

# NOTE

## WHERE RALLS WENT WRONG: CFIUS, THE COURTS, AND THE BALANCE OF LIBERTY AND SECURITY

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### INTRODUCTION

Throughout its history, the United States has often struggled to maintain the delicate balance between liberty and security—a task as difficult as it is exceptionally important.<sup>1</sup> The

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<sup>1</sup> Examples include the Alien and Sedition Acts and the internment of Japanese citizens during World War II. See generally Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1894–96 (2009) (noting that the Alien and Sedition Acts “left broad discretion in the executive to adopt regulations against [] aliens” and “did not require the executive to use any judicial process in its ordinary enforcement of [such] regulations”); *id.* at 1929–30 (noting that Japanese

D.C. Circuit Court opinion in *Ralls Corp. v. Committee on Foreign Investment*<sup>2</sup> exemplifies this problem. The decision asserts that courts have jurisdiction to review the process by which the President investigates and prohibits foreign investment transactions that threaten national security.<sup>3</sup> This issue has serious implications not only for legal theory but also for national security and America's role in the globalized international community.

Where globalization is a defining trait of the modern era, foreign direct investment (FDI) is its lifeblood.<sup>4</sup> For decades, the United States has vocally advocated for increased FDI,<sup>5</sup> which efficiently allocates knowledge and capital across borders.<sup>6</sup> As the top investor and recipient of such investment, the United States takes in hundreds of billions of dollars annually from foreign sources, and American entities invest abroad at the same rate;<sup>7</sup> however, these economic gains are not without risk. FDI creates notable security issues, necessitating policies that balance economic interest with precautionary measures.<sup>8</sup>

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internment lacked "either direct legislative authorization or even a legislative suspension of habeas for its treatment of the American citizens"). Practices regarding detainees in the War on Terror are a more current example of this balancing problem, for which a resolution is not immediately discernable.

<sup>2</sup> 758 F.3d 296 (D.C. Cir. 2014).

<sup>3</sup> *Id.* at 307–09.

<sup>4</sup> See Andrew Burke et al., *The Impact of Foreign Direct Investment on New Firm Survival in the UK*, 31 SMALL BUS. ECON. 395, 395 (2008) (noting that FDI is "likely . . . the most important aspect of globalisation in economic terms"); Press Release, World Trade Org., Foreign Direct Inv. Seen as Primary Motor of Globalization, Says WTO Dir.-Gen. (Feb. 13, 1996), [https://www.wto.org/english/news\\_e/pres96\\_e/pr042\\_e.htm](https://www.wto.org/english/news_e/pres96_e/pr042_e.htm) [<http://perma.cc/P6FB-45EX>].

<sup>5</sup> JAMES K. JACKSON, CONG. RESEARCH SERV., RL34561, FOREIGN INVESTMENT AND NATIONAL SECURITY: ECONOMIC CONSIDERATIONS 1 (2013).

<sup>6</sup> Press Release, World Trade Org., *supra* note 4 (arguing that FDI promotes the "creation of wealth . . . [and] can release much of the untapped production potential of today's developing and transition economies, while at the same time opening up new markets"). See also EDWARD M. GRAHAM & PAUL R. KRUGMAN, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 57–59 (3d ed. 1995) (recognizing three primary sources of economic gain: "comparative advantage" through trade-enabled specialization, "increasing returns to scale," and "increased competition"). Graham and Krugman also note the potential for domestic economic costs to FDI, such as negative effects on the labor market and threats to national sovereignty. *Id.* at 59–60. These potential costs are unrelated to national security, and some would construe certain actions to prevent them as protectionism, which United States FDI policy arguably does not support. See *infra* note 75 and accompanying text.

<sup>7</sup> See JACKSON, *supra* note 5, at 1–2.

<sup>8</sup> See *id.* at 7 (noting that "[s]ome observers [ ] view some of these investments as posing potential threats"). See generally GRAHAM & KRUGMAN, *supra* note 6, at 95–120 (detailing threats to national security emanating from FDI); *infra* note 27 and accompanying text (arguing that FDI has been perceived as a threat to national security since at least World War I).

Consequently, although the United States “treat[s] foreign investors no less favorably” than American ones in most instances, there are certain national security exceptions to this general rule.<sup>9</sup>

One such exception is the power held by the Committee on Foreign Investment in the United States (CFIUS), which “serves the President in overseeing the national security implications of foreign investment.”<sup>10</sup> The CFIUS committee,<sup>11</sup> which derives its authority from legislative and executive sources,<sup>12</sup> reviews foreign acquisitions, mergers, and other transactions for national security threats.<sup>13</sup> These threats encompass “a broad range of national security considerations” pertaining to foreign control of American businesses.<sup>14</sup> After an initial thirty-day review, the committee may initiate a subsequent forty-five-day investigation.<sup>15</sup> Alternatively, if the committee determines that the transaction does not constitute a threat to national security, it informs the parties and the transaction goes through.<sup>16</sup> If CFIUS chooses the subsequent investigation and “finds that a covered transaction presents national security risks” that other provisions of law do not adequately protect against, it can take steps to reduce such risks or forward the case for presidential action, including prohibition of a given transaction or mandatory divestment.<sup>17</sup>

The CFIUS process pits security considerations and property rights against each other in a struggle between concepts

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<sup>9</sup> JACKSON, *supra* note 5.

<sup>10</sup> JAMES K. JACKSON, CONG. RESEARCH SERV., RS22863, FOREIGN INVESTMENT, CFIUS, AND HOMELAND SECURITY: AN OVERVIEW 1 (2011).

<sup>11</sup> This Note refers to “The CFIUS committee” when specifically denoting the committee in order to distinguish between that and the CFIUS process generally, which includes presidential involvement.

<sup>12</sup> See 50 U.S.C. app. § 2170 (2012); Exec. Order No. 11,858, *as amended*, 31 C.F.R. 800.

<sup>13</sup> Dep’t of the Treasury, *Process Overview*, U.S. DEP’T OF THE TREASURY (Dec. 1, 2010, 8:08 AM), <http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-overview.aspx> [<http://perma.cc/W8TN-WCQS>].

<sup>14</sup> COMM. ON FOREIGN INV. IN THE U.S., ANNUAL REPORT TO CONGRESS FOR CY 2012 22 (2013), <http://www.treasury.gov/resource-center/international/foreign-investment/Documents/2013%20CFIUS%20Annual%20Report%20PUBLIC.pdf> [<http://perma.cc/SM83-C25C>]. For an overview of how CFIUS considers certain factors, see generally Guidance Concerning the National Security Review Conducted by the Comm. on Foreign Inv. in the United States, 73 Fed. Reg. 74,567, 74,568–72 (Dec. 8, 2008) [hereinafter Guidance] (providing examples of covered transactions and identifying statutorily defined and other factors pertinent to CFIUS review).

<sup>15</sup> Dep’t of the Treasury, *supra* note 13.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

that were both fundamentally important at the nation's founding. Both the Declaration of Independence and the Constitution prominently suggest the importance of national defense.<sup>18</sup> Likewise, John Jay noted in *The Federalist No. 3* that, "[a]mong the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their *safety* seems to be the first."<sup>19</sup> Alexander Hamilton also addressed serious national security concerns for the fledgling union in *The Federalist No. 8*, though he admittedly expressed concerns about security interests trampling liberty.<sup>20</sup>

The principles underlying property rights were perhaps even more important to the founders.<sup>21</sup> John Adams stated, "The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."<sup>22</sup> Likewise, although some scholars contend that the Declaration of Independence's substitution of the phrase "pursuit of happiness" for "property" suggests a lesser appreciation for the property right, others more persuasively argue that the writers equated that pursuit with "the free acquisition, possession and use of property."<sup>23</sup> Furthermore, the early revolu-

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<sup>18</sup> See THE DECLARATION OF INDEPENDENCE para. 6 (U.S. 1776) (noting the "Power to levy War [and] conclude Peace" first in a list of the powers of "Free and Independent States"); U.S. CONST. pmbl. (endeavoring to "provide for the common defence").

<sup>19</sup> THE FEDERALIST NO. 3, at 18 (John Jay) (Lawrence Goldman ed., 2008).

<sup>20</sup> THE FEDERALIST NO. 8, at 40 (Alexander Hamilton) (Lawrence Goldman ed., 2008). Notably, Hamilton believed that a standing army and internal disunion constituted the greatest national security threats, and he feared that a focus on "[s]afety from external danger" would overpower "[e]ven the ardent love of liberty." *Id.* In this and other writings, Hamilton essentially describes the need for balance between liberty and security that this Note identifies.

<sup>21</sup> See GOTTFRIED DIETZE, IN DEFENSE OF PROPERTY 30–34, 59–63 (1995) (noting the importance of property rights in the Declaration of Independence, the Constitution, and early state constitutions); JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 6 (1990) (stating that the framers viewed property as "a right whose security was essential to the economic and political success of the new republic" and that "[i]f property could not be protected, not only prosperity, but liberty, justice, and the international strength of the nation would ultimately be destroyed").

<sup>22</sup> DIETZE, *supra* note 21, at 34. It is notable that Adams expresses a connection between property rights and security by noting that insubstantial support for the former would lead to "anarchy." Dietze suggests that Adams' opinion "was shared by many." *Id.*

<sup>23</sup> *Id.* at 31, 59 (arguing that "[i]f Jefferson had wanted to omit an emphasis on property, then he would have refrained from denouncing the king's infringements upon the colonists' property so emphatically."); see Edward J. Erler, *The Great Fence to Liberty: The Right to Property in the American Founding*, in LIBERTY, PROPERTY, & THE FOUNDATIONS OF THE AMERICAN CONSTITUTION 43, 50–52 (Ellen Frankel Paul & Howard Dickman eds., 1989).

tion's rallying cry of "no taxation without representation" underscores the focus on property issues.<sup>24</sup>

This application of eighteenth-century thinking on liberty (expressed through property rights) and security calls for recognition that the United States now faces different threats. The growing danger of radicalized non-state actors,<sup>25</sup> the global proliferation of weapons of mass destruction,<sup>26</sup> and the intense speed and power of modern warfare are just some examples, each requiring strong policy responses. FDI also presents modern threats that were largely unimaginable to the founders.<sup>27</sup> Theodore Moran identifies three threat categories that originate in FDI—foreign acquisitions of American entities "that would make the United States dependent on a foreign-controlled supplier of crucial goods or services," "that would allow transfer of technology or expertise to a [harmful] foreign-controlled entity (or its government)," or "that could allow insertion of the means for infiltration, surveillance, or sabotage . . . in goods or services crucial to the functioning of the US economy."<sup>28</sup> The threat of espionage is particularly troubling, because the United States is a global technology leader and an important military and diplomatic power.<sup>29</sup>

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<sup>24</sup> DIETZE, *supra* note 21, at 30.

<sup>25</sup> See DEP'T OF DEF., JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-26: COUNTER-TERRORISM, I1-I2 (Oct. 24, 2014), [http://www.dtic.mil/doctrine/new\\_pubs/jp3\\_26.pdf](http://www.dtic.mil/doctrine/new_pubs/jp3_26.pdf) [<https://perma.cc/B43M-YWU7>] ("[T]he rise in sectarian and ethnic conflict has increased hostilities within countries and terrorism is becoming commonplace. Information and communications technology and other advanced technologies . . . are used by a wide range of state and non-state actors. As a result, the strategic security environment has become more complex and more menacing as nation states and non-state actors compete for strategic influence and access.").

<sup>26</sup> *C.f.* Desmond Butler & Vadim Ghirda, *AP Investigation: Nuclear Black Market Seeks IS Extremists* (Oct. 7, 2015, 5:45 PM), <http://bigstory.ap.org/urn:publid:ap.org:6fd1d202f40c4bb4939bd99c3f80ac2b> [<https://perma.cc/F46Q-DE3J>] (noting, for example, the international market for former Soviet nuclear materials).

<sup>27</sup> Although modern technology, particularly that which facilitates espionage, makes FDI a greater threat today than in the past, it is noteworthy that "FDI has played a significant role in the development of the US economy since at least the 1870s" and has been recognized as a threat since at least World War I. EDWARD M. GRAHAM & DAVID M. MARCHICK, *US NATIONAL SECURITY AND FOREIGN DIRECT INVESTMENT 2-3* (2006).

<sup>28</sup> THEODORE H. MORAN, *THREE THREATS: AN ANALYTICAL FRAMEWORK FOR THE CFIUS PROCESS 1* (2009).

<sup>29</sup> See Souvik Saha, *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, 200 (2012) ("[V]ulnerability to espionage—military or economic—is hardly a secret. . . . Those operating on the frontlines of American counter-intelligence efforts echo the sentiment: 'The Cold War is not over, it has merely moved into a new arena: the global marketplace.'")

This Note considers these problems and analyzes whether the *Ralls* decision adequately addresses the balance between liberty and security. Part I provides a detailed background of the *Ralls* case and a history of the CFIUS process, noting with particular attention the legislative and executive intent in establishing its authority. Part II discusses various problems with the *Ralls* decision from both a legal and practical perspective. First, it argues that the decision misconstrues the limits of a statutory bar on judicial review of the President's actions. Second, it discusses why the D.C. Circuit Court should not have ruled on the merits of the case, arguing that it presents a nonjusticiable matter reserved for the political branches of government. Third, it demonstrates that the decision will produce a counterproductive result. Fourth, it argues that the decision encourages resolution on executive privilege grounds and discusses the negative implications of this conclusion. In Part III, this Note addresses how the government could maintain an appropriate balance between liberty and security in CFIUS matters. Finally, it concludes by considering whether *Ralls* will have any lasting impact on the CFIUS process and expounding the responsibility of Congress and the President in this area of the law.

## I

### THE HISTORY AND CONTEXT OF *RALLS* AND CFIUS REVIEW

#### A. *RALLS*: BACKGROUND, PROCEDURAL POSTURE, AND RESULT

In March 2012, *Ralls Corp.*, an affiliate of the Chinese construction and machinery conglomerate Sany Group,<sup>30</sup> purchased four American companies that were developing wind farms in Oregon.<sup>31</sup> At the time of purchase, these companies had already acquired certain easements and contracts necessary to conduct their business.<sup>32</sup> The wind farm properties were “in and around the eastern region of a restricted airspace and bombing zone maintained by the United States Navy,”<sup>33</sup>

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<sup>30</sup> See Press Release, Sany Group, Suing President Obama Sany Fights for Dignity (Nov. 16, 2012), [http://www.sanygroup.com/group/en-us/media/34262\\_for\\_news\\_text.htm](http://www.sanygroup.com/group/en-us/media/34262_for_news_text.htm) [<http://perma.cc/9EHZ-AHW6>]. For a discussion of possible national security threats from Chinese FDI policy in particular, see generally Saha, *supra* note 29, at 201–08 (arguing that Chinese FDI in the U.S. “creates a potential conduit for leaking American technology, intellectual property, and sensitive information pertaining to critical infrastructure”) and GRAHAM & MARCHICK, *supra* note 27, at 101–04 (asserting similar arguments).

<sup>31</sup> *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 301 (D.C. Cir. 2014).

<sup>32</sup> *Id.* at 304.

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

but notably, “other foreign-owned wind turbines near the restricted airspace” were unchallenged.<sup>34</sup> Though Ralls Corp. knew that its acquisitions might be subject to a CFIUS investigation, it chose not to seek a preliminary ruling from the committee before acquiring the companies and properties at issue.<sup>35</sup>

Soon after, the CFIUS committee concluded that the Ralls Corp. transactions threatened national security and it ordered mitigation measures on July 25, 2012.<sup>36</sup> The order required Ralls Corp. to cease construction and operations at certain project sites, remove all stored items at those sites within five days, and refrain from accessing those locations.<sup>37</sup> On July 30, the CFIUS committee initiated an additional investigation, which led to issuance of an amended order on August 2.<sup>38</sup> On September 13, the committee concluded its investigation and forwarded a report to the President for his decision.<sup>39</sup> The President, in a timely order, then directed Ralls Corp. to

(1) divest itself of all interests in the Project Companies, their assets and their operations within ninety days of the Order, (2) remove all items from the project sites . . . , (3) cease access to the project sites, (4) refrain from selling, transferring or facilitating the sale or transfer of “any items made or otherwise produced by the Sany Group to any third party for use or installation at the [project sites]” and (5) adhere to restrictions on the sale of the Project Companies and their assets to third parties.<sup>40</sup>

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<sup>34</sup> *Id.* at 304–05. It is also notable that the government uses the airspace in question for flying drones—an area of technological competition between the United States and China. Nin-Hai Tseng, *Sany’s Bold U.S. Move*, FORTUNE, June 17, 2013, <http://fortune.com/2013/06/17/sanys-bold-u-s-move> [<http://perma.cc/E835-384W>]. See William Wan & Peter Finn, *Global Race on to Match U.S. Drone Capabilities*, WASH. POST, July 4, 2011, [http://www.washingtonpost.com/world/national-security/global-race-on-to-match-us-drone-capabilities/2011/06/30/gHQACWdmxH\\_story.html](http://www.washingtonpost.com/world/national-security/global-race-on-to-match-us-drone-capabilities/2011/06/30/gHQACWdmxH_story.html) [<http://perma.cc/X3A8-6P6Y>] (describing the competition for drone development between China and the United States).

<sup>35</sup> *Ralls*, 758 F.3d at 307. Foreign entities are increasingly seeking voluntary CFIUS review before closing similar acquisitions. See generally Alexandra López-Casero, *A Year in Review: More Transactions Run into CFIUS Trouble*, NIXON PEABODY LLP: NOW + NEXT (Jan. 16, 2014), [http://www.nixonpeabody.com/files/167021\\_M\\_and\\_A\\_16JAN2014.pdf](http://www.nixonpeabody.com/files/167021_M_and_A_16JAN2014.pdf) [<http://perma.cc/G79W-PT6E>] (noting that “an increasing number of M&A lawyers and deal parties recognize the benefit of filing a voluntary notice and involving CFIUS early on in the process in order to obtain CFIUS clearance”).

<sup>36</sup> *Ralls*, 758 F.3d at 305.

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

<sup>38</sup> See *id.* (detailing the amended order, which placed limitations on Ralls Corp.’s ability to sell the companies or their assets).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 306 (alteration in original).

The Presidential Order also revoked the CFIUS Orders pertaining to Ralls Corp.<sup>41</sup> As a result, that Presidential Order was the only remaining source of executive authority in effect.

Ralls Corp. filed suit against the CFIUS committee, its chairman, and the President in the D.C. District Court, seeking invalidation of both the CFIUS and Presidential Orders.<sup>42</sup> The company alleged that the CFIUS order was invalid under the Administrative Procedure Act (APA), that “the actions of [the committee and the President] . . . [were] *ultra vires*,” and that both of the orders were unconstitutional under the Fifth and Fourteenth Amendments.<sup>43</sup> The court held that the Defense Production Act (DPA)—the enabling statute for CFIUS authority—“barred judicial review of Ralls’s *ultra vires* and equal protection challenges to the Presidential Order but not Ralls’s due process challenge thereto.”<sup>44</sup> It also held that remaining claims about the CFIUS order “were mooted by the Presidential Order.”<sup>45</sup> The court then ruled in favor of the government’s motion to dismiss the due process claims, holding that the Order “did not deprive Ralls of a constitutionally protected property interest . . . because Ralls ‘voluntarily acquired those state property rights subject to the known risk of a Presidential veto’ and ‘waived the opportunity . . . to obtain a determination . . . before it entered into the transaction.’”<sup>46</sup> The court finally noted that, “even if Ralls had a constitutionally protected property interest, the [Government] provided Ralls with due process . . . [by] inform[ing] Ralls in June 2012 that the transaction had to be reviewed and g[iving] Ralls the opportunity to submit evidence in its favor.”<sup>47</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> *See id.* Ralls Corp. originally filed suit against the CFIUS committee and its chairman but amended the complaint, adding the President as a defendant, following the issuance of the Presidential Order of September 28.

<sup>43</sup> *Id.* This Note does not delve into the intricacies of the APA, focusing instead—like the Circuit Court’s opinion—on review of the President’s actions rather than those of the CFIUS committee. *See infra* note 89 (noting that the President is not an agency and is therefore not subject to the APA). It suffices to say that the APA allows courts to review and overturn decisions that an administrative agency made in an “arbitrary [and] capricious” manner. 5 U.S.C. § 706(2)(A) (2012). For further discussion, see Jacob A. Stein et al., 6-51 ADMINISTRATIVE LAW § 51.03 (2014) (explaining the “arbitrary and capricious test”).

<sup>44</sup> *Ralls*, 758 F.3d at 306.

<sup>45</sup> *Id.* at 306–07. For this reason, the court granted 12(b)(1) dismissal of the relevant counts. *See id.*

<sup>46</sup> *Id.* at 307 (second omission in original) (quoting *Ralls Corp. v. Comm. on Foreign Inv.*, 987 F. Supp. 2d 18, 27 (D.D.C. 2013)).

<sup>47</sup> *Id.*

Ralls Corp. then appealed to the D.C. Circuit Court, challenging the dismissal of its due process claims against the Presidential Order and its claims against the CFIUS Order. The court held that, although the DPA states that “[t]he actions [and findings] of the President . . . [regarding CFIUS determinations] shall not be subject to judicial review,”<sup>48</sup> there was no “clear and convincing” evidence of Congressional intent to bar review of constitutional claims.<sup>49</sup> The court supported this finding by claiming that “[t]he text [of the statute] does not [] refer to the reviewability of a constitutional claim challenging the *process* preceding . . . presidential action.”<sup>50</sup> The court also held that the government had deprived Ralls Corp. of a protected property interest and that the corporation had not waived that interest “by failing to seek pre-approval” of its acquisitions.<sup>51</sup> This deprivation, the court claimed, lacked the requisite due process because the government did not “provide notice of, and access to, the unclassified information used to prohibit the transaction,” and because Ralls Corp. needed that information for a legitimate opportunity to respond to the CFIUS committee and the President.<sup>52</sup> As a result, the D.C. Circuit Court of Appeals remanded the matter to the district court “with instructions that Ralls be provided . . . access to the unclassified evidence on which the President relied and an opportunity to respond thereto.”<sup>53</sup>

On November 6, 2014, the D.C. District Court issued an order in accordance with the appellate court’s decision.<sup>54</sup> The order required the executive to provide Ralls Corp. “with access to all unclassified material contained in the record compiled by CFIUS and all unclassified factual findings or evidence underlying CFIUS’s recommendation to the President.”<sup>55</sup> The order also established a framework within which the President could make an executive privilege claim and Ralls Corp. could in turn challenge it.<sup>56</sup> Additionally, it provided Ralls Corp. a later “opportunity to respond to and/or rebut the information in writ-

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<sup>48</sup> *Id.* at 307–08 (first alteration in original).

<sup>49</sup> *Id.* at 308–11.

<sup>50</sup> *Id.* at 311.

<sup>51</sup> *Id.* at 315–17.

<sup>52</sup> *See id.* at 317–20.

<sup>53</sup> *Id.* at 325. The court also remanded claims regarding the CFIUS Order without addressing the merits, because the district court had previously dismissed them on jurisdictional grounds. *See id.*

<sup>54</sup> *Ralls Corp. v. Comm. on Foreign Inv.*, Nos. 12-1513, 12-2026 (ABJ), 2014 U.S. Dist. LEXIS 177868 (D.D.C. 2014).

<sup>55</sup> *Id.* at \*5.

<sup>56</sup> *See id.* at \*5–6.

ing.”<sup>57</sup> Notably, it also required the CFIUS committee to consider that response and issue another recommendation to the President, who would then have to make a final determination regarding the transactions in question.<sup>58</sup> The President ultimately chose to release almost all of the unclassified documents—consisting of over 3,487 pages—withholding only two unclassified documents with an executive privilege claim.<sup>59</sup>

Despite this significant step toward resolving the case, the D.C. Circuit Court’s decision in *Ralls* is problematic. It deviates from the judiciary’s traditional deference to the executive in matters of foreign affairs and national security,<sup>60</sup> setting a dangerous precedent for judicial intrusion into these important areas.

## B. The History of CFIUS

CFIUS originated in an Executive Order that President Ford issued in 1975.<sup>61</sup> In its original form, the committee “lacked its present authority to prevent or suspend foreign investment transactions,” but instead played a monitoring role and “coordinate[d] the implementation of United States policy regarding foreign investment.”<sup>62</sup> Economic concerns led Con-

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<sup>57</sup> *Id.* at \*6.

<sup>58</sup> *See id.*

<sup>59</sup> *See* Karlee Weinmann, *In Rare Move, CFIUS Hands Over Cache of Ralls Docs*, LAW360 (2014), <http://www.law360.com/articles/599760/in-rare-move-cfius-hands-over-cache-of-ralls-docs> [<https://perma.cc/XQ8G-R9W6>]; *see also* TIMOTHY KEELER ET AL., MAYER BROWN, US GOVERNMENT PRODUCES UNCLASSIFIED DOCUMENTS IN LITIGATION REGARDING CFIUS REVIEW OF CHINESE INVESTMENT, <http://www.mayerbrown.com/US-Government-Produces-Unclassified-Documents-in-Litigation-Regarding-CFIUS-Review-of-Chinese-Investment-12-05-2014/> [<https://perma.cc/2QC8-PLPG>] (noting that the government’s release of the information was “unusually forthcoming”).

<sup>60</sup> *See* *Dep’t of the Navy v. Egan*, 484 U.S. 518, 529–30 (1988) (“[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (“We have consistently held [] that courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security.”). Admittedly, *El-Shifa* notes a distinction between claims regarding the wisdom of a policy choice and “purely legal issues.” *Id.* (quoting *Campbell v. Clinton*, 203 F.3d 19, 40 (D.C. Cir. 2000) (Tatel, J., concurring)). Such a distinction should be inapplicable in the *Ralls* context, however, because the due process issue is inseparable from the prudential decision about the release of sensitive information. *See infra* Section II.B.

<sup>61</sup> Christopher S. Kulander, *Intruder Alert! Running the Regulatory Gauntlet to Purchase, Own, and Operate American Energy and Mineral Assets by Foreign Entities*, 46 TEX. TECH L. REV. 995, 1004 (2014); *see also* Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1975) (establishing the committee).

<sup>62</sup> Kulander, *supra* note 61, at 1004.

gress to pass the Exon-Florio Amendment to the DPA in 1988, which provided executive authority to block threatening transactions.<sup>63</sup> Initially, legislators sought to allow the President to block such transactions for purely economic reasons; however, stiff opposition led to the final version focusing solely on national security issues.<sup>64</sup> Still, the Exon-Florio Amendment served to strengthen CFIUS and limit Congress's authority over the committee by providing clearer executive power.<sup>65</sup>

In 1993, Congress passed the Byrd Amendment to the DPA, which further strengthened CFIUS.<sup>66</sup> It "mandated an automatic [CFIUS] investigation" for certain types of transactions, but it still did not give the CFIUS committee the power to "demand notification of proposed transactions."<sup>67</sup> Consequently, the committee relied heavily on voluntary reports from foreign investors, which it encouraged with a "safe harbor" framework that prohibited executive branch national security review after "CFIUS conclusively determined that a transaction did not threaten national security."<sup>68</sup>

Congress implemented the most significant changes to the CFIUS process in 2007, when it passed the Foreign Investment and National Security Act (FINSAs).<sup>69</sup> FINSAs gave CFIUS the authority to "suspend or even unwind any transaction after closing" based on a determination that the transaction in question threatens critical infrastructure.<sup>70</sup> It "require[d] CFIUS to investigate all foreign investment transactions" involving a foreign entity under governmental control,<sup>71</sup> and it "fundamentally altered the meaning of national security in the Exon-Florio provision by including critical infrastructure and homeland se-

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<sup>63</sup> *Id.* at 1004–05.

<sup>64</sup> See GRAHAM & MARCHICK, *supra* note 27, at 43–45. This is an important distinction, which ensures that CFIUS authority is not used as an instrument of economic protectionism. *But see infra* note 75 (presenting arguments in favor of and in opposition to that assertion).

<sup>65</sup> See Kulander, *supra* note 61, at 1005.

<sup>66</sup> *Id.* The Byrd Amendment strengthened CFIUS by lowering the requisite threat level for it to initiate a review and adding two factors to the "original list of national security assessment factors." See Maira Goes de Moraes Gavioli, *National Security or Xenophobia: The Impact of the Foreign Investment and National Security Act ("FINSAs") in Foreign Investment in the U.S.*, 2 WM. MITCHELL L. RAZA J. 1, 16–17 (2011).

<sup>67</sup> Kulander, *supra* note 61, at 1005.

<sup>68</sup> *Id.* at 1005–06.

<sup>69</sup> *Id.* at 1007.

<sup>70</sup> *Id.*

<sup>71</sup> JACKSON, *supra* note 10, at 3. After FINSAs, firms under the control of a foreign government bear the burden of proof to demonstrate that a transaction does not threaten national security. *Id.*

curity as areas of concern.”<sup>72</sup> Perhaps most importantly, FINSA more clearly prohibited judicial review of CFIUS determinations.<sup>73</sup>

Although national security concerns are of the utmost importance, CFIUS maintains its “longstanding commitment to welcoming foreign investment.”<sup>74</sup> “[N]ational economic security” is a recognized factor in CFIUS analysis;<sup>75</sup> however, the government’s policy has generally been to avoid protectionism in favor of a more open economy.<sup>76</sup> The political branches have also consistently enhanced their authority over CFIUS matters at the expense of the judiciary.<sup>77</sup> This consistency, combined with traditional deference to the executive in matters of national security *and* statutory language that explicitly prohibits

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<sup>72</sup> *Id.*

<sup>73</sup> de Moraes Gavioli, *supra* note 66, at 23. Though the statute’s prohibition on judicial review of presidential actions and determinations is clear, a strict textual interpretation could conclude that courts can review the CFIUS *committee*. See Defense Production Act, 50 U.S.C. app. § 2170(e) (2012) (emphasizing “President” and not mentioning the committee). This problem is of little concern in the *Ralls* context because the D.C. Circuit Court—though disagreeing with the district court’s dismissal of the CFIUS Order—focused its holding on the President’s action. See *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 325 (2014).

<sup>74</sup> Guidance, *supra* note 14.

<sup>75</sup> Saha, *supra* note 29, at 215 (quoting JAMES K. JACKSON, CONG. RESEARCH SERV., THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 13 (2009)). Some authors argue that FINSA can be misused as “a tool to perpetuate protectionism.” See, e.g., de Moraes Gavioli, *supra* note 66, at 29. Nevertheless, national economic security is a distinct concept from protectionism. See THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 15 (2015), [http://www.whitehouse.gov/sites/default/files/docs/2015\\_national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/docs/2015_national_security_strategy.pdf) [<https://perma.cc/NQ79-Q6T4>] (“The American economy is . . . a source of stability for the international system. In addition to being a key measure of power and influence in its own right, it underwrites our military strength and diplomatic influence. A strong economy, combined with a prominent U.S. presence in the global financial system, creates opportunities to advance our security.”).

<sup>76</sup> See GRAHAM & MARCHICK, *supra* note 27, at 43–44 nn.33–36 and accompanying text (demonstrating executive and congressional objection to proposed legislation that would have given CFIUS broad review power based on purely economic considerations); Matthew R. Byrne, *Protecting National Security and Promoting Foreign Investment*, 67 OHIO ST. L.J. 849, 890 (2006) (noting that a protectionist policy approach “has not played itself out” in the past); Matthew C. Sullivan, *CFIUS and Congress Reconsidered: Fire Alarms, Police Patrols, and a New Oversight Regime*, 17 WILLAMETTE J. INT’L L. & DISP. RES. 199, 232–33 (2009) (arguing that FINSA’s final form “rejected many of the more protectionist provisions” present in earlier versions of the bill and that the Act “reflects a moderate, responsible position”). *But see* DAVID M. MARCHICK AND MATTHEW J. SLAUGHTER, COUNCIL ON FOREIGN RELATIONS, GLOBAL FDI POLICY 32 (2008), [http://www.cfr.org/content/publications/attachments/FDI\\_CSR34.pdf](http://www.cfr.org/content/publications/attachments/FDI_CSR34.pdf) [<https://perma.cc/AT2W-CRZH>] (arguing that FINSA and other “recent changes in FDI policies . . . constitute the start of a protectionist drift”).

<sup>77</sup> See *supra* notes 60–73 and accompanying text.

judicial review of presidential actions and findings,<sup>78</sup> belies the D.C. Circuit Court's assertion that it can exercise jurisdiction in *Ralls*.

## II

### PROBLEMS WITH THE D.C. CIRCUIT COURT'S HOLDING IN *RALLS*

The *Ralls* holding upended the CFIUS process by declaring that it lacks necessary elements of due process.<sup>79</sup> The decision failed, however, to establish a framework that would rectify the concerns that the court raised. Ultimately, the *Ralls* decision is problematic because of its interpretation of the statutory bar against jurisdiction, its exercise of jurisdiction despite the government's political question argument, and the policy problems that it either creates or fails to adequately address.

#### A. The Statutory Bar on Jurisdiction

In *Ralls*, the D.C. Circuit Court held that the DPA provision against review of presidential actions and determinations did not prohibit review of the procedural due process challenge at issue.<sup>80</sup> The decision notes that the Supreme Court "has long held that a statutory bar to judicial review precludes review of constitutional claims only if there is 'clear and convincing' evidence that the Congress so intended."<sup>81</sup> In *Ralls*, the court relied heavily on two prior cases to find that such evidence was absent and thereby assert the power to review constitutional claims: *Ungar v. Smith* and *Ralpho v. Bell*.<sup>82</sup>

In *Ungar*, the D.C. Circuit Court held that an administrative process to determine ownership rights derived from property seized during World War II was reviewable for

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<sup>78</sup> See 50 U.S.C. app. § 2170(e).

<sup>79</sup> See *supra* note 52 and accompanying text.

<sup>80</sup> See *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 311 (2014).

<sup>81</sup> *Id.* at 308 (citing *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986); *Califano v. Sanders*, 430 U.S. 99, 109 (1977); *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975); *Johnson v. Robinson*, 415 U.S. 361, 373–74 (1974)). This Note does not dispute the court's distinction between constitutional and factual claims; however, it argues that the court misapplied the facts of the *Ralls* case to this legal theory, resulting in an incorrect holding with serious implications for national security and diplomacy.

<sup>82</sup> See *id.* at 308–12; see also *Ungar v. Smith*, 667 F.2d 188, 190–96 (D.C. Cir. 1981) (finding that although a statute stated a court could not review Office of Alien Property claims, that statute did not bar the appellants' due process claim); *Ralpho v. Bell*, 569 F.2d 607, 613, 621–22 (D.C. Cir. 1977) (finding that a statutory bar in the Micronesian Claims Act did not prevent the appellants' due process challenge).

constitutional claims, despite language that broadly precluded judicial review.<sup>83</sup> In that case, which focused on a Hungarian corporation's property in the aftermath of the war, the court held that it could not review agency-determined facts where Congress forbade such review, but that it had jurisdiction over constitutional claims about the agency's procedural mechanisms for making those factual determinations.<sup>84</sup> *Ralpho* similarly demonstrated that "a broadly worded statutory bar [does] not preclude [] consideration of a procedural due process claim."<sup>85</sup> That case involved "a fund for compensation of losses incurred by Micronesians during World War II," from which *Ralpho* claimed he could not fully benefit because of "secret evidence" in an allegedly unfair agency hearing.<sup>86</sup>

Though *Ralpho's* secret evidence is evocative of the scenario presented in *Ralls*, there are critical differences between the cases. Most importantly, *Ralpho* and *Ungar* are about administrative determinations.<sup>87</sup> In fact, the significant cases that support review of constitutional claims despite a statutory bar on review all fail to support review of the President's individual decision-making process, considering only agency actions instead.<sup>88</sup> In *Ralls*, however, the court focuses narrowly on the President, when its reach should not have extended past the CFIUS committee, which is an agency and therefore more suitable for judicial review. Notably, other areas of jurisprudence

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<sup>83</sup> *Ungar*, 667 F.2d at 197–98. The relevant statute stated that the administrative determinations "were . . . to be 'final' and 'not . . . subject to review by any court.'" *Id.* at 193 (second omission in original) (quoting 22 U.S.C. §1631o(c) (1976)).

<sup>84</sup> *Id.* at 190–93.

<sup>85</sup> *Ralls*, 758 F.3d at 309. The relevant statute stated that "settlements . . . and . . . payments made . . . under the authority of [the Act] . . . shall be final and conclusive for all purposes, notwithstanding any other provision of law to the contrary and not subject to review." *Ralpho*, 569 F.2d at 613 (quoting 50 U.S.C. § 2020).

<sup>86</sup> *Ralpho*, 569 F.2d at 611, 615. The evidence in question is a study regarding the value of his home, which had been destroyed in the war. *Id.* at 613–15.

<sup>87</sup> See *supra* notes 82–86 and accompanying text.

<sup>88</sup> See, e.g., *Webster v. Doe*, 486 U.S. 592, 598–99 (1988) (seeking review of actions of the Central Intelligence Agency); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 669 (1986) (seeking review of a Medicare regulation); *Califano v. Sanders*, 430 U.S. 99, 103–04 (1977) (seeking review of an administrative decision regarding social security benefits); *Jarborough v. Att'y Gen. of the U.S.*, 438 F.3d 184, 186 (3rd Cir. 2007) (seeking review of actions of the Board of Immigration Appeals); *Marozsan v. United States*, 852 F.2d 1469, 1470 (7th Cir. 1988) (seeking review of actions of the Board of Veterans' Appeals); *Ungar*, 667 F.2d at 189 (seeking review of actions of the Office of Alien Property); *Ralpho*, 569 F.2d at 611 (seeking review of actions of the Foreign Claims Settlement Commission of the United States).

make clear that the President is not an agency, and nothing suggests that this status would change for CFIUS matters.<sup>89</sup>

Some argue that the judiciary is always empowered to review constitutional claims.<sup>90</sup> But the President's refusal to reveal the facts upon which he made a CFIUS determination is not a constitutional issue because the relevant procedure is at the agency level, not the Oval Office.<sup>91</sup> Of course, not all presidential actions are free from judicial review; however, it seems unlikely that Congress intended to allow review of such action here, because it is entirely different from the *Ralpho* or *Ungar*-type scenarios that trigger the clear and convincing evidence standard. Consequently, the judiciary's claim of legislative support for review of the President's discretionary CFIUS authority may lack merit.

What then of reviewing the CFIUS committee? This Note's interpretation of the statutory bar, which focuses on the President himself rather than the executive branch as a whole, admittedly leaves the committee subject to judicial review. But the statutory bar is not the only impediment to jurisdiction. Even though alone it would not prohibit the judiciary from reviewing the CFIUS committee,<sup>92</sup> the courts should not be able to do so for other reasons—jurisdictional and prudential.<sup>93</sup> As a result, the *Ralls* decision may not only be bad law but also bad judicial policy.

## B. The Political Question Doctrine

Even if the DPA does not bar jurisdiction over this case, the political question doctrine suggests that *Ralls* should evade judicial review. This doctrine of justiciability, which stems

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<sup>89</sup> See Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1613–14 (1997) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) for the proposition that the President is not subject to the APA); Marjorie A. Shields, Annotation, *What Constitutes "Agency" for Purposes of Freedom of Information Act (5 U.S.C.A. § 552)*, 165 A.L.R. FED. 591, at 4b (2000) (noting that the President is not an "agency" under FOIA). Note that Siegel's arguments in favor of the widely-overlooked nonstatutory review doctrine are distinct from constitutional challenges such as those at issue in *Ralls*; therefore, they are not relevant to this Note. See Siegel, *supra* at 1618–19.

<sup>90</sup> E.g., Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 260 (2012).

<sup>91</sup> Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171, 1172–73 (noting a "long line of decisions[] [where] the Supreme Court has declined to review whether the President has properly invoked his statutory powers"); see also *supra* note 89.

<sup>92</sup> See *supra* notes 82–86, 88–90 and accompanying text.

<sup>93</sup> See *infra* Section III.B.

from the separation of powers, features a multifactor test.<sup>94</sup> The Supreme Court noted that a case involving a political question will prominently feature

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>95</sup>

Only one of these factors must be present for courts to determine that the matter raises a nonjusticiable political question under the D.C. Circuit's interpretation.<sup>96</sup> Turning to *Ralls*, even if the government had violated *Ralls Corp.*'s constitutional rights, application of this doctrine would avoid a constitutional dilemma, in keeping with the notion that "there are indeed some rights guaranteed by the Constitution for the violation of which the courts cannot give redress."<sup>97</sup>

A presidential determination regarding a CFIUS matter should fit squarely within the exclusive purview of the executive, because, as the Supreme Court recognizes, "[f]oreign policy and national security is textually committed to the political branches."<sup>98</sup> Likewise, the decision of the President to withhold information that he used to reach a discretionary decision on these topics is a "policy determination of a kind clearly for nonjudicial discretion."<sup>99</sup> *Ralls* impermissibly usurps the Pres-

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<sup>94</sup> See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (describing the various "formulations" used in determining justiciability of a matter before the court).

<sup>95</sup> *Id.*

<sup>96</sup> *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

<sup>97</sup> *Baker*, 369 U.S. at 197 (quoting *Baker v. Carr*, 179 F. Supp. 824, 826 (M.D. Tenn. 1959)).

<sup>98</sup> *Schneider*, 412 F.3d at 195; *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (stating that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government"); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) ("We have consistently held, however, that courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security.").

<sup>99</sup> See *supra* note 95 and accompanying text. This *Baker* factor does not mean that any impact on foreign policy renders the matter nonjusticiable, but rather that a political question is found where adjudication will "displac[e] the Executive in its foreign policy making role." Kimberly Breedon, *Remedial*

ident's foreign policy-making authority. Releasing information that might imply the government's attitude toward a foreign power detracts from the executive's ability to craft a diplomatic strategy for that foreign power and possibly others.<sup>100</sup> Furthermore, the judiciary is unable to act effectively in this area.<sup>101</sup> The President's expertise, advisors, and superior access to information allow him to determine whether the release of information would alter the diplomatic landscape. Such an expert perspective is unavailable to the judiciary.<sup>102</sup> Finally, the speed with which the executive must act on matters of security and diplomacy simply cannot be matched by the judicial branch, presenting yet another reason why courts should not interfere.<sup>103</sup>

Although the political question doctrine does not prohibit courts from reviewing constitutional questions that are tangentially related to foreign relations or national security, it does prohibit review of claims involving prudential decisions committed to Congress or the President.<sup>104</sup> The *Ralls* court relied on *People's Mojahedin Org. of Iran v. U.S. Dep't of State*<sup>105</sup> to

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*Problems at the Intersection of the Political Question Doctrine, the Standing Doctrine, and the Doctrine of Equitable Discretion*, 34 OHIO N. U. L. REV. 523, 548–49 (quoting *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 389 (3d Cir. 2006)).

<sup>100</sup> See generally Laura A. White, *The Need for Government Secrecy*, 43 VA. J. INT'L L. 1071, 1072–74, 1093 (2003) (noting the importance of secrecy for national security and diplomacy).

<sup>101</sup> Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507, 509–10 (arguing that “[s]ecrecy, speed, and decisiveness are at a premium [in issues of foreign affairs], and these are characteristics of the executive, not of the courts, which are slow and decentralized”).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 841–43 (D.C. Cir. 2010) (citing *Campbell v. Clinton*, 203 F.3d 19, 40 (D.C. Cir. 2000)). As discussed previously, the language of the Exon-Florio Amendment and subsequent legislation clearly demonstrates that Congress intended to give the President such prudential authority over CFIUS matters. See *supra* Section I.B.

Though limiting the President's and CFIUS's power to matters of national security (as opposed to economic security), the history of the legislative basis for CFIUS review demonstrates that Congress envisioned strong executive authority to take action on covered transactions that constitute a security threat. This is evidenced particularly by an expansive definition of “national security,” which gives CFIUS and the President broader review power and shows the legislature's consistent disapproval of judicial review over the President's actions. *Supra* Section I.B. Even though FINSIA increased congressional oversight of the CFIUS committee, it had no limiting effect on the President's actions and did not establish any significant shift in decision-making authority from CFIUS to Congress. See 50 U.S.C. app. § 2170 (2012). Foreign Investment and National Security Act of 2007 § 2(b)(3), Pub. L. No. 110-49, 121 Stat. 246.

<sup>105</sup> 182 F.3d 17 (D.C. Cir. 1999).

illustrate “the distinction between a justiciable legal challenge and a non-justiciable political question” of this sort.<sup>106</sup> In that case, the court held that it could not review a determination that an entity was a Foreign Terrorist Organization, but that they could review the procedure by which the State Department reached that conclusion.<sup>107</sup> Although the *Ralls* court saw similarities with this case, it missed a key distinction. Ordering the government to turn over information is not truly about its decision-making procedure. Instead, it involves a separate determination, which in *Ralls* is about conducting foreign affairs and addressing national security concerns. The decision to restrict that information is a prudential determination inextricably linked to these policy areas, which necessarily require delicate control of information and opinions.<sup>108</sup> As such, the release of information that led to a presidential decision on security or diplomacy is not a procedural matter but rather a substantive one. It is a policy choice in areas that are undeniably under executive authority.<sup>109</sup> In *El-Shifa*, the Supreme Court noted that just as “plaintiff[s] may not . . . clear the political question bar simply by ‘recasting [ ] foreign policy and national security questions in tort terms,’” surely they cannot avoid the bar by recasting such questions in property terms.<sup>110</sup> Nevertheless, the appellants in *Ralls* attempt a comparable deception by cloaking foreign policy and national security questions in terms of a due process challenge.

The circumstances of the *Ralls* case demonstrate the need for strong executive control over these policy areas. The perceived threat posed by *Ralls* Corp. (and Sany Group, its affiliate) presumably stems from its executives’ relationship with the Chinese government.<sup>111</sup> How the executive releases infor-

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<sup>106</sup> *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 313–14 (D.C. Cir. 2014).

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

<sup>108</sup> Consider, for example, the Wikileaks data release, which offered foreign governments “an unprecedented look at back-room bargaining by embassies around the world, brutally candid views of foreign leaders and frank assessments of nuclear and terrorist threats.” Scott Shane & Andrew W. Lehren, *Leaked Cables Offer Raw Look Inside U.S. Diplomacy*, N.Y. TIMES, Nov. 29, 2010, at A1. The New York Times recognized that the Wikileaks scandal “could strain relations with some countries.” *Id.*

<sup>109</sup> *Supra* note 99 and accompanying text.

<sup>110</sup> See *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842–43 (D.C. Cir. 2010) (quoting *Schneider v. Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005)).

<sup>111</sup> *Ralls*, 758 F.3d at 304. The corporation is hugely significant in China, and Liang Wengen, its founder and chief shareholder, is among “the [Chinese Communist] [P]arty’s most influential members.” Tseng, *supra* note 34.

mation that might reflect sensitive views on China is a diplomatic decision that has a wide-ranging impact on national security.<sup>112</sup> For this reason, the *Ralls* decision's requirement that the President release all unclassified information used to make a determination on Ralls Corp.'s transactions is highly problematic. Unclassified information about the company could compromise the United States' relationship with China by implying a mistrust of the Chinese government and affiliated corporate actors. The resulting impact on international relations could be significant. Of course, this problem does not just exist for the *Ralls* case. From 2010 to 2012, CFIUS reviewed thirty-nine Chinese acquisitions, the second-most for a single country behind the United Kingdom.<sup>113</sup> Furthermore, Chinese FDI is on an upward trend,<sup>114</sup> suggesting that *Ralls*-like scenarios, with their resulting potential for embarrassment and diplomatic awkwardness, could easily unfold in the future.<sup>115</sup> Consequently, the *Ralls* decision's disregard for the political question doctrine stands poised to promote that which the doctrine exists to protect against—judiciary meddling in an area beyond its expertise and authority, with potentially disastrous results.

Despite this cautionary tale, some argue that the political question doctrine is dying, which might partially explain the D.C. Circuit's decision in *Ralls*.<sup>116</sup> Of course, dying and dead are entirely different, and threats to the doctrine make it more important than ever for each of the political branches to assert their authority to interpret the Constitution.<sup>117</sup> The Obama

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<sup>112</sup> See Christopher K. Johnson, *Recalibrating on China*, in CSIS GLOBAL FORECAST 2015, at 74, [http://csis.org/files/publication/141117\\_Johnson.pdf](http://csis.org/files/publication/141117_Johnson.pdf) [<http://perma.cc/G6JF-G3J5>] (noting “the seeming intractability of many of the security challenges in the relationship [between the United States and China]”).

<sup>113</sup> COMM. ON FOREIGN INV. IN THE U.S., *supra* note 14, at 17.

<sup>114</sup> See *id.*

<sup>115</sup> This Note does not intend to suggest that Chinese FDI alone raises this potential issue; however, other leading investors—Canada, France, Japan, and the United Kingdom, for example—present fewer diplomatic challenges from an American perspective because of the security relationships shared among those nations. See *id.*; NATO MEMBER COUNTRIES, [http://nato.int/cps/en/natohq/nato\\_countries.htm](http://nato.int/cps/en/natohq/nato_countries.htm) [<http://perma.cc/3VPW-Y7TF>]; Beina Xu, *The U.S.-Japan Security Alliance*, COUNCIL ON FOREIGN RELATIONS (July 1, 2014), <http://www.cfr.org/japan/us-japan-security-alliance/p31437> [<http://perma.cc/ZR6D-5TVM>].

<sup>116</sup> 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, 239–44 (2002) (noting a “demise of the political question doctrine” and the “ascendancy of a novel theory of judicial supremacy”).

<sup>117</sup> See J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 101 (1988) (“Any interpretation [of the political question doctrine] that fits our tradition must acknowledge that courts share responsibility for inter-

administration chose a different course of action by failing to appeal the *Ralls* decision or even raise a meaningful executive privilege claim.<sup>118</sup> Where the President could have resuscitated the faltering political question doctrine, he may instead have contributed to its ultimate demise.

### C. Counterproductive Result

The *Ralls* decision represents a judicial demand for increased transparency in the CFIUS process. By holding that due process requires the government to provide all unclassified information about why it reached its determination,<sup>119</sup> the D.C. Circuit Court placed a significant limitation on the government's interest in secrecy.<sup>120</sup> Despite the court's efforts, however, the decision will likely encourage the government to forcefully limit access to relevant information by classifying that which would otherwise be left unclassified.<sup>121</sup> This counterproductive result will not only impact the CFIUS process but also could create a precedent for more stringent classification in the face of public demand for—and executive promises of—enhanced transparency.<sup>122</sup>

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preting the Constitution with the political branches of government.”); Heather P. Scribner, *A Fundamental Misconception of Separation of Powers: Boumediene v. Bush*, 14 TEX. REV. L. & POL. 90, 93 (2009) (describing how *Marbury v. Madison* does not prohibit Congress and the President from engaging in constitutional interpretation).

<sup>118</sup> See Weinmann, *supra* note 59 (reporting that CFIUS handed over documents ordered by the *Ralls* decision, which implies a decision). The executive privilege claim would not really be an adequate solution to the problems presented by the liberty and security balance. See *infra* Section II.D.

<sup>119</sup> *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 325 (D.C. Cir. 2014).

<sup>120</sup> A State's interest in secrecy is, of course, not inherently self-serving or political in nature. See, e.g., Steven Aftergood, *An Inquiry into the Dynamics of Government Secrecy*, 48 HARV. C.R.-C.L. L. REV. 511, 513 (2013) (noting that “there are undoubtedly circumstances in which withholding information from broad dissemination necessarily fosters or reinforces security”). Aftergood also notes, however, that in many other cases “the national security justification for secrecy is uncertain.” *Id.*

<sup>121</sup> The language in *Ralls* is that “due process does not require disclosure of *classified* information supporting official action.” 758 F.3d at 319. This is problematic because the government withholds certain types of unclassified information for associated threats to national security. Christina E. Wells, “*National Security*” *Information and the Freedom of Information Act*, 56 ADMIN. L. REV. 1195, 1197 (2004).

<sup>122</sup> See Aftergood, *supra* note 120, at 511 (recognizing public disappointment); Thomas C. Ellington, *The Most Transparent Administration in History?: An Assessment of Official Secrecy in the Obama Administration's First Term*, 15 PUB. INTEGRITY 133, 134–35 (2013) (arguing that the administration failed in its first term to “live up to its stated goal” of enhanced openness); Wells, *supra* note 121, at 1217–21 (noting that “[e]xcessive secrecy may [] be inevitable” due to the executive's secrecy interest and its control over much of the information).

The government has broad authority to classify information as it sees fit;<sup>123</sup> consequently, the distinction between unclassified and classified does not provide a meaningful standard for the judiciary to police CFIUS. That difference refers only to a government determination about the importance of certain information, rather than any objective characteristic of that information itself. Executive Order 13,526, which contains the rules for classification, endorses as a “principal condition for imposing classification . . . ‘that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security.’”<sup>124</sup> This language is vague and “grant[s] all but unlimited discretion to classification officials.”<sup>125</sup> The government is held simply to a reasonableness standard when defending the classification of information.<sup>126</sup> In the highly interconnected modern world, where information is a critical weapon, a classifying authority would not find it difficult to craft a reasonable argument that release of a certain document could harm the country’s national security interests.

The result, particularly in light of the broad definition of national security that applies in the CFIUS process,<sup>127</sup> is that the classification system could become overzealous, prohibiting the development of a more open and accountable society. The conflict between accountability and security interests is well documented.<sup>128</sup> The *Ralls* decision, however, notably demonstrates that the debate on this question is not solely

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<sup>123</sup> See Exec. Order No. 13,526, 75 Fed. Reg. 707, 709 (Jan. 5, 2010) (allowing significant delegation of classification authority and broad classification categories, which include “foreign relations or foreign activities of the United States”); *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (discussing presidential “authority to classify and control access to information bearing on national security”).

<sup>124</sup> *Aftergood*, *supra* note 120, at 513 (quoting Exec. Order No. 13,526, 75 Fed. Reg. at 707). *But see* Ellington, *supra* note 122, at 143 (noting that the Order establishes “a presumption of openness in classification decisions”).

<sup>125</sup> *Aftergood*, *supra* note 120, at 513.

<sup>126</sup> Exec. Order 13,526, 75 Fed. Reg. at § 1.4 (“Information shall not be considered for classification unless its unauthorized disclosure could *reasonably* be expected to cause identifiable or describable damage to the national security.”) (emphasis added). Note that this standard requires classifying authorities to have the ability to identify future damage to national security, but it does not require them to actually identify or describe that damage. *Aftergood*, *supra* note 120, at 513. This allows them to take proactive steps to neutralize future threats, even though the exact nature of the threat may be uncertain.

<sup>127</sup> See *supra* notes 14, 71–72 and accompanying text.

<sup>128</sup> See, e.g., CAMPBELL PUBLIC AFFAIRS INSTITUTE, NATIONAL SECURITY AND OPEN GOVERNMENT: STRIKING THE RIGHT BALANCE, vi–vii (2003) (noting that most contentious secrecy cases in the world were more about hiding government wrongdoing than protecting a nation’s security interests).

between competing ideologies or political factions. In the matchup between openness and discretion, the headlining pugilists may in fact be the judicial and executive branches of the federal government. But where the D.C. Circuit Court landed a solid blow with *Ralls*, the President failed to counter with the best remaining strategy available to him—an executive privilege claim.<sup>129</sup>

#### D. Inviting Resolution on Executive Privilege Grounds

A deceptively obvious solution to the *Ralls* problems is the President's executive privilege; however, that option is far from ideal. An executive privilege claim is an assertion "of a constitutional right to withhold information from Congress, the courts, or persons or agencies," which is derived from Article II.<sup>130</sup> Though *The Federalist Papers* suggest that Hamilton and Jay supported this privilege, not all of the founders agreed.<sup>131</sup> Nevertheless, executive privilege has played a vital role in the American presidency, taking on particular importance in the post-World War II world.<sup>132</sup>

Executive privilege involves two broader forms of privilege: the state secrets privilege and the official information privilege.<sup>133</sup> The former "arises only when secret military or diplomatic information is sought," whereas the latter applies more broadly, "based on the theory that optimal efficiency in the governmental decision-making process depends upon a free flow of ideas, and frank discussion."<sup>134</sup> As the Supreme Court has made clear, however, there is not "an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."<sup>135</sup> Notably, a privilege claim does not itself end the matter. Instead, the claim must be brought before a court, which has the power to rule on it and decide whether the privilege will apply.<sup>136</sup>

The President's information about CFIUS investigations should fit into both forms of the executive privilege. Courts

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<sup>129</sup> See *supra* note 59 and accompanying text.

<sup>130</sup> Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 491–92 (2007).

<sup>131</sup> See *id.* at 491, 506 (noting Benjamin Franklin's "astonishment" that the executive branch should have such power and quoting Hamilton and Jay in *Federalist* 70 and 64, respectively).

<sup>132</sup> *Id.* at 491.

<sup>133</sup> Seymour Moskowitz & Janet Capurro Graham, 12-5 BENDER'S FORMS OF DISCOVERY TREATISE § 5.08(1) (2015).

<sup>134</sup> *Id.*

<sup>135</sup> *United States v. Nixon*, 418 U.S. 683, 706 (1974).

<sup>136</sup> See *id.* at 694–95.

take seriously the responsibility to protect national security secrets;<sup>137</sup> consequently, the state secrets privilege must apply in *Ralls* where the President determines that release of the information could impact diplomatic relations with China, a geopolitical rival. Furthermore, “communications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege.”<sup>138</sup> As a result, courts should not be able to release documents that informed (and therefore might suggest the content of) such presidential communication.

The immediate problem is that the President chose not to meaningfully take this route.<sup>139</sup> Without access to the documents that he released and those that he withheld, there is no standard by which to gauge the potential impact of a more exacting executive privilege claim in the *Ralls* case. Nevertheless, the precedent that the President set by releasing such a vast amount of information is problematic because it represents a surrender to the judiciary’s interference in the CFIUS process. Had the President made a broader executive privilege claim, the D.C. District Court might have resolved the case in favor of the executive. Although that would have been the best option remaining to the President after losing on statutory bar and justiciability grounds, this method of resolution presents broader issues.

First, closing this matter by means of executive privilege creates the possibility for significant public controversy. CFIUS will undoubtedly face a similar scenario in the future, and it is inadvisable to create a constitutional showdown between the President and the courts each time it does. This public spectacle could spiral into greater scandal if the President were to disregard a court order to release documents so that a higher court could review that order. As the Supreme Court recognized,

[t]o require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government.<sup>140</sup>

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<sup>137</sup> Cf. *United States v. Reynolds*, 345 U.S. 1, 11 (1953) (“[E]ven the most compelling [litigation] necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.”).

<sup>138</sup> *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997).

<sup>139</sup> See *supra* note 59 and accompanying text.

<sup>140</sup> *Nixon*, 418 U.S. at 691–92.

A situation like this could shake public confidence in the American justice system and place the executive's decision-making process in jeopardy.

Additionally, resolution of this issue on executive privilege grounds would create a bureaucratic and unnecessary system of litigation with no real chance of changing the ultimate result, because the final decision that the President makes about a CFIUS-covered transaction is not reviewable.<sup>141</sup> The case-by-case litigation, which would largely avoid the more important justiciability questions, would improperly involve the judiciary at the expense of judicial efficiency, executive time, and taxpayer money.

### E. Thematic Concerns

The thematic issue with the *Ralls* holding, exemplified by each of the aforementioned problems, is that it does not adequately establish a balance between liberty and security. Where a corporation's property rights—here, those of *Ralls Corp.*—are threatened, liberty is undeniably at issue. Where judicial overreach leads a court to address prudential questions of national security and foreign affairs, security is diminished by the lack of authority and expertise with which the judiciary approaches these issues.<sup>142</sup> Finally, where a court decision is counterproductive or leads to inefficiency, both liberty and security are threatened because both the justice system and the executive's security apparatus are needlessly distracted from their primary purposes with superfluous proceedings.

The government generally cannot take property without due process.<sup>143</sup> Determining what process is due, as the court in *Ungar* opined, “involves a balance between the interests of the claimants and of the Government.”<sup>144</sup> In *Ralls*, this balance mirrors the liberty and security balance that comprises the thematic basis of this Note. Disconcertingly, however, the D.C. Circuit Court strongly emphasized the liberty side at the

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<sup>141</sup> Though the *Ralls* decision allowed for review of constitutional claims regarding the CFIUS procedure, the court correctly held that the ultimate determination is not reviewable. *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 311 (D.C. Cir. 2014).

<sup>142</sup> *Supra* notes 101–103 and accompanying text.

<sup>143</sup> U.S. CONST. amend. V (establishing that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law”).

<sup>144</sup> *Ungar v. Smith*, 667 F.2d 188, 197 (D.C. Cir. 1981). On remand, the D.C. District Court oversaw the application of that procedure. See *Ralls Corp. v. Comm. on Foreign Inv.*, 2014 U.S. Dist. LEXIS 177868 (D.D.C. 2014).

expense of security, despite the fact that both are of the highest importance. It did this primarily by setting a precedent that enables courts to order the President to turn over information that led to his decision on a CFIUS-covered transaction,<sup>145</sup> but more broadly by establishing a judicial forum for foreign entities to challenge CFIUS and the President,<sup>146</sup> thereby creating opportunities for diplomatic embarrassment and a resulting detrimental impact on national security. The President's response—refusing to appeal the decision or even make a meaningful executive privilege claim<sup>147</sup>—makes this bad result even worse, ceding significant executive power in the realm of diplomacy and national security.

### III

#### FINDING THE BALANCE BETWEEN LIBERTY AND SECURITY

If the *Ralls* decision did not adequately address the need for balance between liberty and security, then there must be better alternatives. This Note proposes different approaches depending on whether *Ralls* remains good law, or if it does not.

##### A. If *Ralls* Remains Good Law

Finding the balance between liberty and security with respect to CFIUS will be incredibly difficult while *Ralls* remains good law. The decision simply weighs too heavily on the liberty side without due consideration for security. The only possible solution would be consistent judicial deference on executive privilege claims pertaining to the release of CFIUS information. This is very unlikely to occur.<sup>148</sup> Unlike a policy that can be set in one fell swoop by one of the political branches, this would require unrealistic consistency and agreement from the judiciary. Also, though the D.C. Circuit Court made no ruling on potential executive privilege claims,<sup>149</sup> the President's release of massive amounts of information sets a bad precedent in this area.<sup>150</sup> Finally, as previously identified, resolution on executive privilege claims is not an ideal solution to the due process problems that CFIUS presents.<sup>151</sup> As a result, striking a bal-

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<sup>145</sup> *Ralls*, 758 F.3d at 325.

<sup>146</sup> *See id.*

<sup>147</sup> *See supra* note 59 and accompanying text.

<sup>148</sup> *See generally* Amanda Frost, *Overvaulting Uniformity*, 94 VA. L. REV. 1567, 1612–14 (2008) (arguing that uniformity is unlikely in the federal judiciary).

<sup>149</sup> *Ralls*, 758 F.3d at 320–21 (“[W]e leave it to the district court on remand to consider whether the executive privilege shields the ordered disclosure.”).

<sup>150</sup> *See supra* note 59 and accompanying text.

<sup>151</sup> *See supra* Section II.D.

ance between liberty and security will likely require at least the partial abandonment of *Ralls*.

### B. If *Ralls* Is Overturned

If future litigation or legislation renders *Ralls* bad law, it might be tempting to allow the pre-*Ralls* status quo to continue as it had before. It would be reasonable to conclude that foreign entities seeking certain FDI opportunities in the United States are under constructive notice that they should communicate with CFIUS prior to finalizing their acquisitions, and that consequently, later prohibition of a transaction would not constitute an unlawful deprivation of property.<sup>152</sup> But does this, in and of itself, solve the balance problem? Likely, no. Despite the importance of national security, liberty expressed through property rights is a fundamental aspect of the Constitution and the American ethos.<sup>153</sup> *Ralls* threatens the CFIUS function and creates challenges for national security; however, without some level of additional process, CFIUS and the President may be evading at least the spirit of the American constitutional system, if not actually violating foreign entities' rights.

The solution may lie outside the judiciary's authority. Instead, CFIUS in a post-*Ralls* world would be well suited for executive or congressional reform. These branches could add additional process without violating the political question doctrine and giving the judiciary undue power over foreign affairs and national security.

## CONCLUSION

There are those who think that the world should be free from the encumbrances of borders, believing instead that the future of mankind lies in a harmonious global community forged by common interest and a desire to seek the common good.<sup>154</sup> In the international system as it currently stands,

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<sup>152</sup> See Guidance, *supra* note 14, at 74,569. Additionally, current advice from U.S. law firms suggests that this is, in fact, common knowledge. See, e.g., López-Casero, *supra* note 35, at 2 (explaining how *Ralls* had failed to notify CFIUS of the transaction prior to closing and was then subsequently blocked by a Presidential Order); Giovanna M. Cinelli & Kenneth J. Nunnenkamp, *Common Misconceptions Regarding CFIUS and the CFIUS Process*, JONES DAY (2012), [http://www.jonesday.com/common\\_misconceptions\\_regarding\\_cfius/](http://www.jonesday.com/common_misconceptions_regarding_cfius/) [<https://perma.cc/TM2J-7H62>] (noting that "although the process remains voluntary, the analysis needed to make an informed decision on whether to file a notification [with CFIUS] should be conducted for every transaction").

<sup>153</sup> See *supra* notes 21–23 and accompanying text.

<sup>154</sup> See, e.g., Shaun Raviv, *If People Could Migrate Anywhere, Would Poverty Be Eliminated?*, THE ATLANTIC (Apr. 26, 2013) <http://www.theatlantic.com/inter>

however, economic vitality relies upon defense against external threats.<sup>155</sup> As a result, support for property rights in foreign direct investment necessarily presupposes limitations for security measures, which enable the stability that a property regime requires.

That does not mean, however, that the government should unnecessarily sacrifice liberty for the sake of security. If we recognize that the courts cannot resolve constitutional questions like those that arise in *Ralls*, then the political branches have a responsibility to exercise their power in a manner that reflects constitutional principles. That is why a solution to the balancing problem that is driven by those branches is most favorable—it respects the political question doctrine and the need for executive authority over national security, while supporting ideals of the Constitution that could otherwise be ignored. In short, while the pre-*Ralls* CFIUS process may not have been unconstitutional, it is desirable that constitutional ideals be vindicated to the greatest extent possible. In other words, the government should align CFIUS *more directly* with the constitution through executive and legislative branch action.

What lasting effect will the *Ralls* decision have on CFIUS? Likely a minimal one. The executive branch will find ways to avoid divulging information that could critically damage diplomacy or national security. Foreign entities seeking to invest in the United States will still be subject to CFIUS review and to the President's determinations. Nevertheless, *Ralls* sets a dangerous precedent for judicial interference in national security and diplomacy. The silver lining to this case, however, is that it might encourage the political branches to take the type of reformative action that this Note proposes. In this way, the gov-

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national/archive/2013/04/if-people-could-immigrate-anywhere-would-poverty-be-eliminated/275332/ [https://perma.cc/YJ6J-VBL3]; JOHN LENNON, *Imagine*, on IMAGINE (Ascot Sound Studios 1971) (inviting the listener to “imagine there’s [sic] no countries” and arguing that, as a result of such thinking, “the world will be as one”).

<sup>155</sup> See generally, e.g., Ji Guoxing, *SLOC Security in the Asia Pacific*, ASIA-PACIFIC CENTER FOR SECURITY STUDIES ¶¶1–30, 44–55 (2000) (noting the economic importance of securing sea lines of communication); Laura Mills, *Conflict in Ukraine Hammers Economy*, WALL STREET J., May 16, 2015, at A6 (“The economy of Ukraine shrank by more than one-sixth in the first quarter [of 2015], hammered by a conflict with Russia-backed separatists that has slashed industrial output.”); Erika Solomon, *Syrian Middle Class Suffers as Economy Hit by Rebel Gains*, FIN. TIMES, May 17, 2015, <http://www.ft.com/intl/cms/s/0/4aea5cc4-f96a-11e4-ae65-00144feab7de.html#axzz3pJE5CXTz> [https://perma.cc/7GKG-6CM7] (“Those surviving the bloodshed say they are struggling to cope with an ever-worsening economy.”).

ernment can defend the United States and protect its interests while upholding those ideological values that define the nation and its people.