

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

RALLS CORPORATION,)
)
 Plaintiff,)
)
 v.)
)
BARACK H. OBAMA, in his official capacity as)
 President of the United States, *et al.*,)
)
 Defendants.)
_____)

Case No. 1:12-cv-01513-ABJ

DEFENDANTS’ MOTION TO DISMISS THE AMENDED COMPLAINT

The defendants, Barack H. Obama, in his official capacity as President of the United States; the Committee on Foreign Investment in the United States (“CFIUS”); and Jacob J. Lew, in his official capacity as Secretary of the Treasury and Chairperson of CFIUS, respectfully move to dismiss the amended complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The grounds for this motion are set forth in the accompanying memorandum.

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Defendants.)	
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DEFENDANTS’ MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Section 721 of the Defense Production Act (“the Act”) provides that “the President may take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States.” 50 U.S.C. App. § 2170(d)(1). The President exercised this discretionary authority by issuing a Presidential Order that prohibited the transaction in which Ralls Corporation, an entity wholly owned by two Chinese citizens, had acquired four Oregon companies (the “Project Companies”) organized to develop wind farms on property in the vicinity of a military installation. Order of September 28, 2012, Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 77 Fed. Reg. 60,281 (Oct. 3, 2012) (“Presidential Order”). Ralls now challenges the Presidential Order, asserting that Constitutional due process requirements obligated the President to disclose to Ralls the evidence upon which he relied, as well as the inferences that he drew from that evidence. Nothing in the Defense Production Act even remotely contemplates that the President’s deliberations should be invaded in this manner. Nor is there any reason to conclude that the Due Process Clause requires such an invasion into the President’s decision-making.

As an initial matter, Ralls lacks any property interest that could trigger a due process analysis. Ralls complains that the President has required it to divest the Project Companies. It only gained those companies in the first instance, however, because it chose to forgo the process of review under the Defense Production Act. As a foreign acquirer of a United States business in a transaction that may pose a national security concern, Ralls was on notice that it ran the risk of a Presidential prohibition of that acquisition if it did not first seek a review of the transaction under the Act. Accordingly, it did not create any Constitutionally cognizable property rights for itself simply by completing its transaction before the President or the Committee on Foreign Investment in the United States (“CFIUS” or “Committee”) could learn of it. The claim should be dismissed on this ground alone.

In any event, Ralls holds no entitlement to participate in a decision that, as a matter of statute and the Constitution, is committed to the discretion of the President. If the President may prohibit a transaction in his discretion, a party does not have any interest in engaging in that transaction that could rise to the level of a property interest that would be protected by the Due Process Clause. Here, the Defense Production Act commits the decision as to whether to suspend or prohibit a foreign acquisition of a United States business entirely to the President’s discretion. Given the breadth of the discretion that the Act affords to the President to address threats to the national security, Ralls had nothing more than a unilateral hope that the President would exercise his discretion to allow the transaction to proceed. Ralls thus does not have any protectable interest in any particular outcome resulting from the President’s exercise of that discretionary authority.

Even if Ralls did hold a property interest that could trigger a due process analysis, it nonetheless was not entitled to a review of the President's reasoning, or the disclosure of how the President evaluated the evidence before him. The President has strong, indeed compelling, reasons to avoid the disclosure of sensitive information to the foreign subject of an order under the Defense Production Act. In comparison, Ralls's interest in avoiding a Presidential Order is relatively slight, because it is a foreign corporation whose interests in this transaction have always been subject to the requirements of the Defense Production Act. And there would be no value in requiring that Ralls participate in or be privy to the President's decision-making, particularly given the sensitivity and national security classification of the information involved in his decision. Thus, Ralls's assertion that it is entitled to substantively participate in the President's evaluation of sensitive national security considerations must fail.

Background

Ralls is a Delaware corporation that is privately owned by two Chinese nationals, Dawei Duan and Jialiang Wu. (Am. Compl, ¶ 14 (ECF 20).)¹ Mr. Duan is the chief financial officer of the Sany Group ("Sany"), a Chinese global manufacturing company. (*Id.*) Mr. Wu is a Vice President of Sany and also the General Manager of Sany Electric Company, Ltd. ("Sany Electric"), a wholly-owned Chinese subsidiary of Sany. (*Id.*)

Before March 2012, Terna Energy USA Holding Corporation ("Terna") owned four limited liability companies (the "Project Companies") that had been organized to operate wind farm projects at particular locations in Oregon. (Am. Compl., ¶¶ 59-60.)² The Project Companies

¹ The defendants respectfully refer the Court to their previously-filed pleadings for a discussion of the statutory and regulatory structure of the Defense Production Act. (ECF 11, ECF 34-1.)

² The Projects Companies are Pine City Windfarm, LLC; Mule Hollow Windfarm, LLC; High

held land rights for the construction of wind farms at those locations, as well as government permits, power purchase agreements, and other agreements necessary for the construction of commercial wind farms. (Am. Compl., ¶ 61.)

In March 2012, Terna sold the Project Companies to Intelligent Wind Energy, LLC (“IWE”), a Delaware company that was owned by U.S. Innovative Renewable Energy, LLC (“USIRE”). (Am. Compl., ¶ 60.) USIRE then sold IWE to Ralls. (*Id.*)

The wind farm projects are located in or adjacent to a Navy military installation. (Am. Compl., ¶¶ 40-41.) After it purchased the Project Companies, Ralls prepared to begin construction of wind farms at those locations; its construction plans contemplated that it would install wind turbine generators that had been constructed in China by Sany Electric. (Am. Compl., ¶ 58, 81.)

The parties did not provide notice to CFIUS before completing their transaction. (Am. Compl., ¶¶ 60, 72.) Instead, the Committee learned of the transaction only after it had closed. (Declaration of Marisa Lago, ¶ 4 (ECF 11-1).) In June 2012, staff members of CFIUS telephoned representatives of Ralls and invited Ralls to file a voluntary notice of the transaction under 50 U.S.C. App. § 2170(b)(1). (*Id.*, ¶ 5.) During that telephone call, Deputy Assistant Secretary Mark Jaskowiak informed Ralls’s representatives that, if Ralls did not file a voluntary notice, the Department of Defense would file an “agency notice” that would trigger the Committee’s review of the transaction. (*Id.*) Deputy Assistant Secretary Jaskowiak also informed Ralls’s representatives that the Committee had determined that the transaction could present national security considerations that warranted CFIUS review, and he advised Ralls to postpone

Plateau Windfarm, LLC; and Lower Ridge Windfarm, LLC. (Am. Compl., ¶¶ 35-36.) These Project Companies are Oregon limited liability companies. (Am. Compl., ¶ 35.)

construction until after the Committee could complete its review upon receiving Ralls's forthcoming notice. (*Id.*, ¶ 6.) He further advised Ralls's representatives that, if it continued construction, Ralls would assume the risk of any costs due to any subsequent adverse CFIUS determination. (*Id.*) Ralls agreed to submit a voluntary notice to the Committee. (*Id.*, ¶ 7.) However, Ralls declined to heed the Committee's request that it postpone construction of the wind farms. (*Id.*) Ralls's representatives acknowledged that, by doing so, the company was assuming the risk of their decision. (*Id.*)

Ralls submitted its notice to CFIUS on June 28, 2012. (Am. Compl., ¶ 72; *see* ECF 7-7.) The notice included Ralls's detailed argument that its acquisition of the Project Companies did not pose any national security concerns. (ECF 7-7 at 5-6.) CFIUS accepted Ralls's notice on June 28, 2012. (Lago Decl., ¶ 8.) CFIUS conducted an initial review of the notice under 50 U.S.C. App. § 2170(b)(1). (*Id.*) The Committee's regulations contemplate that, during its initial review, the parties to a notified transaction may "attend a meeting with the Committee staff to discuss and clarify issues pertaining to the transaction." 31 C.F.R. § 800.501(b). Pursuant to this regulation, Ralls's representatives met with staff members of CFIUS on July 11, 2012. (Am. Compl., ¶ 74; *see also* Compl., ¶ 31, *Ralls Corp. v. Terna Energy USA Holding Corp.*, No. 1:13-cv-00739-PKC (S.D.N.Y. filed Feb. 1, 2013).) During that meeting, Ralls's representatives made a presentation to CFIUS that stated their views as why their acquisition of the Project Companies did not pose national security concerns. (*Id.*, Ex. K.) After completing the initial review period, CFIUS determined that a further investigation should be conducted under 50 U.S.C. App. § 2170(b)(2). (Am. Compl., ¶ 89.)

During its process of review and investigation, CFIUS exercised its mitigation authority to address the threat to national security arising from the transaction, more specifically from Ralls's continued construction of the Sany wind turbine projects. Accordingly, on July 25, 2012, CFIUS issued an Order Establishing Interim Mitigation Measures ("Interim Order") to Ralls. (Am. Compl., Ex. 4.) The Interim Order directed Ralls to cease all construction and operations at the locations of the wind farm projects; to have United States citizens approved by CFIUS remove any stockpiled or stored items at those locations; and otherwise to cease all access to those locations. (*Id.*, § 1.)

After CFIUS issued the Interim Order, on July 26, 2012, Ralls's representatives informed CFIUS that they intended to sell the Project Companies. (Am. Compl., ¶ 82.) Ralls's proposal contemplated that the purchaser would continue to use Sany's equipment at the site of the wind farm projects. (Lago Decl., ¶ 13.) On July 31, 2012, Ralls contacted CFIUS again to inform the Committee that it intended to complete the transfer of the Project Companies as early as the end of that week. (Am. Compl., ¶ 82.) On August 2, 2012, CFIUS issued an Amended Order Establishing Interim Mitigation Measures ("Amended Interim Order"), which reiterated the Interim Order's directives, and which also instructed Ralls not to transfer any items produced by Sany for use at the locations of the wind farm projects, and not to transfer the Project Companies without first giving CFIUS the opportunity to object to the proposed transferee and without first removing any affixed items at those locations. (Am. Compl., Ex. 5.)

Ralls's representatives presented a revised proposal to CFIUS on August 23, 2012, under which Ralls represented that it would divest the Project Companies and that Sany equipment would not be transferred for use at the locations of the wind farm projects, but that the concrete

foundations that had been poured at those locations would remain in place. (Lago Decl., ¶ 14.) Ralls also proposed that the Department of Defense would pay it for any value that it lost on the projects. (*Id.*) CFIUS rejected this proposal on August 29, 2012. (*Id.*, ¶ 15.) CFIUS also informed Ralls at that time that, unless Ralls withdrew its filing and agreed to divest its interest in the Project Companies voluntarily, CFIUS would recommend to the President that he order Ralls to divest the Project Companies on specified terms. (*Id.*) CFIUS provided Ralls with a copy of the draft order that it was prepared to submit for the President's review. (*Id.*) Ralls did not withdraw its notice or agree to divest the Project Companies. (*Id.*, ¶ 16.)

The President issued an order on September 28, 2012, addressing the threat to national security that he found to have arisen from Ralls's acquisition of the Project Companies. Order of September 28, 2012, Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 77 Fed. Reg. 60,281 (Oct. 3, 2012) ("Presidential Order"). The President found that "[t]here is credible evidence that leads [him] to believe that Ralls Corporation," as well as, among others, Sany, Sany Electric, Mr. Duan, and Mr. Wu, "through exercising control of [the Project Companies] . . . might take action that threatens to impair the national security of the United States." Presidential Order, § 1, 77 Fed. Reg. at 60,281. On the basis of these findings, and "considering the factors described in [50 U.S.C. App. § 2170(f)], as appropriate," the President accordingly exercised "the authority vested in [him] by the Constitution and the laws of the United States of America," including the Defense Production Act, 50 U.S.C. App. § 2170, to address that threat to the national security. *Id.* at 60,281.

The President directed that "[t]he transaction resulting in the acquisition of the Project Companies and their assets by [Ralls and its related entities] or Mr. Wu or Mr. Duan is hereby

prohibited, and ownership by [Ralls and its related entities] or Mr. Wu or Mr. Duan of any interest in the Project Companies and their assets, whether directly or indirectly through owners, subsidiaries, or affiliates, is prohibited.” Presidential Order, § 2(a), 77 Fed. Reg. at 60,281. The President also directed Ralls to divest all interests in the Project Companies; “the Project Companies’ assets, intellectual property, technology, personnel, and customer contracts”; and “any operations developed, held, or controlled, whether directly or indirectly, by the Project Companies at the time of, or since, their acquisition.” *Id.*, § 2(b), 77 Fed. Reg. at 60,281. Ralls was directed to do so within 90 days after the date of the Presidential Order, unless CFIUS were to extend that date for a period of not more than three months on such written conditions as CFIUS might require. *Id.* The President further subjected Ralls to additional requirements to ensure compliance with the prohibition of the transaction at issue in the Presidential Order. *Id.*, § 2(c)-(h), 77 Fed. Reg. at 60,281-60,282.

Argument

Ralls contends that the Due Process Clause of the Fifth Amendment obligates the President to disclose the information that he relied upon in determining that its acquisition of the Project Companies threatens to impair the national security of the United States, and to explain the reasoning that he used to determine that this threat to the national security warranted an order requiring Ralls to divest itself of the Project Companies. In order to state a claim for a violation of due process, a party must show both that it has been deprived of a protected interest, such as a property interest, and that the government did not afford it Constitutionally sufficient procedures. *See, e.g., Kentucky Dep’t of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). Ralls can make neither showing.

I. Ralls Does Not Hold a Constitutionally Cognizable Property Interest in the Project Companies, Because It Was on Notice that Its Acquisition of the Project Companies Was Subject to Suspension or Prohibition by the President

Ralls contends that it “possesses numerous valid property interests and property rights by virtue of its acquisition of the Project Companies, including but not limited to the Project Companies themselves,” as well as easements and other contracts held by the Project Companies. (Am. Compl., ¶ 146.) It accordingly contends that the Presidential Order deprived it of these property interests by requiring it to divest the Project Companies and by imposing the conditions that the President determined necessary to effectuate the divestiture order. (Am. Compl., ¶ 148.) This claim misapprehends the nature of Ralls’s interests. In acquiring the Project Companies, Ralls chose to forgo the process contemplated under the Defense Production Act, which anticipates that a foreign acquirer will first seek a review from CFIUS, and possibly the President, before proceeding with a transaction that could raise national security considerations. Because Ralls chose not to undergo this review before completing its transaction, it ran the risk that the President would later exercise his power to disapprove the transaction and require Ralls to divest its interests. Consequently, Ralls had nothing more than a unilateral expectation that it would be able to avoid a Presidential review, and that unilateral expectation (premised on the hope that its transaction would go unnoticed) cannot give rise to a due process claim.

If a foreign acquirer does not voluntarily file with CFIUS, any CFIUS member or his designee may file an “agency” notice with CFIUS and thereby initiate a CFIUS review process, *even if the transaction has already been completed.* 50 U.S.C. App. § 2170(b)(1)(D); 31 C.F.R. § 800.401(c). A party that does not initiate a review of its transaction remains subject, indefinitely, to the possibility of Presidential action. 31 C.F.R. § 800.601. And if the President’s

review then results in his order suspending or prohibiting the transaction, the parties would then bear the consequences of their choice to proceed before seeking review through the CFIUS process. *See* 50 U.S.C. App. § 2170(d)(3) (authorizing divestment relief). Thus, although the Defense Production Act does not directly require foreign acquirers to file voluntary notices,

there are very, very strong incentives for those companies for which acquisitions could potentially affect national security to file. The potential negative ramifications of not filing are very, very severe. There is no statute of limitations, the transaction can be unwound at any time. There are very strong incentives and I think the voluntary filing system works

H.R. 5337, the Reform of National Security Reviews of Foreign Direct Investments Act: Hrg. Before the Subcomm. On Domestic & International Monetary Policy, Trade, & Technology, H. Comm. on Fin. Servs., 109th Cong. 31 (2005) (testimony of David Marchick, attorney, Covington & Burling).

As a Treasury official has explained the process, parties to covered transactions that raise national security considerations would be wise to file a notice voluntarily with CFIUS:

[H]aving sat on boards of directors both at home and abroad, I cannot imagine in the post-Sarbanes-Oxley world . . . how any director could give the go-ahead on a transaction [that had not been filed], because the President's authority to unwind that transaction is without limit if the person has not received approval of the process. . . . [T]hat very powerful nonjudicially reviewable authority of the President to stop or unwind transactions acts as a real leavener on the process[.]

A Review of the CFIUS Process of Implementing the Exon-Florio Amendment: Hrgs. Before the S. Comm. on Banking, Housing, and Urban Affairs, 109th Cong. 114 (2005) (testimony of Robert M. Kimmitt, Deputy Secretary, U.S. Dep't of Treasury). In other words, “[t]here is no right to buy. You do not have to file, but by not filing, you do not immunize yourself from a finding that the transaction could be canceled on security grounds.” *Committee on Foreign Investment in the United States (CFIUS), One Year After Dubai Ports World: Hearing before H. Comm. on Fin.*

Servs., 110th Cong. 26 (2007) (statement of Rep. Barney Frank, Chairman, H. Comm. on Fin. Servs.).

Ralls, nonetheless, elected to proceed with its acquisition of companies organized to develop wind farms in the vicinity of a military installation, without first seeking a review of the transaction by CFIUS. In order to hold a property interest, a person “must have more than a unilateral expectation of” a benefit; “[h]e must, instead, have a legitimate claim of entitlement to it.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Ralls, like any other foreign acquirer of a United States entity in a transaction that could raise national security considerations, had no legitimate claim of entitlement to retain its acquisition without a determination by CFIUS or the President that the transaction did not pose a threat to national security. After all, “[n]o one can be said to have a vested right to carry on foreign commerce with the United States.” *Ganadera Indus., S.A. v. Block*, 727 F.2d 1156, 1160 (D.C. Cir. 1984) (quoting *The Abby Dodge*, 223 U.S. 166, 176 (1912)). Because Ralls was on notice that its transaction could be unwound at any time, it held no Constitutionally cognizable property interest in the results of that transaction.

Because Ralls chose not to avail itself of the CFIUS process, any interests that it gained in the Project Companies were “‘revocable,’ ‘contingent,’ and ‘in every sense subordinate to the President’s power under the [Defense Production Act],’” *Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981). Ralls thus gained no property interests protectable by the Due Process Clause in those companies. This case is directly analogous to the Supreme Court’s holding in *Dames & Moore*. There, the President had exercised his authority under the International Emergency Economic Powers Act (IEEPA) to block the transfer of any interests in property of the

Government of Iran, but licensed certain pre-judgment attachments against Iranian assets. The President then revoked those licenses, effectively canceling any such attachments. The Supreme Court rejected a takings challenge to these revocations, holding that the plaintiffs lacked any protected property interest in the attachments:

Our construction of petitioner's attachments as being "revocable," "contingent," and "in every sense subordinate to the President's power under the IEEPA," in effect answers petitioner's claim that even if the President had the authority to nullify the attachments and transfer the assets, the exercise of such would constitute an unconstitutional taking of property in violation of the Fifth Amendment absent just compensation. We conclude that because of the President's authority to prevent or condition attachments, and because of the orders he issued to this effect, petitioner did not acquire any "property" interest in its attachments of the sort that would support a constitutional claim for compensation.

Dames & Moore, 453 U.S. at 674 n.6. The same result holds here. Ralls did not acquire any Constitutionally cognizable property interests in the Project Companies, given that it chose to proceed with a transaction that it was on notice would be revocable, contingent, and in every sense subordinate to the President's Defense Production Act powers, instead of seeking a safe harbor by first going through the CFIUS review process. Because Ralls chose to ignore these considerations and to proceed with its acquisition, "the consequences of [its] conduct were entirely foreseeable," and no protected property interest arose. *Paradissiotis v. United States*, 304 F.3d 1271, 1276 (Fed. Cir. 2002); *see also B-West Importers, Inc. v. United States*, 75 F.3d 633, 638 (Fed. Cir. 1995) (denying due process claim because "the appellants' right to import and sell Chinese arms in the United States was subject at all times to the hazard that their permits would be revoked, pursuant to statute and regulation, on foreign policy grounds or for other reasons").

Nor can Ralls demonstrate a protected interest by pointing to a restriction on where it could place the turbines it acquired from Sany. During the hearing that this Court held with respect to

the defendants' jurisdictional motion to dismiss, Ralls suggested that, even if it did not hold a property interest in the Project Companies, it nonetheless held a separate property interest in the turbines that Ralls intended to use in the wind farm projects. Transcript of Nov. 28, 2012 Hearing at 63:6-11. This does not salvage its due process claim. The President has not deprived Ralls of the Sany turbines, or even prohibited Ralls from selling those turbines. Instead, the President directed only that Ralls may not "sell or otherwise transfer . . . any items made or otherwise produced by the Sany Group to any third party for use or installation at the Properties." Presidential Order, § 2(e), 77 Fed. Reg. at 60,282. The Order simply prohibits Ralls from pursuing a future transaction that would contemplate the use of the Sany turbines at the same locations. Any such future transaction, at this point in time, is merely hypothetical. "[T]he mere subjective expectation of a future business transaction does not rise to the level of an interest worthy of constitutional protection." *Needville Cotton Warehouse, Inc. v. ICC*, 845 F.2d 550, 553 (5th Cir. 1988); *see also American Ass'n of Exporters & Importers v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985). Ralls remains free to use the Sany turbines at other locations, and indeed already has done so in projects located in Texas and Massachusetts. (Declaration of Jialiang Wu (ECF 35-7), ¶¶ 4-5.) The prohibition against one particular form of a hypothetical future sale of those turbines did not implicate any property interest that Ralls holds for purposes of the Due Process Clause.

Because Ralls cannot demonstrate that it holds a Constitutionally cognizable property interest, its claim should be dismissed on this ground alone.

II. The Broad Discretion Afforded to the President under the Act Further Undercuts Any Property Interest Claimed by Ralls

Ralls lacks any Constitutionally cognizable property interest in the Project Companies for an additional reason. The Defense Production Act commits the decision whether to suspend or prohibit a foreign acquisition of a United States business entirely to the discretion of the President. Ralls does not hold a property interest in any particular outcome from the President's deliberations as to how to exercise his discretion under the Act.

The Defense Production Act describes the President's authority exceptionally broadly. If the President finds that "there is *credible evidence* that leads [him] to believe that the foreign interest exercising control *might take action* that *threatens to impair* the national security," and that other provisions of law (apart from IEEPA) do not, in his judgment, provide adequate authority for him to protect the national security, he is empowered to take action under the Act. 50 U.S.C. App. § 2170(d)(4) (emphasis added). The statute sets out a list of factors that the President may consider in making his findings, 50 U.S.C. App. § 2170(d)(5), (f), but does not purport in any way to limit the President's power to consider any factor that he "may determine to be appropriate, generally or in connection with a specific review or investigation," 50 U.S.C. App. § 2170(f)(11). Upon making his findings, "the President may take *such action* for *such time* as the President *considers appropriate* to suspend or prohibit *any* covered transaction that threatens to impair the national security of the United States." 50 U.S.C. App. § 2170(d)(1) (emphasis added). Congress thus has ratified the breadth of Presidential power in a field in which he already holds independent Constitutional authority – specifically, his power to address threats to national security that arise from foreign acquisitions of United States businesses.

Congress intentionally avoided imposing limits on the President’s discretionary authority to take action with respect to foreign acquisitions that he finds raise threats to “national security.” See H.R. Conf. Rep. No. 100-576, at 926 (1988) (“The Conferees recognize that the term ‘national security’ is not a defined term in the Defense Production Act. The term ‘national security’ is intended to be interpreted broadly without limitation to particular industries.”)³ In defining the scope of the statute, Congress recognized that it was legislating against a backdrop in which the President already held a broad, discretionary power: “[E]xclusive of any powers derived from the Exon-Florio amendment or related regulations or executive orders, the President ultimately reserves the right *in any transaction* and *at any time* to reverse a transaction for national security purposes. This authority derives both from the International Emergency Economic Powers Act and his inherent powers in the conduct of foreign affairs.” H.R. Rep. No. 110-24, pt. 1, at 12 (2007) (emphasis added).

It necessarily follows from the breadth of the President’s discretion under the Defense Production Act that a foreign acquirer does not have any protected interest in how the President exercises that discretion. “[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion.” *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). A protected interest could arise if a statute “establish[es] substantive predicates to govern official decision-making and, further, . . . mandat[es] the outcome to be reached upon a finding that the

³ See also *A Review of the CFIUS Process of Implementing the Exon-Florio Amendment: Hrgs. Before the S. Comm. on Banking, Housing, and Urban Affairs*, 109th Cong. 162 (2005) (statement of Robert M. Kimmitt, Deputy Secretary, U.S. Dep’t of Treasury) (“The statute lays out a broad set of factors that may be considered, but this is not an exhaustive list. Each transaction has unique characteristics and agencies are not constrained in examining all facets of a transaction that could impact national security. This is consistent with the fact that ultimately the judgment as to whether a transaction threatens national security rests within the President’s discretion.”).

relevant criteria have been met.” *Kentucky Dep’t of Corrections v. Thompson*, 490 U.S. at 462 (internal citation omitted). But where a statute does not do so, then no due process rights accrue from the government’s exercise of its discretion under that statute. *See Menkes v. Dep’t of Homeland Security*, 637 F.3d 319, 338 (D.C. Cir. 2011); *Roth v. King*, 449 F.3d 1272, 1285 (D.C. Cir. 2006); *see also Omar v. McHugh*, 646 F.3d 13, 22 n.7 (D.C. Cir. 2011).

These considerations apply with particular force to the President’s discretionary decisions. “No question of law is raised when the exercise of [the President’s] discretion is challenged.” *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940). Thus, for example, where the Defense Base Closure and Realignment Act established a process under which a commission could make recommendations to the President, but the President remained free to reject those recommendations for any reason, no property interest arose in the outcome of the President’s deliberations under the Act. *See Specter v. Garrett*, 971 F.2d 936, 955-56 (3d Cir. 1992), *rev’d on other grounds by Dalton v. Specter*, 511 U.S. 462 (1994). Likewise, given that the President had the complete discretion to approve or deny applications to operate international air routes under the Civil Aeronautics Act, *see Chicago & Southern Airlines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111-12 (1948), it follows that no applicant had any interests protectable under the Due Process Clause in such an application: “the President must be free to consider broad ‘evidentiary’ policy factors not involved, and indeed not relevant, in Board proceedings and that the President must be free to exercise unreviewable discretion as to the weight to be given to such extrajudicial factors.” *American Airlines, Inc. v. CAB*, 348 F.2d 349, 352 (D.C. Cir. 1965).

The courts have consistently held that the President is not constrained to provide an interested party with any particular procedures when he is exercising discretion that is committed

to him by the Constitution or by a statute. Accordingly, no property interest that would be protectable under the Due Process Clause arises from the President's exercise of a broad discretionary authority. For example, it is generally presumed, absent a clear statement from Congress, that the President holds broad discretion to remove civil officers from their positions. *See Shurtleff v. United States*, 189 U.S. 311, 314 (1903). It follows, therefore, that a civil officer does not hold any property interest in his employment where Congress has not restricted the President's discretionary authority, as the officer can hold no more than a subjective expectation that the President will not act. *See id.*; *Reagan v. United States*, 182 U.S. 419, 425 (1901); *Chabal v. Reagan*, 841 F.2d 1216, 1223 (3d Cir. 1988). Similarly, it is well settled that no person holds any due process interest in the results of the President's deliberations whether to issue a pardon, because "[i]t is up to the President then to act on [a pardon] petition as he sees fit." *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1245 (D.D.C. 1974); *see also Jay v. Boyd*, 351 U.S. 345, 355-56 n. 16 (1956); *Binion v. Dep't of Justice*, 695 F.2d 1189, 1190 (9th Cir. 1983))⁴

It follows from these decisions that Ralls did not hold a property interest that constrained the President's discretion here. As noted, the President was free to consider any factor that he considered to be appropriate in finding whether there was credible evidence to believe that Ralls's acquisition of the Project Companies threatened to impair the national security of the United States. Because the Defense Production Act did not mandate any particular outcome to the President's consideration of the Ralls transaction, Ralls did not obtain any right protectable by the

⁴ *See also Orloff v. Willoughby*, 345 U.S. 83, 90 (1953) ("It is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief. Whatever control courts have exerted over tenure or compensation under an appointment, they have never assumed by any process to control the appointing power either in civilian or military positions.")

Due Process Clause in the President's decision-making. *See Town of Castle Rock*, 545 U.S. at 756; *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. at 462.

Moreover, because the decision whether to suspend or prohibit Ralls's transaction was committed to the President's discretion, this case is entirely unlike the cases arising under the Anti-Terrorism and Effective Death Penalty Act (AEDPA) upon which Ralls has relied for its due process claim. *See People's Mojahedin Org. of Iran v. Dep't of State*, 613 F.3d 220, 230 (D.C. Cir. 2010); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 209 (D.C. Cir. 2001). These cases do not involve Presidential decision-making at all, but instead prescribe limited procedures that the Secretary of State must follow in determining whether an entity is a "foreign terrorist organization" under AEDPA. Notably, AEDPA requires the Secretary of State also to determine whether the "terrorist activity of the organization threatens the security of United States nationals or the national security of the United States." Because AEDPA had not prescribed any procedures that the Secretary of State must follow in making *that* determination, the D.C. Circuit has found that determination to be non-justiciable, and no enforceable rights under the Due Process Clause could arise with respect to that finding. *See People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (finding question whether "terrorist activity of the organization threatens the security of United States nationals or the national security of the United States" to be nonjusticiable). Similarly, no due process rights can accrue from the President's exercise of his discretion under the Defense Production Act to act where a foreign acquisition threatens to impair the national security.

III. Ralls Was Not Entitled to Receive the Evidence upon which the President Relied in Reaching the Decision Committed to His Discretion

Even assuming that the Presidential Order deprived Ralls of a property interest, and even assuming that Ralls has any procedural rights relating to a decision committed to the President's discretion, its claim still fails. Ralls asserts that, as a matter of due process, the President was required to disclose the evidence upon which he relied in finding that its acquisition of the Project Companies "threatens to impair the national security of the United States," 50 U.S.C. App. § 2170(d)(1). Ralls had no right to such participation in the President's decision-making.

In a case (unlike this one) where due process rights are implicated, the determination of what process is "due" requires a review of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Under this analysis, the Due Process Clause requires only that process which is due under the circumstances of the case. "[I]t is by now well established that 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (quoting *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) (internal quotations omitted)). Instead, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In this particular situation where Congress has committed a decision implicating national security to the

President's discretion, Ralls was not entitled to demand to participate directly in the President's decision-making.

A. The Government Has a Strong Interest Weighing against the Disclosure of Sensitive National Security Evidence to the Subject of a Presidential Order under the Defense Production Act

“[N]o governmental interest is more compelling than the security of the Nation.” *Haig v. Agee*, 453 U.S. 280, 307 (1981). It is obvious that the Defense Production Act supports a governmental interest of the highest order. The President is charged with protecting the national security of the United States, and as part of that duty he has the authority to review whether the foreign acquisition of a United States business will threaten to impair the national security. The Defense Production Act is structured so that “interventions by the President would be extraordinary,” H.R. Rep. No. 110-24, pt. 1, at 12 (2007); as this Court has recognized, “Congress structured the process so that Presidential action would be a last resort, to be exercised only [in] the face of an otherwise uncontrollable national security risk.” (ECF 48 at 26.) In the rare cases where the President exercises this extraordinary authority, it is clear that he requires the ability to keep sensitive national security information confidential from the foreign acquirer. *See* 50 U.S.C. App. § 2170(b)(4) (requiring Director of National Intelligence to prepare analysis of threat to national security posed by covered transactions). Indeed, the foreign acquirer is the very focus of the President's finding of credible evidence of a threat to the national security. *See* 50 U.S.C. App. § 2170(d)(4)(A) (directing the President to find whether “there is credible evidence that leads the President to believe that the *foreign interest exercising control* might take action that threatens to impair the national security”). It would therefore be intolerable if foreign acquirers could gain access to the confidential national security bases for the President's determinations on this score.

See Waterman, 333 U.S. at 111; *see also Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (due process does not prevent decision based on classified information to which party did not have access); *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1242-43 (D.C. Cir. 2003) (same).

Moreover, Ralls seeks access to the recommendations by CFIUS to the President, as well as the President's analysis of those recommendations. Its claim thus seeks to pierce fundamental protections for the confidentiality of the President's decision-making. Case law has recognized a presidential communications privilege that is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974). It is well settled that the President has a "need for confidentiality in the communications of his office . . . in order to effectively and faithfully carry out his Article II duties and to protect the effectiveness of the executive decision-making process." *Judicial Watch v. Dep't of Justice*, 365 F.3d 1108, 1115 (D.C. Cir. 2004) (internal quotation marks and citations omitted). Any court-sanctioned invasion into the President's decision-making would interfere with the freedom that is guaranteed to him and to his advisers under Article II "to explore alternatives in the process of shaping policies and making decisions." *In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997). Indeed, it is precisely this interest in the confidentiality of Presidential decision-making that Congress sought to protect by insulating his decisions under the Defense Production Act from judicial review. *See* 50 U.S.C. App. § 2170(e). A plaintiff should not be permitted to circumvent Congress's decision by claiming a due process right to gain access to the President's decision-making process.

In sum, Ralls's request to review the evidence before the President and the contents of his deliberations, if granted, would interfere with the President's performance of his duties to protect the national security and to force the disclosure of national security-sensitive information that by necessity should be held confidential from the foreign acquirers of United States businesses.

B. Ralls's Private Interest Is Insubstantial Relative to the Government's Interests

In comparison to these compelling governmental interests, Ralls's interests are minimal. At noted, Ralls was on notice that, by proceeding with its acquisition without first submitting a notice to CFIUS, it ran the risk of a Presidential prohibition of the transaction at any time. For the reasons described above, Ralls therefore lacked any protected property interest in its acquisition. But even if Ralls could clear that threshold for a due process claim, it is apparent that any interest that it held in maintaining its transaction free from the President's oversight pales in comparison to the government's interests here.

Moreover, Ralls's interests are further diminished, given the narrow circumstances under which a Presidential Order under the Defense Production Act could arise. The Act seeks to fulfill the policy of the United States to encourage foreign investment, where it is possible to do so consistent with national security interests. The Act, by its own terms, applies only to foreign acquisitions of United States businesses that implicate national security considerations, and the Ralls transaction is such an acquisition. It is well settled that "a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other." *Mathews v. Diaz*, 426 U.S. 67, 78 (1976); *see also id.* at 78 n.12 (citing favorably to the "multitude of federal statutes [that] distinguish between citizens and aliens . . . includ[ing] prohibitions and restrictions . . . upon

investments and businesses of aliens”). While, as a matter of policy, the United States is open to and seeks to attract foreign investment, it is apparent that, as a legal matter, the Constitutional due process calculus weighs differently where Congress has legislated specifically with respect to the authorization of commercial transactions involving aliens, particularly where such transactions raise sensitive national security considerations. *See Demore v. Kim*, 538 U.S. 510, 521-22 (2003); *United States v. Lue*, 134 F.3d 79 (2d Cir. 1998). As such, Ralls's interests accordingly do not weigh heavily enough to justify the intrusion into the President's decision-making that it demands.

C. Ralls’s Intrusion into the Presidential Decision-Making Process Would Add No Value to the President’s Deliberations

Finally, no value would be added to the President’s decision-making if he were required to disclose his evidence or his deliberations to Ralls. Again, as noted, the President may consider any factor that he deems appropriate in making his finding that a foreign acquisition threatens to impair the national security. Indeed, the President is not obligated to accept a recommendation from CFIUS, *see* 50 U.S.C. App. § 2170(d)(2) (reserving power to the President to decide whether or not to take action), and nothing in the statute limits the sources of information that the President may draw upon in assessing threats to the national security. Congress has specified the process that it deemed warranted, and a federal court should not specify additional procedures for the President to follow. After all, unlike the President, “neither the Members of [the Supreme] Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. It is vital in this context not to substitute [the court’s] evaluation of evidence for a reasonable evaluation by the Legislative Branch.” *Humanitarian Law Project v. Holder*, 130 S. Ct. 2705, 2727 (2010) (internal quotations omitted).

Congress intentionally avoided requiring the President to disclose any evidence or the content of his deliberations to foreign acquirers under the Defense Production Act. *See* 50 U.S.C. App. § 2170(d)(2) (requiring the President to announce only the result of his decision). Given that “national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess,” *Humanitarian Law Project*, 130 S. Ct. at 2727, the political branches are in the best position to ascertain the procedures that the President should follow in exercising his Defense Production Act authority. *See Haig v. Agee*, 453 U.S. at 292 (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”); *Waterman*, 333 U.S. at 111-12.

In light of the foregoing, due process did not require the President to engage Ralls in his decision-making. It is notable that Ralls did, once prompted, submit a notice to CFIUS in which it availed itself of the invitation extended to all filers under CFIUS’s regulations to state its views as to why national security was not implicated by its transaction. (ECF 7-7 at 5-6.) It is also notable that Ralls requested and received the opportunity to meet and discuss the matter with CFIUS several times to discuss the matter. (*See supra*, pp. 4-7.) The question at hand, however, is Ralls’s claim that the President was required to afford it particular procedures before arriving at the decision committed to his discretion. There is no basis to conclude that the President’s exercise of his discretionary authority should be cabined by mandating that he directly engage Ralls in his decision-making process.

