

Landmark CFIUS Ruling in Ralls Case - D.C. Circuit Reverses District Court

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In a surprising decision, on July 15, the U.S. Court of Appeals for the District of Columbia Circuit found that President Obama's order blocking the Ralls Corporation's (Ralls) acquisition of four wind farm projects on national security grounds deprived Ralls of its right to due process under the law.^[1] The court held that Ralls' vested property interest could not be deprived without first notifying Ralls of the official action, providing Ralls access to the unclassified evidence on which the President relied, and affording Ralls an opportunity to rebut that evidence. The Committee on Foreign Investment in the United States' (CFIUS) review process, which culminated in the issuance of the Presidential order, provided none of these procedural protections, the court found.

As background, in March 2012, Ralls, owned by two Chinese nationals who also hold senior management positions within the Chinese company, Sany Group, acquired interests in four wind farm project companies in Oregon. The project sites overlap with a restricted airspace and bombing zone used by military aircraft out of Naval Air Station Whidbey Island. Ralls did not voluntarily notify CFIUS of the transaction prior to closing. Subsequently, after inviting Ralls to file the notice, CFIUS and the President determined that there existed "credible evidence" indicating that Ralls, the Chinese nationals, and/or Sany, "through exercising control of the [companies,] might take action that threatens to impair the national security of the United States." President Obama issued a Presidential Order, based on recommendations from CFIUS, prohibiting the acquisition and ownership, either directly or indirectly. Ralls was given 90 days to divest all interest in the project companies and 14 days to remove all structures or physical objects from the project

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On September 12, 2012, Ralls took the unprecedented step of challenging CFIUS' and the President's authority to thwart its acquisition of the wind farm project companies, challenging the divestiture as an unconstitutional "taking" of property without due process of law. The U.S. District Court for the District of Columbia found that Ralls had no protected property interest in the four wind farm project companies because it had acquired the companies subject to the known risk of divestiture under the President's CFIUS authority. The District Court also determined that Ralls' ability to submit written arguments, meet with CFIUS officials in-person, and answer follow-up questions was sufficient due process in light of the government's interest in protecting the national security of the United States.

On appeal, the D.C. Circuit disagreed with the lower court, and found that the government had, in fact, deprived Ralls of its protected property without due process, including the opportunity to view and respond to the unclassified information on which the President based his decision. In reaching that decision, the court found that while Congress may have precluded judicial review of the final actions of the President "to suspend or prohibit any covered transaction that threatens to impair the national security of the United States," it does not preclude "the reviewability of a constitutional claim challenging the process preceding such presidential action."

The Court of Appeals has remanded the case back to D.C. District Court, with instructions that Ralls be provided adequate due process, including access to the unclassified information on which the President relied in reaching his decision, as well as an opportunity to rebut such information. The U.S. government can appeal this decision to the Supreme Court of the United States.

[1] *Ralls Corporation v. Committee on Foreign Investment in the United States*, No. 13-5315 (D.C. Cir. July 15, 2014).