National Security

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I. War Crimes*

The year 2009 was an active one for prosecuting violations of the law of war. The trial of former Bosnian Serb leader Radovan Karadžic began before the International Criminal Tribunal for the Former Yugoslavia (ICTY) on October 26, 2009.[1] Karadžic, representing himself, at first boycotted his trial, protesting the amount of time he was given to prepare.[2] In response, the ICTY Trial Chamber requested that the Tribunal's Registrar assign Karadžic counsel and postpone trial to give assigned counsel time to prepare.[3] Karadžic is one of the three highest profile persons indicted by the court; along with former Serbian President Slobodan Miloševic, who died during trial in 2006; and Bosnian Serb military leader, Ratko Mladic, who is still at large. Karadžic is charged with crimes against humanity, violations of the law of war and genocide, in part for his involvement in the siege of Sarajevo from 1992-95 and for the massacre of Bosnian Muslims at Srebrenica in 1995.[4]

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1. International Criminal Tribunal for the Former Yugoslavia, Case Information Sheet (IT-95-5/18) (2009), *available at* http://www.icty.org/x/cases/karadzic/cis/en/cis_karadzic_en.pdf.

2. Prosecutor v. Karadžic, Case No. IT-95-5/18-T, Decision on Appointment of Counsel and Order on Further Trial Proceedings, ¶¶ 1-4 (Nov. 5, 2009), *available at* http://www.icty.org/x/cases/karadzic/tdec/en/091105.pdf.

3. Case Information Sheet (IT-95-5/18), *supra* note 1.

4. Prosecutor v. Karadžic, Case No. IT-95-5/18-PT, Third Amended Indictment, (Feb. 27, 2009), *available at* http://www.icty.org/x/cases/karadzic/ind/en/090227.pdf.

The ICTY is currently scheduled to complete its last appeal in 2013.[5] The Tribunal indicted 161 individuals; completed proceedings for 120 of those indicted, and has 39 cases ongoing.[6] In addition to Ratko Mladic, Goran Hadžić, the political leader of the Serb entity in Croatia during the mid-1990s, is also at large.[7]

The International Criminal Tribunal for Rwanda (ICTR) continued hearing cases in 2009. It has thirty-nine cases currently in progress, ten of which are appeals.[8] ICTR has indicted ninety people thus far, and has completed forty-nine cases.[9]

The Special Court for Sierra Leone Appeals Chamber issued its judgment in the Revolutionary United Front (RUF) trial, in which three defendants were convicted.[10] The Appeals Chamber upheld the convictions of RUF Interim Leader, Issa Hassan Sesay, and Senior RUF Commander, Morris Kallon on all counts.[11] The Court overturned two counts against former RUF Security Chief, Augustine Gbao, but upheld the remaining counts.[12] Significantly, the Appeals Chamber Judgment upheld the first convictions by an international tribunal for forced marriage as a crime against humanity and for attacks against United Nations peacekeepers as a crime against humanity.[13] The trial of the highest-profile defendant, former President of Liberia Charles Taylor continued, with the trial moving from the prosecution phase to the defense phase. Taylor has been indicted on eleven counts of war crimes, crimes against humanity, and other serious crimes.[14]

The Prosecutor for the International Criminal Court (ICC) has opened and is conducting investigations into four situations. All except one, Sudan, were self-referred. In the first situation, the Democratic Republic of Congo, four arrest warrants have been issued.[15] Three persons have been surrendered to the Court.[16] Thomas Lubanga Dyilo is charged with use of child soldiers.[17] His trial commenced in January 2009. Germain Katanga and Mathieu Ngudjolo Chui were jointly charged with crimes against humanity including murder, rape, and sexual slavery; and war crimes including conscription of child soldiers, destruction of property, pillaging, and directing attacks against the civilian popu-

5. *See generally* United Nations International Criminal Tribunal for the Former Yugoslavia, About the ICTY, http://www.icty.org/ (last visited Jan. 31, 2010).

6. *Id.*

7. *Id.*

8. *See generally* United Nations International Criminal Tribunal for Rwanda, Latest News, http://www.ictr.org/default.htm (last visited Jan. 31, 2010).

9. *Id.*

10. *See* The Special Court for Sierra Leone, Case 15: The Prosecutor vs. Sesay, Kallon and Gbao (RUF Case), http://www.sc-sl.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/tabid/105/Default.aspx (last visited Jan. 31, 2010).

11. *Id.*

12. *Id.*

13. *See* The Special Court for Sierra Leone, Case 16: The Prosecutor vs. Brima, Kamara and Kanu (AFRC Case), http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/tabid/106/Default.aspx (last visited Jan. 31, 2010).

14. Prosecutor v. Taylor, Case No. SCSL-03-01-PT, Prosecution's Second Amended Indictment, (May 29, 2007), *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=lrn0bAAMvYM%3d&tabid=107.

15. UN Gen. Assembly, Report of the International Criminal Court, summary, U.N. Doc. A/64/356 (Sept. 17, 2009) [hereinafter ICC Report].

16. *Id.*

17. *Id.* at 6.

lation.[18] Their trial was scheduled to start November 24, 2009. Bosco Ntaganda remains at large.

In the second situation, Uganda, the Pre-Trial Chamber issued five arrest warrants, one against Joseph Kony, commander of the Lord's Resistance Army.[19] All of the accused are still at large.

The third situation is Sudan, which was referred by the United Nations Security Council.[20] Arrest warrants have been issued against three persons, all of whom are still at large, including Omar Hassan Ahmad Al Bashir, President of Sudan.[21] Charges include murder, extermination, forcible transfer, torture, rape, intentionally directing attacks against civilians, and pillaging.[22] A summons to appear was issued against Bahr Idriss Abu Garda.[23] He appeared before the Pre-Trial Chamber and is charged with three counts of war crimes related to an attack on the African Union Mission in Sudan.[24]

In the fourth situation, the Central African Republic, one arrest warrant has been issued by the Pre-Trial Chamber for Jean-Pierre Bemba Gombo.[25] He is charged with crimes against humanity and war crimes, including pillage and rape.[26]

In Cambodia, five persons are being prosecuted before the Extraordinary Chambers in the Courts of Cambodia for atrocities committed during the Khmer Rouge regime.[27] The first trial, of Kaing Guek Eav (Duch), began on February 17, 2009.[28] He was the Secretary of S-21, a security center where 15,000 prisoners died.[29] He is charged with crimes against humanity, war crimes, and violations of Cambodian law including murder and torture.[30] The trials of the other four defendants are in the pre-trial stage.

Although not a prosecution, it is worth noting that the Ethiopia-Eritrea Claims Commission, established pursuant to a December 2000 peace agreement between the two countries, issued its final award for damages on August 17, 2009.[31] The Commission's mandate was to utilize binding arbitration to decide claims for damages resulting from law of war violations during the 1998-2000 conflict between Ethiopia and Eritrea in two circumstances: claims by each government against the other and by nationals of one party

18. *Id.* at 7.

19. *Id.* at 9.

20. *Id.* at 8.

21. Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009), *available at* http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf.

22. ICC Report, *supra* note 15, at 8.

23. *Id.*

24. *Id.*

25. *Id.* at 7.

26. *Id.*

27. *See generally* Extraordinary Chambers in the Courts of Cambodia, Introduction to the ECCC, http://www.eccc.gov.kh/english/about_eccc.aspx (last visited Jan. 31, 2010).

28. ECCC, CASE INFORMATION SHEET CASE FILE N° 001/18-07-2007/ECCC-TC (2009), *available at* http://www.eccc.gov.kh/english/cabinet/files/Case_Info_DUCH_EN.pdf.

29. *Id.*

30. Kaing Guek Eav "Duch," Case No. 001/18-07-2007-ECCC-OCIJ, Closing Order indicting Kaing Guek Eav alias Duch, ¶¶ 131-52 (Aug. 8, 2008), *available at* http://www.eccc.gov.kh/english/cabinet/courtDoc/115/Closing_order_indicting_Kaing_Guek_Eav_ENG.pdf.

31. Press Release, Ethiopia-Eritrea Claims Commission, Ethiopia-Eritrea Claims Commission Renders Final Awards on Damages (Aug. 17, 2009), *available at* http://www.pca-cpa.org/upload/files/EECC%20Final%20Awards%20Press%20Release.pdf

against the government of the other party.[32] The commission awarded $174 million to Ethiopia for Eritrea's *jus in bello* and *bellum jus ad* violations and $161.5 million to Eritrea for Ethiopia's violations of *jus in bello*.[33]

II. Khadr v. Canada (Prime Minister): The Consequences of State Participation in Torture*

Thomas Wolfe notwithstanding, perhaps you can go home again. Such was the glimmer of hope offered by Justices Evans and Sharlow of the Canadian Federal Court of Appeal to Guantánamo Bay Detention Camp detainee Omar Ahmed Khadr.[34] In ordering the Government of Canada to seek Mr. Khadr's repatriation, the Court explored the limits of judicial superintendence over ministerial discretion, and offered useful insights into the extraterritorial application of Canadian constitutional law.

Omar Khadr was born in Canada to Egyptian-Canadian parents with ties to Al-Qaeda. He was fifteen years old when he was captured by U.S. Special Forces in Afghanistan and was held in custody under the belief that he had thrown a grenade that caused the death of a U.S. soldier. After three months at Bagram Airbase, Mr. Khadr was moved to Guantánamo.[35]

Omar Khadr's plight has captured the attention of the legal community in Canada and internationally, partly because the Canadian government has not sought his repatriation, but mostly because he was a child when arrested.

Mr. Khadr was processed initially as an enemy combatant under the provisions of the Presidential Military Order of November 13, 2001.[36] After the procedural regime established under that order was declared illegal by the United States Supreme Court,[37] Mr. Khadr was prosecuted under the Military Commissions Act of 2006.[38] He faces an array of charges in Guantánamo, including murder and attempted murder in violation of the law of war, conspiracy, providing material support for terrorism, and spying.[39]

Mr. Khadr has sought help from Canadian courts several times. In 2005, Justice von Finckenstein of the Federal Court issued an injunction preventing Canadian authorities from conducting any more interrogations of Mr. Khadr.[40] In 2006, Mr. Khadr obtained an order from the Federal Court of Appeal compelling the Minister of Justice to turn over

32. *Id.*

33. *The Eritrea-Ethiopia Claims Commission has Delivered its Final Award Ordering Compensation to Both Sides of the 1998-2000 War*, HAGUE JUSTICE PORTAL, Aug. 19, 2009, http://www.haguejusticeportal.net/eCache/DEF/10/951.TGFuZz1FTg.html.

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34. Khadr v. Canada (Prime Minister), [2009] F.C.J. 893, 2009 FCA 246 (Nadon J.A. dissenting); *aff'g*, [2009] F.C.J. 462, 2009 FC 405 (Can.).

35. Affidavit of Lt. Cdr. William at ¶¶ 3, 7, 8, 10, 11, Khadr, [2009] F.C.J. 893 (found in Court of Appeal Book, Vol. I).

36. *See* Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

37. Hamdan v. Rumsfeld, 548 U.S. 557, 558-60 (2006).

38. Military Commission Act of 2006, Pub. L. No. 109-366 § 3(a)(1), 120 Stat. 2625 (2006).

39. Affidavit of Lt. Cdr. Kuebler at ¶ 45, Exhibit K, Khadr, [2009] F.C.J. 893.

40. Khadr v. Canada (F.C.), [2006] 2 F.C.R. 505 (Can.).

documents held by the federal government that would assist his Guantánamo defense.[41] Neither of those decisions, however, offered the prospect of returning to Canada. The appellate review conducted by the Federal Court of Appeal in the summer of 2009 provided that very relief.

Although Mr. Khadr claims to have been subjected to an array of coercive interrogation techniques at Guantánamo, only sleep deprivation was formally found by the Court of Appeal to have taken place.[42] But, that was enough.

The majority of the Court found that the use of sleep deprivation against Mr. Khadr violated the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[43] Accordingly, Mr. Khadr was found to have been tortured. The holding implicated Canada in this violation, as agents of the Canadian Security and Intelligence Service interrogated Mr. Khadr at Guantánamo for law-enforcement and intelligence-gathering purposes. Indeed, the agents had turned over to U.S. authorities information gleaned from these sessions—knowing of the illegal conditions of Mr. Khadr's confinement.[44]

Given the finding that Canadian authorities were participants in a process that violated international law, the majority concluded that Canadian official conduct was subject to the extraterritorial application in Section 7 of the Canadian Charter of Rights and Freedoms, which constitutionalizes the duty of the state to protect the life, liberty, and security of persons under its protection.[45]

The question then left for the court was whether this duty to protect would overcome the exercise of ministerial prerogative and discretion not to seek Mr. Khadr's repatriation. As the majority posed it, what obligations does Canada owe its citizens abroad in circumstances when their rights under the Charter are engaged?[46]

In resolving this issue, the majority found that, because Mr. Khadr was a child when captured, Canada was required under conventional law to protect him from violence, injury, and abuse.[47] The government of Canada was obligated to mitigate the deprivation of rights protected by constitutional and conventional law—a deprivation in which it was found to have participated. This would be achieved most appropriately by ordering the prime minister and other senior officials to make the request that the United States return Mr. Khadr to Canada.[48]

The majority was not persuaded by the argument that an order compelling a repatriation request would involve the court in the exercise of a prerogative power involving rela-

41. Khadr v. Canada (Minister of Justice), [2008] 1 F.C.R. 270 (Can.).

42. Khadr, [2009] F.C.J. 893, ¶¶ 20, 35.

43. *Id.* ¶ 52 (citing Canada, Aug. 23, 1985, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36, entered into force June 26, 1987).

44. *Id.* ¶ 55.

45. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, no. 7.

46. Khadr, [2009] F.C.J. 893, ¶¶ 55-57.

47. Id. ¶ 53 (citing the Convention on the Rights of the Child, Canada, May 28, 1990, 1577 U.N.T.S. 3, Can. T.S. 1992, No. 3, entered into force Sept. 2, 1990, art. 37(a)); *see also* Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49 (2000).

48. Khadr, [2009] F.C.J. 893, ¶ 70.

tions with the States. Such an order required no special knowledge that might not be possessed by the Court, and would not require ongoing judicial supervision.[49]

On September 4, 2009, the Supreme Court of Canada granted the federal government leave to appeal.[50] Argument was heard on November 13, 2009. Curiously absent from the government's case has been any meaningful analysis of alternative remedies based on President Obama's executive order bringing military commissions up to U.S. and international-law due process standards.[51] Would a request for due process in a civilian court be a suitable substitute for repatriation?

A late-breaking development is the announcement made by Attorney General Eric Holder—released just as the Supreme Court of Canada was hearing argument in Ottawa—that Omar Khadr was one of ten high-value Guantánamo detainees whose prosecutions would be continued by the United States, in Mr. Khadr's case, before a military commission.[52] In recognizing that Mr. Khadr is not in the same class as Khalid Sheikh Mohammed, Walid Muhammed Salih Mubarak Bin Attash, Ramzi Bin Al Shibh, Ali Abdul-Aziz Ali, or Mustafa Ahmed Al Hawsawi; the attorney general may be signaling that alternatives to prosecution are on the table.

III. CFIUS Review: What Foreign Acquisitions Pose National Security Concerns?*

The Committee on Foreign Investment in the United States (CFIUS or the Committee) reviews mergers and acquisitions to identify and address any national security risks.[53] CFIUS has jurisdiction to review any deal in which a foreign person will obtain control of a U.S. business—a "covered transaction." In November 2008, the CFIUS regulations were overhauled to implement changes required by the Foreign Investment and National Security Act (FINSA).[54] CFIUS jurisdiction and review processes are now more clear.

One remaining puzzle is determining whether to submit a particular deal for CFIUS review. The decision turns on whether CFIUS is likely to identify any national security considerations. CFIUS review is voluntary (though the Committee can self-initiate a review), and the parties must decide whether to file a voluntary notice. Most do not file: "historically fewer than ten percent of all foreign acquisitions of U.S. businesses are noti-

49. *Id.* ¶ 72.

50. *Appeal in Khadr Case to be Heard by Top Court*, CBC NEWS, Sept. 4, 2009, http://www.cbc.ca/canada/story/2009/09/04/khadr-supreme-court090409.html.

51. Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 27, 2009); *see also* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §§ 1801-1807, 123 Stat. 2190 (2009).

52. Press Conference, Eric Holder, United States Attorney General (Nov. 13, 2009), *available at* http://blogs.usdoj.gov/blog/archives/348.

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53. Members are the Secretaries of the Treasury, Homeland Security, Commerce, Defense, State, Energy, and Labor (non-voting); the Attorney General; the Director of National Intelligence (non-voting); and the heads of those other departments and agencies the President deems appropriate. *See* 50 U.S.C. App. § 2170(k)(2) (2007).

54. FINSA amended § 721 of the Defense Production Act of 1950, 50 U.S.C. App. § 2170 (2007). The regulations are found at 31 C.F.R. §§ 800.101-801 (2008). For an overview of the changes, *see* Department of Treasury, Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 70,702-70,716 (Nov. 21, 2008).

fied to CFIUS."[55] One reason to file is to gain the assurance that the Government will not unwind the transaction later. Neither CFIUS nor the President will exercise divestment authority for deals that have been approved.[56] The Committee's high approval rate is another incentive to file. "Between 2005 and 2007, 313 voluntary notices of covered transactions were filed with CFIUS, and none of the transactions were prohibited."[57]

But what if a deal does not appear to implicate any national security considerations? Should precious resources be spent on a discretionary filing?[58] Based on a review of CFIUS guidance and reported data, as well as publicly available information on filings, this article describes the types of U.S. businesses involved in transactions reviewed by CFIUS.[59]

CFIUS also closely considers the nature of the foreign acquirer.[60] Specifically, CFIUS considers whether the acquirer is foreign-government controlled or whether the acquirer's country supports terrorism, is involved in proliferation of weapons of mass destruction, or is a potential regional military threat.[61] Parties should analyze both aspects of any covered transaction when deciding whether to notify CFIUS voluntarily.

The parties must determine whether a covered transaction presents any national security considerations. This determination is not straightforward, as the term "national security" is not defined in the statute or regulations. The statute provides a list of factors that CFIUS may consider, but the Committee's review expands concomitantly with the concept of national security. In addition to the listed factors, CFIUS considers "all other national security factors that are relevant to a covered transaction it is reviewing."[62]

Traditional Defense Grouping: Not surprisingly, a "significant number" of deals reviewed by CFIUS have involved foreign acquisitions of U.S. businesses that provide defense-related products and services to the U.S. government.[63] This traditional defense grouping includes companies with access to classified information, businesses related to law enforcement, and cyber-security. This defense grouping also includes businesses in certain critical technology sectors. FINSA defines "critical technologies" as "critical technology, critical components, or critical technology items essential to national defense."[64] The critical sectors are advanced materials and processing, chemicals, advanced manufacturing, information technology, telecommunications, microelectronics, semiconductor fabrication equipment, military-related electronics, biotechnology, professional and scientific instruments, aerospace and surface transportation, energy, and space and marine sys-

55. 73 Fed. Reg. at 70,716.

56. *See* 31 C.F.R. § 800.601.

57. COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES, ANNUAL REPORT TO CONGRESS (2008), *available at* http://www.treas.gov/offices/international-affairs/cfius/docs/CFIUS-Annual-Rpt-2008.pdf, [hereinafter CFIUS Annual Report]. Some notices were withdrawn by the parties.

58. CFIUS review can take up to ninety days. *See* 31 C.F.R. §§ 800.501-506.

59. CFIUS review is confidential, but the Committee has published aggregate data and guidance. Some companies publicize information on CFIUS reviews in press releases and SEC filings.

60. Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States, 73 Fed. Reg. 74,567, 74,570 (Dec. 8, 2008) [hereinafter Guidance].

61. 50 U.S.C. app. § 2170(f)(4), (8), (9) (2007).

62. Guidance, 73 Fed. Reg. at 74,569.

63. *Id.* at 74,570.

64. 50 U.S.C. app. § 2170(a)(7).

tems.[65] These high-tech businesses are often involved in developing components with both military and commercial applications, known as "dual-use" components.

Energy: In the aftermath of the September 11, 2001 terrorist attacks, the concept of national security expanded beyond traditional defense concerns. The March 2005 attempt by the China National Offshore Oil Corporation (CNOOC) to buy Unocal was another formative event. Though CNOOC abandoned its bid, many lawmakers argued that CFIUS should have blocked the proposed deal and that the Department of Energy should have played a formal role. Two years later, FINSA made the Secretary of Energy a member of CFIUS and expanded the list of factors to be considered.[66] CFIUS must now consider the effects of a deal on "critical infrastructure, including major energy assets."[67]

Guidance published by CFIUS confirms that it has reviewed deals involving foreign acquisition of U.S. businesses in the energy sector. Energy companies drawing attention from CFIUS include businesses "at various stages of the value chain."[68] The Committee has reviewed acquisitions of oil and gas exploration and production companies as well as pipeline transportation companies. Fifteen notices of transactions involving electric power generation, transmission, and distribution were reviewed between 2005 and 2007.[69] In one such transaction, an Australian-controlled entity purchased several power generation projects from Consolidated Edison. More recently, CFIUS reviewed Electricite de France's acquisition of a stake in Constellation Energy.

Transportation: CFUIS has also reviewed foreign acquisitions of "businesses that affect the nation's transportation system."[70] Port operations and aviation maintenance are among the types of businesses in this group. The Dubai Ports World transaction of 2006 is a prominent example. The company, owned by the United Arab Emirates, acquired an English company with leases to operate several American ports. CFIUS approved the transaction, but the ensuing political uproar led Dubai Ports World to sell the English company's U.S. port operations.

Technical and Financial Services: CFIUS reports that more than one third of the deals submitted for review between 2005 and 2007 were in the "information sector."[71] This sector overlaps with the traditional defense sector, as it includes telecommunications companies. It also includes businesses offering professional, scientific, and technical services, such as engineering, computer systems design, scientific research, and consulting.[72] Finally, this category includes financial companies.[73] In its December 2008 guidance,

65. CFIUS Annual Report, *supra* note 57, at 27. Some of the business categories are overlapping. While both energy and transportation are listed as critical sectors, those types of businesses are also considered separate groupings when the connection to national defense is less direct.

66. 50 U.S.C. app. § 2170(k)(2)(G).

67. *Id.* § 2170(f)(6). The term "critical infrastructure" is defined as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security." *Id.* § 2170(a)(6).

68. Guidance, 73 Fed. Reg. at 74,570.

69. CFIUS Annual Report, *supra* note 57, at 8-9.

70. Guidance, 73 Fed. Reg. at 74,570.

71. CFIUS Annual Report, *supra* note 57, at 6-7.

72. *Id.* at 8.

73. *Id.* at 7.

CFIUS confirmed that it has reviewed transactions involving "businesses that could significantly and directly affect the U.S. financial system."[74]

The expanding concept of national security, as reflected in FINSA, and the revised regulations and guidance effectively obligates parties to scrutinize foreign acquisitions of U.S. businesses outside the traditional defense sector. As has historically been true, parties should voluntarily notify CFIUS of deals in that sector. CFIUS review has now expanded to consider potential risks to U.S. energy and transportation infrastructures. The national security considerations involved in acquisitions of technical consulting and financial companies are less obvious, but nevertheless should also be analyzed. Finally, as noted above, parties should also consider the nature of the foreign acquirer when determining whether to voluntarily notify CFIUS of a proposed transaction.

IV. Detainee Photographs: United States Department of Defense v. American Civil Liberties Union, and the Protected National Security Documents Act of 2009.*

On October 29, 2009, President Obama signed into law the Department of Homeland Security Appropriations Act of 2010, which contains a provision potentially mooting a six-year controversy between the American Civil Liberties Union (ACLU) and the United States Department of Defense (DoD) over the release of suspected detainee abuse photographs.[75]

The controversy began with the October 7, 2003 filing of a request for expedited release of DoD records related to allegations of detainee abuse in Afghanistan pursuant to the Freedom of Information Act (FOIA)[76] by the ACLU and several other interested parties.[77] After receiving subsequent DoD responses that ACLU requests did not meet criteria for expedited release,[78] the ACLU filed for injunctive relief in the United States District Court for the Southern District of New York to compel release in 2004.[79]

During the course of the litigation, it was determined that the DoD was withholding photographs depicting alleged detainee abuses in Afghanistan due to concerns about the risk to U.S. forces under the FOIA exemption for "records or information compiled for law enforcement purposes [. . .] to the extent that the production of such law enforcement records or information [. . .] could reasonably be expected to endanger the life or physical

74. Guidance, 73 Fed. Reg. at 74,570.

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75. Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 565, 123 Stat. 2142 (2009).

76. 5 U.S.C. § 552 (2009).

77. Letter from ACLU et al., to Freedom of Information Officer (Oct. 7, 2003), *available at* http://www.aclu.org/torturefoia/legaldocuments/nnACLUFOIArequest.pdf.

78. Letter from H.J. McIntyre, Director, U.S. Dept. of Defense, to Ms. Amrit Singh, ACLU Staff Attorney (Oct. 30, 2003), *available at* http://www.aclu.org/torturefoia/legaldocuments/mmDODrejectexpproc.pdf; Letter from C.Y. Talbot, Chief, U.S. Dept. of Defense, to Ms. Jennifer Ching, Gibbons, Del Deo, Dolan, Griffinger & Vecchione (June 21, 2004), *available at* http://www.aclu.org/torturefoia/legaldocuments/iiDODDenyExpProc.pdf.

79. *See* Amended Complaint, *ACLU v. Dep't of Def.*, No. 04-CV-4151 (S.D.N.Y. 2004).

safety *of any individual.*"[80] The U.S. government's position was that the photos, gathered during the course of a criminal investigation by the Army Criminal Investigations Division, were exempted law enforcements records whose release would incite violence against U.S. soldiers.[81] In its decision on September 22, 2008, the Second Circuit held in *ACLU v. Department of Defense* that the 7(F) exemption was not applicable as the DoD could not identify a single specific individual who might be endangered by the release.[82] On March 11, 2009, a DoD petition for a panel rehearing or hearing *en banc* was denied by the Second Circuit.[83]

On August 7, 2009, the U.S. Solicitor General filed a petition for a writ of certiorari with the Supreme Court on behalf of the DoD, appealing the Second Circuit's ruling. The DoD argued that the FIOA exemption (U.S.C. § 552(b)(7)(F)) did exempt photographs concerning allegations of abuse of detainees when the disclosure of those photographs "could reasonably be expected to endanger the lives or physical safety of United States military and civilian personnel in Iraq and Afghanistan."[84] The DoD argued that the Second Circuit's interpretation of the 7(F) language "any individual" to mean a specific individual was in error, was contradictory to the expansive plain reading of the text, and resulted in the rejection of numerous expert affidavits indicating that lives of DoD personnel would be at risk should the photos be released.[85] The ACLU, in response, argued that the plain reading of the text required showing of a threat to a specific individual—otherwise the scope of the exemption would be overly broad and the statutory words "any individual" would be superfluous and devoid of meaning.[86]

Despite these arguments, the tensions between the competing interests of government transparency and accountability versus the safety and security of U.S. military personnel appear to have been settled by Congress. The Department of Homeland Security Appropriations Act, 2010, signed into law on October 29, 2009, contains within Section 565, "The Protected National Security Documents Act of 2009," providing the Secretary of Defense with FOIA exemption authority over these photographs upon a determination that disclosure "would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States."[87] This exemption authority applies only to photographs taken of detainees of U.S. military forces from September 11, 2001 to January 22, 2009, and requires a recertification by the Secretary of Defense every three years.[88]

As of early November 2009, the Secretary of Defense had not yet exercised this new exemption authority, and the Supreme Court was still conferencing with the parties regarding the impact of the legislation. The controversy has been widely regarded as legally moot. Regardless of the legal standing, debates amongst advocates of human rights and

80. 5 U.S.C. § 552(b)(7)(F) (emphasis added).

81. ACLU v. Dep't of Defense, 543 F.3d 59, 66-67 (2d Cir. 2008).

82. *Id.* at 81.

83. Order, ACLU v. Dep't of Defense, No. 06-3140-cv (2d Cir. 2008), *available at* http://www.aclu.org/torturefoia/legaldocuments/Order030909.pdf.

84. Petition for Writ of Certiorari, Dep't of Defense v. ACLU, No. 09-160 (S. Ct. Aug 7, 2009).

85. *Id.* at 15-16.

86. Brief in Opposition at 9-10, Dep't of Defense v. ACLU, No. 09-160 (S. Ct. Sept. 8, 2009).

87. Department of Homeland Security Appropriations Act § 565 (2010).

88. *Id.*

civil liberties about the wisdom and morality of the law and use of the waiver authority continue unabated.

V. Chemical Facility Anti-Terrorism Standards Act of 2009*

With the Department of Homeland Security's (DHS) Chemical Facility Anti-Terrorism Standards (CFATS) for critical infrastructure facilities set to expire, Congress looks to permanently authorize and/or expand the mandates.[89] The precise form of permanent authorization is a hotly debated subject before the U.S. House of Representatives Committee on Energy and Commerce. The current program is authorized under Section 550 of the DHS Appropriations Act of 2007.[90] The debate turns on whether to amend Section 550 drastically to encompass more facilities, allow civil suits, and create more control in DHS to mandate changes in the facilities technologies.

The Chemical Facility Anti-Terrorism Act of 2009, H.R. 2868, incorporates the new amendments.[91] Under Section 550, there is a list of exempt entities regulated by other statutes.[92] H.R. 2868 requires that chemical facilities currently operating under the Maritime Transportation Security Act (MTSA)[93] submit information to determine whether they are a covered facility under CFATS. Covered facilities must update their vulnerability assessments (VA) and site security plans (SSP) to comply with CFATS.[94] H.R. 2868 would continue to exclude facilities owned by the Department of Defense,[95] facilities regulated by the Nuclear Regulatory Commission,[96] and public water systems subject to the Safe Drinking Water Act.[97]

A key issue included in H.R. 2868 is the Citizen Enforcement and Citizen Petitions sections.[98] The legislation would allow any person to commence a civil suit against any government entity for failure to perform any nondiscretionary duty.[99] The petition section allows any person to file a petition with the Secretary of DHS identifying anyone in violation of CFATS.[100] House members and professionals in the private chemical sector dispute the notion that citizen suits are commonplace in federal regulatory statutes.[101] Two main concerns are that "civil suits generally have no place in national security legisla-

88. U.S. Dept. of Homeland Security, Chemical Facility Anti-terrorism Standards (Nov. 19, 2009), http://www.dhs.gov/files/laws/gc_1166796969417.shtm.

89. *Id.*

* This section was authored by John T. Hicks, Senior Research Fellow, Center for Terrorism Law, St. Mary's University School of Law.

91. H.R. Rep. No. 111-205, pt. 2 (2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:hr205p2.111.pdf

92. Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, 120 Stat 1355 (2006).

93. 46 U.S.C. § 70103(c) (2009).

94. H.R. 2868, § 2103(f)(1).

95. *Id.* § 2112(1).

96. *Id.* §2112(3)(A).

97. 42 U.S.C. § 300f (1996).

98. H.R. 2868 §2116-17.

99. *Id.* § 2116(a)(1) (emphasis added).

100. *Id.* § 2117(b) (emphasis added).

101. *See* H.R. 2686, at 88. *See also The Chemical Facility Antiterrorism Act of 2009: Hearing on H.R. 2868 Before the Subcomm. on Energy and the Environment of the H. Comm. on Energy and Commerce*, 111th Cong. 12 (2009) (statement of Stephen Poorman, Society of Chemical Manufacturers and Affiliates).

tion"[102] and that a suit would allow "a plaintiff, through the court system, to gain access to information that [§2116 of H.R. 2868] is otherwise trying to protect."[103]

CFATS currently lacks authorization to require facilities to use inherently safer technologies (ISTs) to reduce their risk or vulnerabilities, although the facilities may use such technologies to satisfy their regulatory burdens.[104] H.R. 2868 will grant the Director of the Office of Chemical Facility Security the ability, "at his or her discretion," to force Tier 1 and 2 facilities to implement IST if it would significantly reduce risk and could be implemented feasibly.[105] If the amendment becomes law, every facility covered under CFATS must assess how to implement IST at its facility, including completion of a feasibility study for the IST implementation.[106] DHS is in favor of having the regulatory power to require IST implementation.[107] Chemical industry experts are concerned that "IST is a process-related engineering concept, not a security one."[108] Because there is no "agreed-upon methodology to measure whether one process is inherently safer than another,"[109] a switch to an IST may not reduce overall risk, but simply shift it, making a "safer" alternative more harmful than beneficial.[110] Opposing parties are concerned that the amendments are not designed to bolster security and that DHS lacks the personnel to properly evaluate IST.[111]

There are two distinct viewpoints about CFATS: extend current legislation without major changes to give the system a chance to work;[112] or overhaul the current CFATS authorization to go further in securing our nation's chemical facilities.[113]

102. H.R. Rep. No. 111-205, at 91 (dissenting views).
103. *Id.*
104. See Chemical Facility Anti-Terrorism Standards; Final Rule, 6 C.F.R. pt. 27, 17718 (2007).
105. *See* H.R. 2868 §§ 2111(b)(1)(A), 2114.
106. *Id.* § 2111(a)(1).
107. *See Chemical Facility Antiterrorism Act of 2009: Hearing on H.R. 2868 Before the Subcomm. on Energy and the Environment of the H. Comm. on Energy and Commerce*, 111th Cong. (2009) (statement of Rand Beers, Under Secretary, National Protection and Programs Directorate, Dep't of Homeland Security), *available at* http://energycommerce.house.gov/Press_111/20091001/beers_testimony.pdf.
108. *See* Poorman, *supra* note 101, at 4.
109. *Id.* at 5.
110. *Id.* at 7-8.
111. *See* H.R. 2868.
112. *See* Beers, *supra* note 107.
113. *See Legislative Hearing on H.R. 3258, the Drinking Water System Security Act of 2009, and H.R. 2868, the Chemical Facility Anti-Terrorism Act of 2009 Before the H. Comm. on Energy and Commerce*, 111th Cong. (2009) (statement of Rep. Henry Waxman, Chairman, Comm. on Energy and Commerce).