanation, however general, of the national security concerns that led to the decision to prohibit or unwind the transaction in question. Similarly, the government could provide investors a clearer sense up front of what factors are likely to be considered in the CFIUS review.

C. *Formalizing Judicial Review of Due Process Issues Related to the CFIUS Process*

It is important to note the both the D.C. District Court and the D.C. Circuit Court of Appeals found that due process claims based on the CFIUS process are not precluded by the current provisions of Section 721.[264] However, with regard to the president's decisions based on CFIUS determinations, the district court's definition of due process is not appropriate under the relevant legal standards, nor is it compatible with the goal of fostering an open and transparent foreign investment environment. Although the substance of the president's decision to prohibit or suspend a transaction is clearly not reviewable under the current provisions of Section 721, a limited opportunity for judicial review would allow courts to determine whether certain procedural safeguards were followed or whether more should be applied.

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262 Brevetti, *supra* note 3, at 1411.

263 Ralls Corp. v. Comm. on Foreign Inv. in the United States (*Ralls II*), No. 1:12-cv-01513-ABJ, 2013 WL 5565499, at *10 (D.D.C. Oct. 9, 2013).

264 Ralls Corp. v. Comm. on Foreign Inv. in the United States (*Ralls III*), No. 13-5315, 2014 WL 3407665, at *9 (D.C. Cir. July 15, 2014); Ralls Corp. v. Comm. on Foreign Inv. in the United States (*Ralls I*), 926 F.Supp. 2d 71, 94-95 (D.D.C. 2013).

As discussed above, the D.C. District Court based its definition of due process in the Ralls case on whether Ralls had notice of the CFIUS proceedings and sufficient opportunity to be heard "*appropriate to the nature of the case*."[265] In determining what constituted sufficient procedural protections, the district court applied the balancing test established in *Mathews v. Eldridge*[266] in which the court weighs: "(1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation of such interest and the probable value of additional procedural safeguards; and (3) the government's interest in the existing procedure."[267] Although the D.C. Circuit Court of Appeals cited the *Mathews* test in its opinion, it did not explicitly apply these factors to the Ralls transaction, opting instead for a simpler definition of due process that involves only notice of the action and its factual basis, as well as the opportunity to rebut that evidence.[268] If the government appeals the court of appeals' decision, it remains to be seen which due process construct the Supreme Court will apply. However, examination of the district court's balancing test analysis reveals not only why this is inappropriate for cases involving national security issues, but also why a more formalized judicial review process for CFIUS challenges would be advantageous.

The district court reasoned that Ralls' "private interest" was not as great as in other national security cases based on due process claims, such as *Hamdi v. Rumsfeld*,[269] because *Hamdi* was a criminal case involving a person's liberty, and Ralls merely involved an investment that could be resold.[270] Regarding the second factor in the *Mathews* test, the district court found there was essentially no value in providing Ralls the procedural safeguards it requested—the reasons behind the president's decision—because even if Ralls had the opportunity to respond to those concerns, the president could still decide to suspend the transaction.[271] This finding is speculative, since neither the court nor Ralls knew what those reasons were or whether they could have been successfully mitigated.[272] In addition, even if the president could still block the transaction once Ralls had an opportunity to address the concerns voiced against them, this does not mean the information has no value. As Ralls indicated in its argument, it intends to pursue other windfarm projects in the United States, and knowledge of the specific con-

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265 *Ralls II*, 2013 WL 5583847, at *10 (quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S, 532, 542 (1985)) (internal quotation marks omitted).

266 424 U.S. 319 (1976).

267 *Ralls II*, 2013 WL 5583847, at *10.

268 *Ralls III*, 2014 WL 3407665, at *15.

269 542 U.S. 507 (2004).

270 *Ralls II*, 2013 WL 5583847, at *12.

271 *Id.*

272 *See supra* Part III.0.

cerns that could lead to the unwinding of future transactions would certainly have value in that context.[273]

The court's finding for the third *Mathews* factor is also speculative, since the court simply refers to the government interest as "national security," without knowing exactly what this national security interest is.[274] In this sense, the court has created a paradox by applying a balancing test that requires consideration of the government interest at stake but at the same time refusing to consider what that interest is or why it was determined to be an interest at all.

Through its application of the *Mathews* test, the D.C. District Court created a definition of due process with regard to CFIUS determinations that in reality does not allow for any balancing of interests.[275] It would be essentially impossible for a foreign investor to successfully argue for the application of additional procedural safeguards, since their "private interest" will never outweigh the government interest of "national security," and the value of additional safeguards cannot be determined because the court simply points to the president's power to decide against the investor regardless of the additional process. This definition of due process is incompatible with maintaining an open and transparent environment for foreign investment—a situation that will ultimately be detrimental to the U.S. economy.[276] If the scope of CFIUS reviews continues to expand, it is unrealistic to expect investors to simply walk away from transactions without any explanation of why they were refused.

The due process construct adopted by the D.C. Circuit Court of Appeals provides a much clearer standard in terms of what process is due in the context of a CFIUS review. However, even if a court were to apply the *Mathews* balancing test to future CFIUS challenges, there are opportunities to do so that would allow for a more meaningful review of the government interests at stake, as well as whether providing additional transparency to foreign investors would provide value while still protecting national security concerns. This type of judicial review, which would likely involve the selective release of classified information to judges, is not without precedent. The Foreign Intelligence Surveillance Court ("FISC") is comprised of federal district court judges who review warrants related to domestic surveillance in national security investigations.[277] The FISC is mandated by statute to review the substance of these warrants to prevent executive

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273 Ralls Corp. v. Comm. on Foreign Inv. in the United States (*Ralls I*), 926 F.Supp. 2d 71, 97-98 (D.D.C. 2013).

274 *Ralls II*, 2013 WL 5583847, at *12.

275 *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

276 LARSON & MARCHICK, *supra* note 5, at 22-23.

277 *Foreign Intelligence Surveillance Court*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/courts_special_fisc.html.

branch abuses.[278] A similar special court could be established to review the considerations involved in CFIUS determinations, not in terms of whether the president's actions were valid, but for whether the parties involved should be notified of the rationale used or afforded another type of procedural protection.

CONCLUSION

The CFIUS review process is a necessary part of maintaining the important balance between foreign investment and national security. In CFIUS's attempt to respond to public sentiment and fears of foreign control of U.S. industries in recent years, however, this process has become overpoliticized and counterproductive. This problem is due primarily to the overly broad definition used by CFIUS to initiate national security reviews, and the inconsistent and unpredictable application of this process to politically sensitive transactions. The result has been, and will continue to be, unnecessary and inefficient precautions taken by foreign investors to avoid or mitigate the CFIUS review process, as well as parallel restrictions on U.S. investment in other countries that are harmful to international trade relationships overall.

This problem can be addressed by implementing three changes to the administrative and statutory regime governing the CFIUS review process. First, Congress should enact more specific language defining the scope of "national security concerns" in the context of foreign investment and critical industries. Second, the executive branch should use these statutory provisions to provide more specific feedback to investors, while at the same time protecting classified information. Finally, courts should consider the opportunity for limited judicial review of CFIUS decisions based on due process requirements, particularly in the context of more specifically defined statutory authorities. As the international economy and national security environment continue to become more interconnected and complex, the CFIUS review and disclosure process must similarly evolve to promote transparency and efficiency.

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278 *Id.*