The Nippon-U.S. Steel Case Tests Presidential Power to Block Foreign Investment, Judicial Review

*By Hdeel Abdelhady**

"Gentle into that good night" is how most foreign investors and their U.S. investment targets go after their deals meet with Congressional or public backlash, are scuttled by CFIUS (the Committee on Foreign Investment in the United States), or, in rare cases, are prohibited by the President.[1] The forces of public pressure and CFIUS's influence are so strong that in 36 years, presidents have blocked foreign investments only nine times under Section 721 of the Defense Production Act of 1950 (DPA).[2]

But Nippon Steel of Japan and Pittsburgh-based U.S. Steel refuse to go gently. On January 3, 2025, President Biden prohibited Nippon's proposed $14.9 billion acquisition of U.S. Steel. U.S. Steel called the order "shameful and corrupt." Three days later, the companies took their battle to the courts.[3] In the U.S. Court of Appeals for the District of Columbia Circuit, Nippon and U.S. Steel challenge the lawfulness of President Biden's (and CFIUS's) actions under Section 721.

The resistance may have bought time. CFIUS extended to June 18, 2025 the deadline to comply with President's order. Meanwhile, the case presents a rare test of presidential authority over foreign investment and the limits of Section 721's judicial review restrictions.

The Historical and Legal Landscape

A Full Circle Moment in Section 721's History

In two ways, President Biden's order brings full circle the history of Section 721. First, the order is only the second prohibiting a foreign investment in traditional industry. The very first order under Section 721, issued by President Bush in 1990, required a Chinese government-owned company to divest ownership of a U.S. metal aircraft parts manufacturer.[4]

Second, Section 721 was born of opposition to Fujitsu of Japan's planned acquisition of Fairchild Semiconductor from its French owner, Schlumberger. Against the backdrop of the U.S.-Japan trade war, and fierce opposition from government trade and national security hawks and the U.S. semiconductor industry, Fujitsu walked away from the deal in 1987. Still, the deal's opponents lamented the lack of "legal authority under which the Government can enjoin a foreigner from making an American investment."[5] Section 721, enacted in 1988, provides that legal authority.[6]

The President's Authority to Prohibit Foreign Investment

Section 721 authorizes the President to review, investigate, suspend, and prohibit foreign mergers, acquisitions, takeovers, and other "covered transactions" that "threaten to impair" U.S. national security.[7] The President exercises his authority directly and through his "designee," CFIUS, which conducts reviews and investigations, negotiates and enforces national security mitigation

measures, and may suspend transactions during the pendency of its work.[8] CFIUS's work under Section 721 concludes by clearing transactions with or without mitigation measures, or referring a transaction to the President.[9]

The President may prohibit a transaction, but "*only if*" he makes two required findings.[10] First, the President must find, based on "credible evidence," that the "foreign person that would acquire an interest in a United States business . . . might take action that threatens to impair the national security."[11] Second, Section 721 requires a finding that "provisions of law, other than . . . [Section 721] and the International Emergency Economic Powers Act, do not, in the judgment of the President, provide adequate and appropriate authority for the President to protect the national security."[12]

The requirement of these two findings and treatment of IEEPA as a substitute for Section 721 reinforce Section 721's national security boundaries. Tellingly, Section 721 and IEEPA are codified at Title 50 of the U.S. Code, on "War and National Defense."

***Ralls v. CFIUS*: A Landmark Decision and Unfinished Business**

From its enactment in 1988, Section 721 has barred judicial review of the President's "actions," meaning prohibiting and suspending a transaction, and "findings" resulting in those "actions."[13] Only one case – *Ralls v. CFIUS* (2014) – has meaningfully tested that limitation and partially reached the merits of a challenge to the President's (and CFIUS's) authority.[14]

Delaware company Ralls and its Chinese owners challenged President Obama's order retroactively prohibiting Ralls' acquisition of four windfarm companies having project sites in and near military air space.[15] Ralls also challenged CFIUS's mitigation orders directing the company to, among other things, cease operations and access to the project sites.[16] Ralls contended that the President's blocking order violated the Administrative Procedure Act, exceeded the President's Section 721 authority and was thus *ultra vires*, and deprived Ralls of due process and equal protection.[17]

The D.C. Circuit rejected the government's claim that judicial review was barred by Section 721 and the political question doctrine.[18] Section 721's text and legislative history did not establish by "'clear and convincing'" evidence that Congress intended to preclude judicial review of constitutional claims.[19] Ralls had a state law property interest protected by the Due Process Clause.[20] "[A]t the least," due process required the President to inform Ralls of his "official action," and give Ralls "access to" and an opportunity to rebut unclassified evidence on which the President relied.[21]

Ralls's other claims remain untested. The D.C. District Court dismissed the *ultra vires* claim against the President and CFIUS for lack of subject-matter jurisdiction, because Section 721 "barred judicial review."[22] On appeal, Ralls dropped the *ultra vires* and equal protection challenges to the President's order. The claims were not further explored, as the case was settled.[23]

Post-*Ralls* Amendments to Section 721's Judicial Review Provisions

In 2018, Section 721 was substantially amended by the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). FIRRMA did not in response to *Ralls* clarify or further curtail

judicial review, but added provisions accommodating judicial review. FIRRMA gives the D.C. Circuit original and exclusive jurisdiction of any "civil action challenging an action or finding" of the President.[24] FIRRMA also codified *Ralls* by providing that classified or other protected information shall, where deemed necessary by the D.C. Circuit, be filed *ex parte*, *in camera*, and under seal.[25]

New Challenges to Presidential Authority and Limits on Judicial Review

President Biden's order asserts that Nippon "might take action that threatens to impair the national security of the United States," but does not identify the threat. That is not unusual. Section 721 blocking orders do not consistently elaborate the threat.[26] What is unusual is the President's accompanying statement explaining the order. President Biden said he had fulfilled his "solemn responsibility" "to ensure that, now and long into the future, America has a strong domestically owned and operated steel industry" and that "U.S. Steel will remain a proud American company . . . American-owned, American-operated, by American union steelworkers - the best in the world."[27] This seemingly expansive view of Section 721 authority raises three legal vulnerabilities.

Lack of a Particularized Finding as to Nippon

In *Dalton v. Spencer*, the Supreme Court stated that judicial review "is not available when the statute in question commits the decision to the discretion of the President."[28] However, a challenge to the President's "want of" "power," and not merely "'an excess or abuse of discretion in exerting a power given'" is reviewable.[29] President Biden's order may be challenged for lack of authority.

Again, the President was required to find, based on "credible evidence," that Nippon *in particular* might act to "impair" national security.[30] As a former Deputy Treasury Secretary explained in Congressional testimony, although the "credible evidence"-based finding "is a relatively low standard," it is "clearly more than conjecture." "The President must have some reason to believe, based, for example, on the foreign person's past actions or likely motives, that it will take action through the acquisition that threatens to impair U.S. national security."[31]

President Biden's order formulaically states that Nippon might take such action. But his contemporaneous statement objects to *any* foreign ownership of U.S. Steel and other U.S. steel producing assets.[32] If the President failed to make a particularized finding, he lacked authority to take "action" under Section 721.[33]

The President's Legal Finding on the Inadequacy of Other Laws

The Nippon facts offer an opportunity to, for the first time, question the President's legal finding that no laws, other than Section 721 and IEEPA, were appropriate and adequate to address the national security threat. Courts generally defer to the President on matters of national security.[34] However, "not every case touching on national security lies beyond judicial cognizance."[35] In the context of Section 721, a determination of whether the President made the required legal finding is material to whether his "action" was *ultra vires*.[36] Arguably, the President's legal determination is detachable from his national security finding, even if the legal determination is committed to the President's "judgment."[37] "The D.C. Circuit arguably may review the President's legal determinations without traversing Section 721 or political question doctrine boundaries.[38]

The President's Stated Reasons May Cross National Security Boundaries

President Biden's statement also cites unfair trade practices, national industrial (*and not just defense*) steel requirements, factory closings, and job losses as reasons for his order. Conceivably, other laws – such as trade, antitrust, and labor laws – are adequate and appropriate to address those concerns. Moreover, Congress has never authorized, and has rejected, the expansion of Section 721 beyond national security.

As stated in Congress's Conference Report on the 1988 law, Section 721 was not intended "to have any effect on transactions which are outside the realm of national security," or in any way "impose barriers to foreign investment."[39] Within those parameters, the Foreign Investment and National Security Act of 2007 (FINSA) – one of only three substantive amendments of Section 721[40] – clarified that "national security" encompasses "'homeland security', including its application to critical infrastructure."[41]

Before and after FINSA Congress declined repeatedly to expand Section 721's scope. For example, the Foreign Investment and Economic Security Act of 1991 proposed to allow "consideration of "economic" security, but did not make it out of committee.[42] Other iterations of the bill were introduced in 2014, 2016, and 2017, to require consideration under Section 721 of a foreign investment's "net benefit" to the "level and quality of employment," "productivity, industrial efficiency, technological development," and "competition within any industry" in and outside the United States.[43] Those bills died in committee.

In 2022, President Biden issued an executive order expanding the factors that CFIUS should consider under Section 721.[44] The order directs CFIUS to consider, among other things, foreign investments' effect on "domestic capacity to meet national security requirements, *including those requirements that fall outside of the defense industrial base*."[45] However, Section 721's text and legislative history confine industrial capacity considerations to "national defense" and "national security."[46] The day President Biden issued his order, the Treasury Secretary (and CFIUS Chair) issued a statement that the order merely provided "context" but did "not change CFIUS operations or process," and tacitly acknowledged statutory limits.[47] Congress did not act to codify the order.[48] The Nippon order may be challenged as an instrument of President Biden's policy that expands Section 721.

Youngstown Sheet & Tube v. Sawyer is instructive. During the Korea war, President Truman ordered the Commerce Secretary to seize and operate steel and related companies – including U.S. Steel – to avoid supply disruptions expected from an impending United Steelworkers' strike.[49] The Court struck down the order, reasoning that Congress had not authorized seizure as a "method of settling labor disputes," and had "refused" to do so.[50] The seizure order did not implement a "congressional policy," but impermissibly "direct[ed] that a presidential policy be executed in a manner prescribed by the President."[51] President Biden's order may be challenged as an implementation of a presidential policy that Congress did not authorize, and rejected.

Conclusion: A Defining Case for Foreign Investment Regulation

For the first time in Section 721's 36-year history, the Nippon-U.S. Steel case offers an opportunity to examine the President's contingent authority to prohibit foreign investment. Section 721's text reinforces the United States's policy of openness to foreign investment by making the President's blocking authority contingent on findings that a particular foreign investor might act to impair national security and that laws other than Section 721 and IEEPA are not adequate and appropriate to mitigate the particular national security threat.

President Biden's blocking order formulaically makes those findings, but his contemporaneous statement couches the order in broad opposition to foreign ownership of U.S. Steel and steel producing assets. Moreover, the statement appears to advance broader objectives outlined in President Biden's 2022 executive order to expand the scope of Section 721 considerations, and that Congress has rejected. Akin to *Youngstown*, a question is whether the blocking order implements Congress's policy, or the Executive's.

If the D.C. Circuit examines whether the President's contingent Section 721 authority vested, and if it was exceeded, the admissibility and weight to be accorded to his accompanying statement may be in issue. These issues, and the scope of judicial review, implicate new, post-*Ralls* legal authority, including *Trump v. Hawaii* or similar cases and FIRRMA's 2018 amendments to Section 721's judicial review provisions.

With national security increasingly intertwined with "economic security," the Nippon-U.S. Steel case may shape how future administrations wield Section 721. Fatefully, Nippon's refusal to go gently may reset the course of a law born of opposition to a Japanese investment decades ago.

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NOTES

[1] Dylan Thomas, *Do not go gentle into that good night*.

In 2020, China's Beijing Kunlun Tech quietly divested ownership of the dating app Grindr at CFIUS's direction. In 2006, Dubai Ports World's CFIUS-cleared takeover of commercial operations at six U.S. ports – from a British company that DPW had acquired a year before – was abandoned amidst Congressional backlash. After President Obama blocked the ultimately Chinese-owned Grand Chip Investment GmbH's proposed acquisition of Aixtron SE in 2016, the parties moved on. Under the crush of bipartisan and public scrutiny, Chinese direct investment in the United States plummeted from nearly $27 billion in the second half of 2016 to $1.8 billion in the first half of 2018. Source: Rhodium Group (on file with author).

[2] 50 U.S.C. § 4565.

[3] In the U.S. District Court for the Western District of Pennsylvania, the companies sued U.S. Steel rival Cleveland-Cliffs, Inc. ("Cliffs"), Cliffs' CEO, and the Unted Steelworkers' President, alleging "a coordinated

series of anticompetitive and racketeering activities illegally designed to prevent any party other than Cliffs from acquiring U. S. Steel."

[4] *Order on the China National Aero-Technology Import and Export Corporation Divestiture of MAMCO Manufacturing, Incorporated*, Feb. 1, 1990, *available at* https://www.presidency.ucsb.edu/documents/order-the-china-national-aero-technology-import-and-export-corporation-divestiture-mamco.

[5] David E. Sanger, *Japanese Purchase of Chip Maker Cancelled after Objections in U.S.*, N.Y. Times, Mar. 17, 1988.

[6] Section 721, known as the "Exon-Florio amendment," was added to the DPA by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418 (Aug. 23, 1988).

[7] 50 U.S.C. § 4565.

[8] 50 U.S.C. §§ 4565(b), (l).

[9] 50 U.S.C. § 4565(l)(2).

[10] 50 U.S.C. § 4565(d)(1), (4) (emphasis added).

[11] 50 U.S.C. § 4565(4)(A). Notably, this language – particular to the foreign acquirer – was added to Section 721 by the Foreign Investment Risk Review Act of 2018 (FIRRMA). Before FIRRMA, the President was to find that "the foreign interest exercising control" might take action threatening to national security.

[12] 50 U.S.C. § 4565(d)(4)(B). Under IEEPA, enacted in 1977, the President may exercise the substantial authority granted by that law only as to an "unusual and extraordinary" threat emanating wholly or substantially from outside of the United States, and declare a national emergency. 50 U.S.C. § 1701.

[13] 50 U.S.C. § 4565(e)(1).

[14] In 2020, TikTok, Inc. and its ultimately Chinese owner ByteDance Ltd. challenged President Trump's August 2020 order directing ByteDance to divest its ownership of Musical.ly. *TikTok, Inc. v. Committee on Foreign Investment in the United States*, 20-1444 (D.C. Cir.). Before briefing, the case was held in abeyance while the parties negotiated an alternative to divestment, and was ultimately mooted by the passage of the Protecting Americans from Foreign Adversary Controlled Applications Act, that among other things codified the divestiture order. The Supreme Court upheld the Act, that took effect on January 19, 2024. On his first day in office, President Trump issued an executive order prohibiting enforcement of the duly enacted law upheld by the nation's highest court, and further directed the Attorney General to "issue a letter" to app store operators and others "stating that there has been no violation of the statute" and no "liability" for noncompliance.

[15] *Ralls v. Committee on Foreign Investment in the United States*, 758 F.3d 296, 304-05 and n. 7 (D.C. Cir. 2014).

[16] *Id.* at 305.

[17] *Id.* at 306-07.

[18] *Id.* at 307-12.

[19] *Id.*

[20] *Id.* at 305-18 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). A key distinction between Ralls and Nippon is that Ralls completed its acquisition. Whether Nippon and U.S. Steel have due process-protected property interests will turn on the facts and state law.

[21] *Id.* at 319-20.

[22] *Id.* The trial court dismissed the equal protection claim on the same grounds, and dismissed the due process and other claims for failure to state a claim. *Id.* at 306-07.

[23] *Id.* at 307 n. 9.

[24] 50 U.S.C. § 4565(e)(2).

[25] 50 U.S.C. § 4565(e)(3).

[26] In contrast, President' Biden's other Section 721 order, blocking the acquisition of real estate near a U.S. military installation by an ultimately Chinese-owned crypto mining company, explains the national security threat. *Order Regarding the Acquisition of Certain Real Property of Cheyenne Leads by MineOne Cloud Computing Investment I L.P.*, May 13, 2024.

[27] Statement from President Biden, Jan. 3, 2025.

[28] 511 U.S. 462, 474 (1994).

[29] *Id.* (quoting *Dakota Central Telephone Co. v. South Dakota ex rel. Payne,* 250 U.S. 163, 184 (1919)).

[30] 50 U.S.C. § 4565(4)(A). Notably, this language – particular to the foreign acquirer – was added to Section 721 by the Foreign Investment Risk Review Act of 2018 (FIRRMA). Before FIRRMA, the President was to find that "the foreign interest exercising control" might take action threatening to national security.

[31] S. Hrg. 109-805 at 175 ("The Implementation of the Exon-Florio Provision by CFIUS, Which Seeks to Serve U.S. Investment Policy Through Reviews That Protect National Security While Maintaining the Credibility of Open Investment Policy") Oct. 6 and 20, 2005.

[32] The particularized finding requirement was added by FIRRMA in 2018. Previously, the President was required to find that "the foreign interest exercising control" "might take action that threatens to impair" national security. *See, e.g.*, H.R. Rep. No. 115-784, pt. 1 at 69, 115th Cong., 2nd Sess., 2018.

[33] 50 U.S.C. § 4565(d)(4)(A). The lack of a particularized finding may also support a due process claim under *Ralls*. Whether and the extent to which the President's statement will be considered evokes *Trump v. Hawaii,* in which challengers of President Trump's Muslim ban proclamation relied on his campaign statements as evidence that the proclamation was motivated by impermissible religious animus. 585 U.S. 667 (2018). The Court "assume[d]" it could "look behind the face of the Proclamation to the extent of applying rational basis review" and "uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." Under that lenient standard, Trump's proclamation – by then sanitized – supported the "Government's claim of a legitimate national security interest," and was upheld. A key difference here is that President Biden issued his explanatory statement as President and contemporaneously with his order.

[34] *See, e.g., Lee v. Garland,* 120 F.4th 880, 891 (D.C. Cir. 2024) ("national security is a 'quintessential source[] of political questions.'") (quoting *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006)).

[35] *Id.*

[36] 50 U.S.C. § 4565(d)(4)(B).

[37] 50 U.S.C. § 4565(d)(4)(B).

[38] *Dalton*, 511 U.S. at 474; *Ralls*, 758 F.3d at 313 (discussing that a "non-justiciable political question" unreviewable by the courts is present where any one of five circumstances are present, including "'a lack of judicially discoverable and manageable standards for resolving'" the question) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

[39] H.R. Rep. No. 100–576, 100TH Cong., 2nd Sess. 1988, 1988 U.S.C.C.A.N. 1547, 1959-60 (Conf. Rep.).

[40] In addition to FIRMA and FINSA, the "Bryd amendment" of 1992 required CFIUS to conduct "reviews" of foreign investments in which the foreign investor was a foreign government actor.

[41] 50 U.S.C. § 4565(a)(1). This clarification was added by the Foreign Investment and National Security Act of 2007, adopted largely in response to the proposed Dubai Ports World takeover of port operations.

[42] Foreign Investment and Economic Security Act of 1991, H.R.2386 (102nd Congress (1991-1992)).

[43] *E.g.,* Foreign Investment and Economic Security Act of 2017, H. R. 2932 (115th Congress (2017-2018)).

[44] Executive order 14083, *Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States*, Sept. 15, 2022.

[45] *Id.* § 2(i) (emphasis added).

[46] 50 U.S.C. § 4565(f)(1)-3; Conf. Rep. at 1959, *supra* n. 6.

[47] Dept. of the Treasury, *Statement by Secretary of the Treasury Janet L. Yellen on President Biden's Executive Order on the Committee on Foreign Investment in the United States*, Sept. 15, 2022.

[48] FINSA, in contrast, codified Executive Order 11858 of May 7,1975, creating CFIUS to monitor, compile data on, and make recommendations on foreign investment, particularly in response to OPEC nations' oil-fueled capability to acquire U.S. businesses.

[49] Executive Order 10340, *Directing the Secretary of Commerce to Take Possession of and Operate the Plants and Facilities of Certain Steel Companies*, Dec. 16, 1950.

[50] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952). The Court also rejected the government's claim that other provisions of the DPA authorized steel mill seizures. *Id.* at 585-86.

[51] *Id.* at 588.