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I. Supreme Court Again to Consider Guantanamo Detainees

After passage of the Military Commissions Act (MCA) in October 2006, detainees held at the U.S. military base in Guantanamo Bay, Cuba, suffered a setback to their attempts to seek habeas corpus relief for their detention, since the MCA stripped them of any potential rights to file habeas petitions in U.S. courts.[1] But the U.S. Supreme Court has reversed its earlier decision and will consider the Act this term, via the consolidated cases *Boumediene v. Bush* and *Al Odah v. United States*.[2] That said, the path to the Court has not been easy for the detainees or their attorneys.

This group of detainees first sought relief in 2002 from the D.C. District Court, which dismissed the habeas corpus petitions and other claims.[3] The D.C. Court of Appeals af-

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1. *See* Military Commissions Act of 2006 § 7(a), Pub. L. No. 109-366, 120 Stat. 2600 (2006) (amending 28 U.S.C. § 2241 by adding subsection (e)(1) stating:

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

2. *See* Robert Barnes, *Justices to Weigh Detainee Rights*, WASH. POST, Jun. 30, 2007 at A1. In April 2007, the Supreme Court Justices decided 6-3 to reject the appeal from two groups of prisoners seeking to challenge their detention and the MCA, which had previously been upheld by the U.S. Court of Appeals for the District of Columbia. *See also* Boumediene v. Bush, 127 S. Ct. 1478 (2007) (denying petitions for writs of certiorari); Boumediene v. Bush, 476 F.3d 981, 994 (D.C. Cir. 2007) (ruling against detainees' argument that the MCA and suspension of habeas corpus relief is unconstitutional); CNN, *Supreme Court Rejects Appeal by Gitmo Prisoners*, Apr. 2, 2007, http://www.cnn.com/2007/LAW/04/02/scotus.detainees/index.html.

3. Rasul v. Bush, 215 F. Supp. 2d 55, 56 (D.D.C. 2002) (dismissing detainees complaint and petition for writs of habeas corpus).

firmed the dismissal.[4] The Supreme Court reversed the dismissal in *Rasul v. Bush*, finding that habeas protections extended to aliens detained at Guantanamo Bay.[5] Congress attempted to curtail habeas petitions from the detainees by passing the Detainee Treatment Act (DTA) of 2005;[6] however, in June 2006, the Supreme Court responded again in *Hamdan v. Rumsfeld*, holding that the DTA did not strip federal courts of jurisdiction over pending habeas petitions from detainees.[7] As a response, Congress and the executive branch passed the MCA.[8] *Boumediene* and *Al Odah* have now been crafted as challenges to the MCA and its prohibition on habeas applications from the detainees.

In addition to the succession of cases filed by the detainees, attorneys for the prisoners have faced challenges communicating and meeting with their clients. Most recently, in September 2007, the Department of Justice notified lawyers for Guantanamo detainees that a ruling from the D.C. District Court[9] invalidated the protective order that established the rules governing contact between the detainees and their attorneys.[10] Further, the Department of Justice warned that attorneys would be denied access to the detainees unless new suits were filed on behalf of the detainees under the DTA and the attorneys agreed to tighter restrictions on attorney-client communications.[11] Fortunately for the prisoners, the D.C. Court reversed its ruling in October 2007, expressing concern about the Department of Justice's decision to restrict attorneys' access to their clients.[12]

II. Legal Challenges to the Terrorist Surveillance Program

Attorneys have filed a series of cases challenging the Terrorist Surveillance Program—more commonly known as the warrantless domestic surveillance program—instituted by the Bush administration shortly after the attacks of September 11, 2001. The Terrorist Surveillance Program (the "Program") began with a presidential order in 2002 authorizing the National Security Agency (NSA) to eavesdrop on telephone calls and emails made by U.S. citizens and others *inside* the United States without seeking warrants from the courts,[13] either under the Foreign Intelligence Surveillance Act of 1978 (FISA)[14] or Title

4. Al Odah v. United States, 321 F.3d 1134 (D.C.Cir. 2003).

5. Rasul v. Bush, 542 U.S. 466, 483-84 (2004).

6. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (adding subsection (e) to the habeas statute stating that no court, justice or judge may exercise jurisdiction over applications for writs of habeas corpus filed by or on behalf of aliens detained at Guantanamo Bay).

7. Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2769 (2006).

8. *See* Boumediene, 476 F.3d at 987 (quoting statement of Sen. Leahy that the MCA goes far beyond what Congress did in the DTA by stripping habeas retroactively, even for pending cases).

9. Omar v. Harvey, 514 F. Supp. 2d 74 (D.D.C. 2007).

10. Ben Fox, *Gitmo Ruling Clouds Attorney Access*, ABC NEWS, Sept. 22, 2007, http://abcnews.go.com/International/wireStory?id=3638949. .

11. *Id.*

12. Associated Press, *Ruling Reversed on Gitmo Lawyer Access*, ABC NEWS, Oct. 5, 2007, http://abcnews.go.com/International/wireStory?id=3696128.

13. *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005 at A1, *available at* http://www.nytimes.com/2005/12/16/politics/16program.html.

14. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-11 (governing U.S. government interception of electronic communications involving foreign intelligence information) [hereinafter FISA].

III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III).[15] The Bush Administration has defended the Program and stated that it is consistent with U.S. laws and the Constitution;[16] however, many disagree, prompting the cases challenging it.

One of the first cases to reach the courts was *ACLU v. NSA*, and in 2006, Judge Anna Diggs Taylor found the Program illegal and unconstitutional.[17] In 2007, however, the Sixth Circuit Court of Appeals overturned Judge Taylor's ruling and dismissed the case, concluding that the plaintiffs lacked standing for their claims and that the information necessary to overcome the lack of standing—*i.e.* evidence that the plaintiffs themselves were subjected to illegal search or seizure—could not be obtained via discovery since the information is protected by the state secrets privilege.[18]

Another set of cases in the Ninth Circuit, however, may ultimately reach a different conclusion. In *Al-Haramain Islamic Found., Inc. v. Bush*, plaintiffs claim that the U.S. government violated FISA, the Fourth, First, and Sixth Amendments, the Separation of Powers Clause, and the International Convention for the Suppression of the Financing of Terrorism by illegally conducting surveillance against them and freezing their assets. In 2006, the U.S. District Court in Oregon ruled against the U.S. government's motion to dismiss based on the invocation of the state secrets privilege.[19] The government appealed the decision to the Ninth Circuit Court of Appeals, which heard arguments in August 2007, but the court had not made a decision at the time this paper was written.[20]

In *Hepting v. AT&T Corp.*, a former AT&T technician brought suit against AT&T, seeking to demonstrate that AT&T implemented a warrantless surveillance system on behalf of the U.S. government and in doing so committed violations of the First and Fourth Amendments, FISA, Title III, the Communications Act of 1934, the Stored Communications Act, and California state law.[21] The U.S. government intervened in the case in order to assert the state secrets privilege, and both the U.S. government and AT&T moved to

15. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-22 (regulating U.S. government interception of wire, oral, and electronic communications that do not involve foreign intelligence information) [hereinafter Title III].

16. *See, e.g.*, Department of Justice, Office of Public Affairs, *The NSA Program to Detect and Prevent Terrorist Attacks Myth v. Reality*, Jan. 27, 2006, http://www.usdoj.gov/opa/documents/nsa_myth_v_reality.pdf. *See also* Associated Press, *U.S. Eavesdropping Program "Saves Lives": Bush*, SYDNEY MORNING HERALD, Dec. 18, 2005, http://www.smh.com.au/news/world/us-eavesdropping-program-saves-lives-bush/2005/12/18/1134840729456.html.

17. ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 781 (E.D. Mich. 2006) (finding that the Program violates the Administrative Procedures Act, Separation of Powers doctrine, First and Fourth Amendments of the U.S. Constitution, and statutory law).

18. ACLU v. Nat'l Sec. Agency, 493 F.3d 644, 673-74, 685, 687 (6th Cir. 2007). The court found the plaintiffs lacked standing with regard to their Fourth Amendment constitutional claims because there is no evidence that plaintiffs themselves were subjected to illegal search or seizure and they only alleged that they have been. The plaintiffs also lacked standing with regard to their statutory claims under the Administrative Procedures Act, FISA and Title III because none of these statutes provides an express or implied cause of action that authorizes plaintiffs' claims. Finally, plaintiffs were unable to overcome their lack of standing because discovery of the necessary evidence to demonstrate standing is prevented by the invocation of the state secrets privilege.

19. Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215, 1218, 1227 (D. Or. 2006).

20. *See* Les Zaitz, *Charity Case Spotlights Spying*, THE OREGONIAN, Aug. 16, 2007, http://www.oregonlive.com/oregonian/stories/index.ssf?/base/news/1187234773644700.xml&coll=7&thispage=1.

21. Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 978-79 (N.D. Ca. 2006).

dismiss the complaint.[22] The court, however, denied the motions to dismiss after finding the arguments regarding state secrets unpersuasive.[23] Again, the decision has been appealed to the Ninth Circuit, and a ruling from that court is pending.

These cases raise important issues, especially concerning the Fourth Amendment and the right to privacy. Thus far, the best chance for consideration of the Program will likely come from *Hepting*. Oral arguments during *Hepting* suggest that the Ninth Circuit finds the government's assertion of the state secrets privilege to be dubious—a sign that the case may be allowed to proceed. Given the scope of the Program and the questions surrounding its operation, it is imperative that the courts review the Program and reach a conclusion on its continuation and legality.[24]

III. Civil Rights Under the Canadian Security Certificate Scheme: An Update

In 2001, following the September 11 attacks, the Canadian Parliament passed the Immigration and Refugee Protection Act[25] (IRPA). Section 77 of the IRPA authorizes the Minister of Immigration and Citizenship, together with the Minister of Public Safety and Emergency Preparedness, to issue a certificate declaring a foreign national or permanent resident to be inadmissible to Canada on the ground of national security. Sections 78 through 84 of the IRPA establish the contours of the scheme, including applicable detention review periods and procedures for non-citizens named in security certificates.

In early 2007, the Canadian Supreme Court, in *Charkaoui v. Canada (Citizenship and Immigration)*, unanimously declared[26] that core elements of Canada's security certificate scheme established under IRPA violate fundamental rights and liberties guaranteed under the Canadian Charter of Rights and Freedoms.[27] The Court, however, suspended the effect of its judgment for one year in order to give Parliament time to introduce amending legislation.[28]

In *Charkaoui*, the Supreme Court held that Section 78(g) of the IRPA, which allows for the use of confidential security evidence in detention reviews, violates the right to life, liberty, and security of the person as guaranteed by Article 7 of the Canadian Charter by failing to permit the person named in the security certificate to know the case against him or to fully answer that case. The absence of any procedural device, such as a special coun-

22. *Id.* at 979-80.

23. *Id.* at 995.

24. Russell Tice, the NSA whistleblower who exposed the program to The New York Times, has stated that the number of Americans subject to eavesdropping by the NSA could be in the millions if the full range of secret NSA programs is used. *See* Brian Ross, *NSA Whistleblower Alleges Illegal Spying*, ABC NEWS, Jan. 10, 2006, http://abcnews.go.com/WNT/Investigation/story?id=1491889.

25. Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.).

26. Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350 (Can.).

27. Enacted as Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11, which came into force on April 17, 1982 [hereinafter "Canadian Charter"].

28. Legislation was tabled in the House of Commons on October 22, 2007, to remedy the impugned provisions. *See* Bill C-3, An Act to Amend the Immigration and Refugee Protection Act (Certificate and Special Advocate) and to Make a Consequential Amendment to Another Act, 39th Parl., 2nd Sess., passed Second Reading on November 20, 2007, *available at* http://www.parl.gc.ca/legisinfo/index.asp?Language=E&query=5278&Session=15&List=toc.

sel system,[29] to ensure that confidential information submitted by the government is subject to some form of adversarial process precluded any reliance on the Canadian Charter's general saving clause, which permits enactments determined to violate a fundamental right to stand where "demonstrably justified in a free and democratic society."[30] The Supreme Court also determined that the 120-day embargo on a foreign national's right to a detention review per Section 84 of the IRPA, following an initial determination of the reasonableness of the security certificate under which the person is held, violates the guarantee against arbitrary detention and the right to prompt detention review in the Canadian Charter. Because permanent residents are entitled to prompt detention review under Section 83 of the IRPA, the Court determined the embargo provision could not be saved.

The appellants also argued, unsuccessfully, that extended periods of detention under the IRPA constitute cruel and unusual treatment in violation of the Canadian Charter. The Court held that because the IRPA scheme provides for detention reviews on a regular basis following an initial determination of reasonableness, lengthy detentions under the IRPA scheme are not *per se* unconstitutional provided they are subject to the following considerations: (1) reasons for detention, (2) length of detention, (3) reasons for delay in deportation, (4) anticipated length of detention, and (5) availability of alternatives to detention.

Shortly following the release of the Supreme Court's judgment, Hassan Almrei, an appellant in the *Charkaoui* case and the only remaining security certificate detainee in Canada, applied for review of his detention.[31] But because the Supreme Court had suspended the operation of its judgment in *Charkaoui* for one year to permit Parliament to act, the procedures for taking in and assessing confidential evidence continued to be those in place under the IRPA prior to the *Charkaoui* decision. As a result, although the Federal Court determined upon consideration of the detention review factors that Almrei should be released, it concluded, on the basis of secret information not disclosed to Almrei or his counsel, that there are reasonable grounds to believe he continues to pose a substantial threat of harm to Canada's national security.[32] As the proposed alternatives to detention were also found to be insufficient, the Federal Court dismissed the application.

Although 2007 saw certain improvements in the security certificate scheme, ardent criticism continues among civil rights advocates. The consequences of being named in a security certificate are dire. Once a certificate has been confirmed, it becomes a final removal order, and the person named is stripped of the benefit of basic protections under

29. The Supreme Court identified several alternative procedures that Parliament could have included in section 78 of the IRPA to ensure that the rights of non-citizens are minimally impaired, including, *inter alia*: (i) the special counsel system (*i.e.*, the Security Intelligence Review Committee) established under the Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23 (1984), which applied to detention reviews of permanent residents under the IRPA until 2002; (ii) the review process established under the Canada Evidence Act, R.S.C. 1985, c. C-5 (1985), as amended by the Anti-terrorism Act, S.C. 2001, c. 41 (2001), in which a judge of the Federal Court retains discretion to determine whether the public interest in the disclosure of security information outweighs the public interest in non-disclosure of the information; or (iii) mechanisms similar to those implemented in the course of the Air India Trial R. v. Malik, [2005] B.C.J. No. 521, 2005 BCSC 350 (B.C.S.C. Mar. 16, 2005), *available at* 2005 B.C.C. LEXIS 645) and the Maher Arar Commission Inquiry, such as reliance on independent security-cleared legal counsel to serve as *amicus curiae* on confidentiality applications.

30. See Canadian Charter, *supra* note 27, art. 1.

31. Almrei v. Canada, [2007] F.C. 1025 (Can.).

32. *Id.* ¶¶ 72-74.

Canadian law, including the safeguard against removal to a country in which the person may face torture or persecution.[33]

IV. *Al-Marri v. Wright*: Court Reconsiders Issue

On June 11, 2007, the U.S. Court of Appeals for the Fourth Circuit issued its decision in *Al-Marri v. Wright*, ruling against the executive branch's arguments for unlimited executive authority to detain enemy combatants indefinitely without judicial review.[34] The case concerns Ali Saleh Kahleh al-Marri, who entered the United States in September 2001 on a student visa, and was later indicted for various financial fraud crimes.[35] In June 2003, the government moved to dismiss the criminal case against al-Marri based on a Presidential Order that al-Marri was an enemy combatant closely associated with al-Qaeda.[36] The criminal indictment was dismissed, and al-Marri was transferred to military custody in South Carolina.[37] In 2004, al-Marri's counsel filed a petition for writ of habeas corpus, but the government offered the declaration of Jeffrey Rapp, then Director of the Joint Intelligence Task Force for Combating Terrorism, as evidence supporting the President's order to detain al-Marri as an enemy combatant (the "Rapp Declaration").[38]

The Rapp Declaration alleged that al-Marri was an agent of al-Qaeda,[39] but the government did not argue that al-Marri was either a citizen of a state at war with the United States, seized on or near a battlefield where American troops were fighting, or that he fought U.S. troops. Al-Marri lost his petition in the U.S. District Court and appealed to the Fourth Circuit, which found that despite the government's arguments, the MCA did not apply to al-Marri because he could not be properly classified as an enemy combatant.[40] The Fourth Circuit specifically noted that "[t]he law of war refuses to classify persons affiliated with terrorist organizations as enemy combatants for fear that doing so would immunize them from prosecution and punishment by civilian authorities in the capturing country."[41] Since the government did not allege that al-Marri participated in the war between the United States and the Taliban, nor that he was in some way connected to the Taliban, nor that he was in Afghanistan during the conflict between the United States and the Taliban, the executive branch did not have authority to detain him under the MCA.[42]

As a further justification for al-Marri's detention, the government offered an "inherent authority" argument that, under Article II of the Constitution, the President's "war-mak-

33. *See* Public Statement, Amnesty International Canada, *Proposed Security Certificate Legislation Fails to Address Human Rights Shortcomings* (Oct. 25, 2007), *available at* http://www.amnesty.ca/archives/features_prototype.php.

34. *See generally* Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007).

35. *Id.* at 164.

36. *Id.* at 164-65.

37. *Id.* at 165.

38. *Id.*

39. *Id.* at 166.

40. *Id.* at 168-69 (noting that the MCA does not apply to al-Marri since it only eliminates habeas jurisdiction for an alien determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination, and al-Marri has neither received such a determination nor is he awaiting one).

41. *Id.* at 187 n.15.

42. *Id.* at 166.

ing powers . . . include the authority to capture and detain individuals involved in hostilities against the United States."[43] The Fourth Circuit found the argument absurd, noting that the government was making the "breathtaking claim" that:

> the President has inherent authority to subject persons legally residing in this country and protected by our Constitution to military arrest and detention, without the benefit of any criminal process, if the President believes these individuals have engaged in conduct in preparation for acts of international terrorism.[44]

Further, the Fourth Circuit highlighted the explicit prohibition of this action by the USA PATRIOT Act, which places the President's power to act at its "lowest ebb,"[45] and stated that al-Marri's status as a legal resident alien with "substantial connections" to this country would entitle him to constitutional due process protection.[46]

Following the Fourth Circuit's reversal of the district court's decision,[47] the government moved for a rehearing of the appeal *en banc*, which was granted. Although predicting how a court will decide any particular case is always a dicey proposition, it is likely that the Fourth Circuit would not have granted an *en banc* rehearing if they thought the case was correctly decided on every point. Undoubtedly, no matter the outcome at the *en banc* rehearing, al-Marri will remain in military custody pending the court's decision and pending the almost certain grant of certiorari by the Supreme Court that will likely follow. Indeed, the question of whether a person who is entitled to constitutional habeas protection, such as al-Marri, can be indefinitely held based solely on a Presidential determination of the necessity for detention is too important to not be answered by the Supreme Court.

V. Developments in Export Controls

National security is one of the major factors that shape the U.S. export controls regime.[48] In some cases, such as with defense trade, national security concerns are paramount.[49] In other cases, such as with "dual-use" items, national security may be one of many reasons why controls are placed on the export of items—or may not be a factor at all.[50] There have been major national security developments in 2007 in the world of export controls.

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43. *Id.* at 190.

44. *Id.* (internal quotations omitted).

45. *Id.* at 191 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring)).

46. *Id.* at 191.

47. *Id.* at 195.

48. *See* 15 C.F.R. § 766, Supp. 1 (2007) (referring to national security as a key interest protected by the export control system).

49. The Arms Export Control Act, 22 U.S.C. §§ 2751-56 (2008) [hereinafter AECA], provides the statutory authority for controls on the export of defense articles and defense services. The State Department's Directorate of Defense Trade Controls (DDTC) administers the International Traffic in Arms Regulations (ITAR) that implement the AECA. *See* 22 C.F.R. pts. 120–130 (2008).

50. Generally speaking, dual-use items are items that could be used for commercial applications or by militaries, proliferators, or terrorists. In addition to national security, exports may be controlled for a number of other reasons, including foreign policy concerns and domestic short supply. The Commerce Department's Bureau of Industry and Security (BIS) administers the Export Administration Regulations. *See* 15 C.F.R. pts.

In June, the Bureau of Industry and Security (BIS) at the U.S. Department of Commerce released the long-awaited "China Rule."[51] The China Rule revamped dual-use export controls with respect to China, taking into account two countervailing goals: 1) encouraging increased exports from the United States to this major market overseas and 2) preventing exports that would strengthen the Chinese military. In order to accomplish the first goal, BIS named China as the first nation eligible for the Validated End-User (VEU) export authorization.[52] U.S. exporters are free to export certain products to VEUs without obtaining a license from BIS.[53]

Although this aspect of the China Rule should facilitate trade with China,[54] the China Rule also tightened export controls in certain respects. First, certain items that otherwise would not need an export license now require a license from BIS if the exporter knows that the items are intended for a military end-use.[55] Examples of items subject to this rule include high-performance computers, certain telecommunications and radio equipment, avionics and inertial navigation systems, and aircraft and aircraft engines. Second, BIS revised the license review process for items controlled for reasons of national security.[56] BIS added 15 C.F.R. § 742.4(b)(7), which provides in relevant part that "[t]here is a presumption of denial for license applications to export. . . [such] items that would make a direct and significant contribution to [China]'s military capabilities." BIS also provided an illustrative list of weapons systems that could constitute Chinese military capabilities.[57]

Moving beyond the China Rule, exporters of dual-use items also must take into consideration the greatly enhanced civil and criminal penalties after the October enactment of the International Emergency Economic Powers Enhancement Act.[58] This legislative development increases the maximum civil penalties to the greater of $250,000 per violation or twice the amount of the transaction giving rise to the violation. Maximum criminal penalties increased to $1 million (with the potential maximum prison term of twenty years remaining unchanged).[59] The effect of this legislation is potentially sweeping in light of the fact that this statutory scheme is the current basis for the Export Administration Regulations and for many economic sanctions programs administered by the Treasury Department's Office of Foreign Assets Control (OFAC).

730–774 (2008) [hereinafter EAR]. During the lapse in the Export Administration Act (EAA), the EAR are maintained under an Executive Order. *See* 72 Fed. Reg. 50869 (Sept. 5, 2007) (continuing Executive Order 13222's declaration of a national emergency).

51. *See* 72 Fed. Reg. 33646 (June 19, 2007).

52. *Id.* BIS recently named India as the second destination eligible for the VEU authorization. *See* 72 Fed. Reg. 56,010 (Oct. 2, 2007).

53. Items controlled for missile technology or crime control reasons are not eligible for this treatment. Also, restrictions such as those in Parts 736 and 774 of the EAR, *supra* note 50, may apply.

54. So far, five customers in China have earned VEU status. Last year, these companies accounted for about 18% of the total licensed exports from the United States to China. *See* Press Release, New BIS Program Changes Export Rules on Targeted Products for Select Companies in China (Oct. 18, 2007), *available at* http://www.bis.doc.gov/news/2007/china10182007.htm.

55. The United States also maintains an arms embargo against China. *See* ITAR, *supra* note 49, § 126.1(a).

56. *See* 72 Fed. Reg. 33,646 (June 19, 2007).

57. *See* EAR, supra note 50, at pt. 742, supp. no. 7.

58. International Emergency Economic Powers Enhancement Act, Pub. L. No. 110-96 amending 50 U.S.C. § 1705) [hereinafter "IEEPA Enhancement Act"].

59. The maximum civil penalty was previously $50,000 per violation. The maximum criminal fine in the statute was previously $50,000, although 18 U.S.C. § 3571 had provided alternative maximum criminal penalties (now less than those provided for in the IEEPA Enhancement Act).

Shifting focus to defense trade, a notable recent development was the signing of the U.S.-U.K. Defense Treaty by President Bush and former Prime Minister Tony Blair.[60] On September 20, President Bush sent the U.S.-U.K. Defense Treaty to the Senate for advice and consent to ratification. The U.S.-U.K. Defense Treaty should facilitate defense trade between the United States and the U.K. and promote interoperability of their armed forces and security agencies.[61] It provides "a comprehensive framework for Exports and Transfers, without a license . . . of Defense Articles, whether classified or not, to the extent that such Exports and Transfers are in support of [enumerated] activities."[62] The U.S.-U.K. Defense Treaty provides for an "Approved Community" consisting of the two governments as well as approved defense companies. A member of the U.S. "Community" would be able to export defense articles to other members of the Approved Community without a license so long as certain conditions are met (e.g., the article must be subject to the exemption, and the export must be in support of an approved activity, such as joint U.S.-U.K. military or counterterrorism operations).[63] It is expected that the DDTC will create a new license exemption in the ITAR to implement these provisions.

60. United States of America Treaty with the United Kingdom Concerning Defense Trade Cooperation, U.S.-U.K., Jun. 21 & 26, 2007, Temp. State Dep't No 110-7, 2007 WL 3390904, *available at* http://www.state.gov/t/pm/rls/othr/misc/92770.htm [hereinafter "U.S.-U.K. Defense Treaty"]. A treaty liberalizing defense trade with Australia also has been sent to the Senate for approval.

61. Fact Sheet, The U.S.-U.K. Defense Trade Cooperation Treaty, Aug. 10, 2007, http://www.state.gov/t/pm/rls/fs/90740.htm (last visited Mar. 8, 2008) [hereinafter "Fact Sheet"].

62. *See* U.S.-U.K. Defense Treaty, *supra* note 60, at art. 2.

63. *See id.* at art. 3. *See also* Fact Sheet, *supra* note 61.