

Court Tosses Most Claims in Challenge To Presidential Wind Farm Divestiture Order

(Ralls Corp. v. Committee on Foreign Investment in the United States, D. D.C., Civil Action No. 12-1513 (ABJ), 2/22/13).

Key Holding: District court tosses most of Ralls Corp.'s complaint challenging presidential actions regarding proposed acquisition of wind farms for lack of jurisdiction.

Next Steps: A due process claim is allowed to proceed. The court expresses no opinion on the merits of the claim.

By [Rossella Brevetti](#) and [Len Bracken](#)

The U.S. District Court for the District of Columbia Feb. 22 rejected most claims brought by an entity owned by two Chinese nationals that challenged a presidential order directing it to divest its interest in several wind farm projects, but the court allowed a due process claim to move forward to the merits (*Ralls Corp. v. Committee on Foreign Investment in the United States, D. D.C., Civil Action No. 12-1513 (ABJ), 2/22/13*).

In a closely watched and precedent-setting case involving judicial review of actions taken by the president to protect national security, attorneys familiar with the process said the language used by the court and affirmation of a statutory bar to judicial review of the president's decision suggested it would be difficult for the firm get the court to overturn the president's order on due process grounds.

Plaintiff Ralls Corp., a Delaware corporation owned by two Chinese nationals, entered into a transaction to acquire several wind farm projects located in the vicinity of a U.S. Naval installation in Oregon. Ralls planned to install Chinese turbines at that location.

The Committee for Foreign Investment in the United States (CFIUS)—an interagency body that conducts national security reviews of transactions that would result in the control of a U.S. business by a foreign person—conducted a 30-day, first-stage review, along with an additional 45-day, second-stage investigation. Following the CFIUS reviews, the Treasury Department Sept. 28, 2012, announced a presidential order prohibiting the acquisition and ownership of four wind farm project companies by Ralls Corp., its owners, its subsidiaries, and its affiliates. A related presidential order directed Ralls to divest its interest in the wind farm project companies ([189 DER EE-17, 10/1/12](#)).

Ralls's amended complaint challenged President Obama's actions taken under Defense Production Act Section 721 as well as the CFIUS order. According to Ralls, the president's actions are ultra vires—unauthorized or beyond the scope of power granted by law—and violated the Constitution's due process and equal protection clauses ([195 DER A-25, 10/10/12](#)). Moving to dismiss, the defendants argued that the court lacks jurisdiction ([211 DER A-17, 11/1/12](#)).

The rationale for barring the acquisition can be traced to the proximity of the wind farms to a nearby Naval facility conducting electronic combat training as well as research and development on unmanned aerial systems, one of the attorneys said.

Ultra Vires Claim Barred.

District Judge Amy Berman Jackson noted that the “finality clause” in Section 721 withdraws judicial review over the president's actions taken “under paragraph (1) of subsection (d) of this section.” Paragraph (1) of subsection (d), in turn, authorizes the president, once he has made the requisite findings, to “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.”

Ralls claimed the finality provision does not bar its ultra vires claim because the provision's express language applies only to presidential actions “under” the statute. According to Ralls, the court may determine whether the president's actions fell outside the statutory grant of authority. The presidential order declares the transaction that resulted in the acquisition to be prohibited and then states, “in order to effectuate this order,” Ralls is required to divest and take other steps. Ralls's ultra vires claim is based on the notion that the only thing the statute permits the president to do is to suspend or prohibit a transaction. “But the statute doesn't say that,” the court said, adding that Section 721(d)(1) grants the president “extremely broad authority” to “take such action for such time as the President considers appropriate to suspend or prohibit” transactions. “This artful legal packaging cannot alter the fact that what plaintiff is urging the Court to do is assess the President's findings on the merits, and that it cannot do. Since the finality provision bars review of the ultra vires and equal protection challenges to the President's order, the Court will dismiss those claims for lack of jurisdiction,” the court wrote.

The court found the “same structural and historical factors that call for the application of the finality provision to the ultra vires claim provide convincing evidence of Congress's intent to withdraw judicial review over the equal protection claim.”

Court Allows Due Process Claim.

The court, however, allowed to stand and proceed to the merits a due process claim raising purely legal questions on the process that was followed in implementing the statute. “It may be that the Court will ultimately decide that in the context of a national security decision committed to the President's discretion, the opportunities provided to the plaintiff here comported with due process, or the plaintiff is not entitled to the reasons. Since the matter has not yet been fully briefed, the Court expresses no opinion on those issues. The sole question

before the Court at this stage is whether the statute clearly bars any consideration of plaintiff's procedural concerns, and the Court finds that it does not.”

The court also dismissed Ralls's attempt to get court review of the CFIUS order as moot. In a statement, the firm said: “The Court Friday ruled that it has jurisdiction over Ralls' primary claim that the Presidential order violated constitutional due process. We look forward to litigating this matter on the merits and vindicating the rule of law.”

Bart Fisher, a professor and practitioner of international trade law, told BNA the conservative holding is limited to the plaintiff having a right to know the rationale for the barring of the acquisition.

He added that the limited win by Ralls is not unimportant, as it could allow foreign investors to make the executive branch more accountable for its decisions. He noted that Ralls, however, did not file a voluntary notification with the CIFIUS panel prior to making the acquisition, which the firm should have done out of abundance of caution to avoid the trouble and expense of divestiture.

Fisher Cites Key Doctrines.

Fisher said the case falls within the realm of the political question doctrine and Curtiss-Wright doctrine whereby it is not considered to be the court's role to review the wisdom of foreign policy and national security decisions made by the president.

The political question doctrine is the judicial principle that a court should refuse to decide issues involving the discretionary powers by the executive or legislative branch of government. The Curtiss-Wright doctrine stems from the 1936 Supreme Court case *United States v. Curtiss-Wright Export Corp.* in which the court established in its decision the principle of executive supremacy in national security and foreign affairs.

Fisher pointed to the following passage in the ruling: “The fact that the challenge in this case is dressed in constitutional garb is inconsequential. In the political question context, the D.C. Circuit has found that judicial review of claims that 31 present political questions is barred, ‘regardless of how they are styled, [so long as they] call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion.’ *El-Shifa*, 607 F.3d at 842.”

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The full text of the court's opinion can be accessed at <http://op.bna.com/itr.nsf/r?Open=esin-959v4n>.