

Virginia Lawyer

The Official Publication of the
Virginia State Bar

International Law and National Security

Global Mergers and National Security

National Security, Foreign Ownership and
Defense Contractors

U.S. Obligations for the Treatment of Detainees

Human Rights and Counterterrorism: A Tale of
Two Districts

Book Review: *TO OPPOSE ANY FOE—The Legacy
of U.S. Intervention in Vietnam*

Special Feature:
Reflections on the History of Legal Aid in Virginia

National Security Law

Since September 11, 2001, anxiety about national security has grown exponentially in the United States and worldwide. This phenomenon has grave implications for global commerce and the rights of individuals.

The International Practice Section presents this issue of *Virginia Lawyer* to explore this new reality.

Two articles examine the impact of increasing national security considerations in global commerce, by assessing global mergers and defense contracting. Other articles appraise the historical challenge that President George W. Bush's policies pose to the Constitution, international legal order and American values. They analyze recent cases concerning executive power, international agreements and new federal legislation detailing rights of detainees. The issue concludes with a review of a new publication, edited by professors from the University of Virginia Law School, on the political and legal legacy of the Vietnam War.

National security cuts across disciplines: contributors are from George Mason University's schools of law, public policy and information technology.



Stuart S. Malawer, J.D., Ph.D., is Distinguished Professor of Law and International Trade at George Mason University. He is also a visiting professor at St. Peter's College, Oxford University. He is a former chair of the International Practice Section of the Virginia State Bar. Dr. Malawer is special editor of the articles sponsored by the International Practice Section featured in this issue of *Virginia Lawyer*. He is the author of two-volume *WTO Law, Litigation & Policy* (2006). Photo taken in Moscow's Red Square. E-mail: StuartMalawer@msn.com. Web site: www.InternationalTradeRelations.com

Global Mergers and National Security

by Stuart S. Malawer

The world of global mergers today is like a Virginia steeplechase, frantic and exciting, with a field of powerful participants. The competitors are hyperactive; adrenalin is flowing, leaving spectators anxious and amazed. In an instant a horse may stumble; if so, it will almost certainly face a horrible end.

Global mergers are in a turbo-charged environment, where activity is at a historical high. Corporations look for deals worldwide. But in the postmortems of all tragedies, one can usually spot early warning signs, almost always overlooked until it is too late. Were there unforeseen obstacles? Were the participants new and inexperienced? Did they understand the rules? Did the participants react irrationally?

Since September 11, 2001, the global merger field has become more dangerous. New, inexperienced players have entered the world of cross-border acquisitions and mergers. Each player has its agenda. Now the home countries of the experienced firms and others are beginning to change the rules—creating new challenges for all.

The Global Landscape— Investment Data and Recent Deals

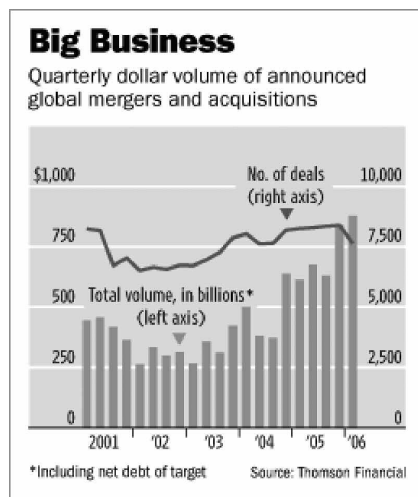
International transactions are at the heart of economic globalization,¹ and foreign direct investment is a critical aspect of these transactions. Cross-border acquisitions and global mergers are at the transactions' core. Transnational corporate undertakings have raised national security anxieties worldwide.² Resource nationalism and renewed reaction to globalization further stir global anxieties. Combine these concerns with the growing number of global takeovers by private and state-owned firms from China, Russia and India, and a dramatically new and unsettling global landscape emerges.³

This latest global environment has evolved in the post-9/11 world, in part from reactions to the threat of global terrorism, but also in large measure from economic change in developing and transitional economies. The change has been accentuated by high energy and commodity prices and an international economy awash in private capital, as well as corporate and government surpluses.

Global Data

The merger boom of the late 1990s is back.⁴ Worldwide deals reached a total volume of \$2.8 trillion in 2005, up from \$1.9 trillion in 2004.⁵ In the first quarter of 2006, \$857 billion in global mergers and acquisitions were announced—the highest level since 2001.⁶ See chart 1.

Chart 1



WALL STREET JOURNAL (April 4, 2006).

The year 2006 may set new records.⁷ As of May 2006, global mergers and acquisitions topped \$1.3 trillion, a 40 percent increase over the same period the prior year. The announced U.S. merger activity for the current year as of May 2006 was \$476 billion, the highest since 2001.⁸

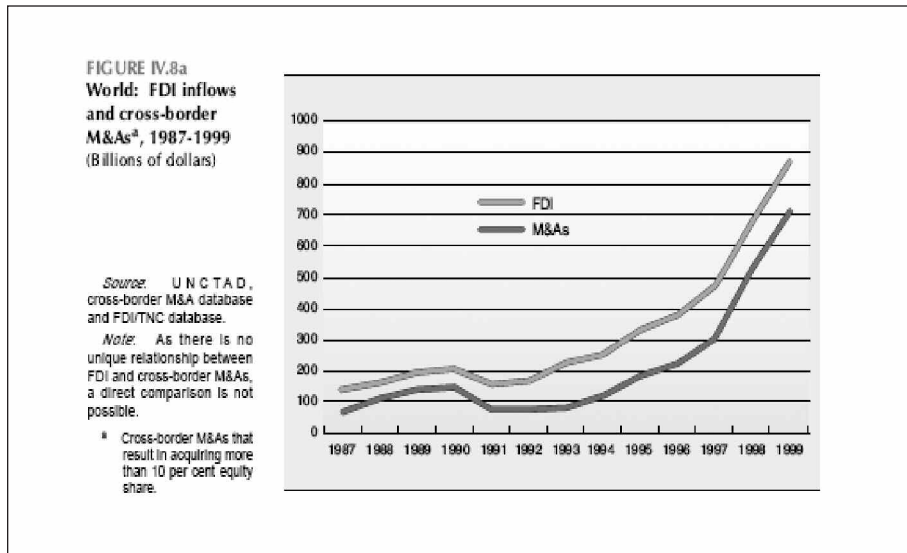
A recently released annual study on foreign direct investment by the United Nations Conference on Trade and Development (UNCTAD) determined that global foreign direct investment (FDI) inflows rose by 29 percent to \$916 billion in 2005, compared to a 27 percent increase in 2004.⁹ “As in the late 1990s, that growth was spurred by cross-border mergers and acquisitions,” the study concluded.¹⁰ The study found that the value and number of mergers and acquisitions in 2005 were comparable to the averages in 1999–2001.¹¹ The study also noted that many parts of the world undertook intense discussions on economic protectionism.¹² It did not discuss the issue of national security,¹³ and it ominously concluded that “the number of changes (to a host country’s regulatory environment) making a host country less welcoming to FDI was the highest ever recorded by UNCTAD.”

This current pattern of FDI growth and importance of global mergers is similar to the go-go years of the late 1990s. An earlier study by UNCTAD in 2000 determined that global mergers amounted to \$710 billion as part of the total worldwide foreign direct investment of \$880 billion in the 1990s.¹⁴ See chart 2, above right.

The study determined that eighty percent of foreign direct investment into the United States during the late 1990s resulted from cross-border mergers and acquisitions.¹⁵ According to the U.S. Bureau of Economic Analysis, foreign direct investment into the United States last year reached its highest level since 2001.¹⁶

Recent data confirm that the global merger boom is roaring back. Such mergers are the major source of FDI into the United States, and, despite the war on terrorism, foreign direct investment into the United States and its accompanying cross-border

Chart 2



WORLD INVESTMENT REPORT 2000 (UNCTAD).

mergers and acquisitions of U.S. firms are at their highest levels since 9/11.¹⁷

Global Deals

American anxiety over global mergers and their implications for national security reached record heights with the aborted management takeover of several U.S. port facilities by the United Arab Emirates-based Dubai Ports World in early 2006. This political fiasco for the Bush administration came a few short months after the China-based CNOOC Ltd. dropped its bid for U.S.-based Unocal and its global oil reserves. This aborted acquisition occurred shortly after the takeover of IBM's PC business by China-based Lenovo and Singapore Technologies Telemedia's purchase of Global Crossing and acquisition of its global fiber optics network. The recent transatlantic purchase of Lucent Technologies by France's Alcatel raised concerns of national security regarding sensitive telecommunications research.

National security concerns are not limited only to the United States government. China Mobile Communication's Corp, the world's largest wireless operator based on subscribers and market capitalization, was forced to drop its \$5.3 billion bid for European-based Millicom International Cellular.¹⁸ This decision came in the midst

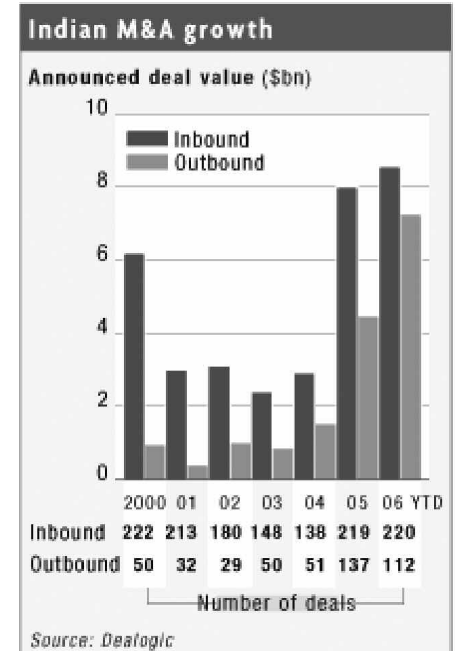
of mounting concern in Europe of Chinese ownership in the telecom sector. Only after a severely bruising battle did India-based Mittal take over European-based Arcelor to form one of the largest steel companies in the world—and only after the Russian firm Severstal was dropped, perhaps for being viewed as more of a national security risk.¹⁹

The offer by Tata Steel to buy British steelmaker Corus Group would make it the biggest foreign acquisition by an Indian company. However, the more recent offer by the Brazilian steel giant Companhia Siderurgica Nacional (CSN) for Corus strikingly highlights the tip of a very large iceberg of a rapidly changing structure of global trade. Global mergers are significantly driven by companies from developing countries. These companies are well on their way to becoming the great industrial enterprises of the Twenty-First Century.²⁰

India's outbound merger and acquisition growth is greater than ever.²¹ Its outbound investment is almost as great as its inbound deal value.²² See chart 3 above.

However, India is also concerned about national security—particularly the effect of foreign investment into its infrastruc-

Chart 3



FINANCIAL TIMES (October 4, 2006).

ture. China has complained that several Chinese companies, including telecommunications firm Huawei Technologies Co., have been blocked from bidding on projects because security clearances have been withheld.²³ India is considering new legislation similar to the legal regimes in the European Union and the United States that review foreign investment in context of security concerns. China is also raising fears that it will restrict foreign takeovers of state-owned companies.

Russia-based Gazprom's proposed takeover of Centrica in the United Kingdom and its interest in investing in European pipelines has raised concerns in the United Kingdom and Europe, relating primarily to the aggressiveness of Russian firms in the global energy sector.²⁴ This aggressiveness has particularly aggravated the situations in France²⁵ and Germany.²⁶ Russia's cutoff of natural gas supplies to the Ukraine earlier this year, and its interest in increasing its stake in EADS, an aerospace group, has further inflamed political sentiment.²⁷

The Russian Federation's most recent threat to curb foreign investment into the massive Sahalin-2 project and the

Shtokman natural gas field,²⁸ along with its growing restrictions on investment in the energy sector generally, highlight a new dimension of global mergers and national security—one of “resource nationalism,” in which the protection of natural resources, principally oil and energy reserves, is viewed as a matter of national security. This trend is also visible in Bolivia’s recent restrictions on foreign firms participating in its oil industry²⁹ and the attempt by Ecuador to terminate its long-term production agreement.³⁰ These actions by Bolivia and Ecuador further extend resource nationalism in Latin America that is evidenced by Venezuela’s long-standing restrictions on its oil industry, which are clearly directed against the United States.

“Foreign corporate takeovers have been made subject to tighter political scrutiny in major countries, both members and non-members of the OECD.”

The intriguing aspect of these new global realities is that many of the global mergers are now emanating from companies in the Middle East, China, India and Russia. For example, the recent merger of two Russian firms (Rusal and Sual) and a Swiss firm (Glendore) created the world’s largest aluminum company, overtaking Alcoa of the United States.³¹ If concluded the proposed acquisition of Oregon Steel by the Russian firm Evraz will be the largest Russian takeover of a U.S. firm. Many of the transactions are energy and commodities related. But now some of these countries are concerned about growing foreign investment into their strategic industries. Countries are beginning to restrict foreign

takeovers based on their own national security calculations—in many ways mirroring those made in the United States and Europe.

This increasing concern for national security in economic and business transactions is new to today’s global economy. The recent 2006 report of the Organization for Economic Co-operation and Development (OECD) on foreign direct investment states, “Issues of security and other strategic concerns have moved to the forefront of domestic and international investment policy making.”³² The secretary-general of the OECD noted it recently. He said, “The global economy is also facing a resurging risk of international investment protectionism. Foreign corporate takeovers have been made subject to tighter political scrutiny in major countries, both members and non-members of the OECD.”³³ Indeed, the OECD considers recent action restricting takeovers to be going “beyond just national defense to include energy security.”³⁴ The report notes that “concerns about security and other essential national interests are on the rise” and can be seen in Europe, the United States, China and India.³⁵

Major Developments

Four newer realities in global trade in the post-9/11 world are clearly discernible:

- Takeovers and foreign investment are emanating from firms based in developing countries such as India and the United Arab Emirates (UAE), as well as from countries transitioning from central planning such as China and Russia.
- National security fears are arising among many governments, not only those in the United States and Europe, but also governments in Russia, India and China.
- More resource nationalism is evident in countries with significant oil and gas reserves and production facilities.
- This rise occurs in tandem with latent protectionism in many countries and with an increasing reaction against global integration, now referred to by some as “economic patriotism.”

Most important is understanding why takeovers and foreign investment are emanating more today from developing countries and those transitioning from central planning to free markets. There are five major reasons and five supporting causes.

The five major reasons are:

- The World Trade Organization (WTO) has spurred the growth of world trade and investment over the last ten years. India and China have greatly benefited from membership in the WTO, and the Gulf states have prospered from both trade liberalization and higher oil prices.
- Foreign companies that have foreign government equity are in a strong position to mount foreign takeovers. They do not have to worry about the reaction of public markets. This is true of firms in many countries, including China and Russia.
- Growth in foreign corporate profits and surpluses (retained earnings) provide a ready war chest to be utilized by foreign corporations in their cross-border takeovers.³⁶
- Foreign countries have amassed huge surpluses that can help finance private takeovers and investments.
- The increase in oil revenues and those due to higher commodity prices have allowed foreign governments to finance overseas activities. Russia and the UAE are examples of this development.³⁷

Because abundant liquidity exists throughout the world, it is easy to convert corporate reserves into corporate bids. Historically low interest rates for corporate borrowers facilitate ever more cross-border transactions. An explosion in foreign capital markets of initial public offerings (IPOs) allow for even greater financing.³⁸ For example, the IPO of the Industrial & Commercial Bank of China, Ltd. (ICBC), in October 2006, was the world’s largest IPO. This has pushed China’s stock exchanges into the world’s biggest source of new listings, ahead of those in New York and London. Growth in private equity, respon-

sible for more than 20 percent of recent merger activity in the U.S. and the EU, introduces a new and potentially significant and worrisome player into global mergers, and strong economic growth in a range of countries provides firms a strong basis for global undertakings.

There are new major players in global trade that have so much capital available and growing market prowess that they are able to more strenuously compete for global mergers—which they have done with increasing success.

U.S. Response to the New Landscape

The U.S. response to this new landscape has been to bog itself down with a debate over foreign investment focused on revamping the Exon-Florio legislation and the related congressional review process. Public demand for increased congressional oversight of foreign takeovers persists, but to a weakened degree. “A key issue for Congress is whether and in what way it should respond to essentially private economic investment activities and how to assess the impact of such investments on the nation’s security.”³⁹ After a year of consideration, Congress has not enacted any changes.

The principal legislative and regulatory process to review foreign takeovers of U.S. firms is the Committee for Investment in the United States (CFIUS) as strengthened by the Exon-Florio amendment. This review process gives the U.S. president significant powers to block particular types of foreign investment.

In 1975 an executive order established CFIUS as an interagency panel, primarily to monitor foreign direct investment into the United States.⁴⁰ In 1988 the Exon-Florio amendment strengthened and better focused the review of acquisitions and mergers.⁴¹ This amendment was enacted amid congressional concerns over foreign acquisitions of U.S. firms, particularly by firms from Japan. This change was included as a provision of the Defense Production Act. The new legislation authorized the president to investigate the

Chart 4

CFIUS 1997–2004 Data					
	Notifications	Acquisitions	Investigations	Notices w/d	Pres. Determinations
1997	62	60	0	0	0
1998	65	62	2	2	0
1999	79	76	0	0	0
2000	72	71	1	0	1
2001	55	51	1	1	0
2002	43	42	0	0	0
2003	41	39	2	1	1
2004	53	50	2	2	0
Total	470	451	8	6	2

GAO Testimony, “Implementation of Exon-Florio.” p. 13 (GAO-06-135T—October 6, 2006).

impact of foreign acquisitions of U.S. companies on national security. It also authorized the president to suspend or prohibit acquisitions that might threaten national security. CFIUS was delegated responsibility for investigating foreign acquisitions, when necessary.

The legislation established a ninety-day review process involving a voluntary submission by the acquiring party, an initial review period of thirty days to determine whether the acquisition could pose a threat to national security, and an additional forty-five-day investigation that results in a report to the President. The president then has fifteen days to allow, suspend or prohibit the transaction. It is important to note that national security is not defined; only factors to consider are enumerated. Withdrawing and refining notices restart the review clock.

In 1992 amendments were adopted that require greater reporting to Congress. A report to Congress was required if the president made any decision. An investigation was required if the acquiring company is controlled or acting on behalf of a foreign government (Byrd Amendment). When credible evidence was found, a report was also required every four years.

The current regulatory process is minimally transparent and discretionary only. The committee’s mandate is not well defined; there is no definition of national

security to provide guidance to the committee or parties to a transaction. The statute provides for factors to be considered in determining a threat to national security. They include the transaction’s impact on domestic production for national defense; the effect on the capacity of industries to meet defense requirements; the foreign control of commercial activity; the transaction’s implications for national security, the military, technology transfer as to terrorism; and the potential effects on U.S. technological leadership.

In a seminal study last year, the Government Accountability Office empirically examined the cases considered by the CFIUS between 1997 and 2004. The CFIUS had 470 notifications⁴² and only 45 investigations, resulting in just two presidential determinations—both concerning telecommunications. *See chart 4 above.*

Clearly, this process has not resulted in many or even significant decisions blocking foreign takeovers for national security reasons. It seems that the CFIUS process draws more heat than the outcome would otherwise suggest.

Legislative proposals during the 2006 congressional session have generally required greater congressional notification and greater review by the CFIUS. The Senate and House have considered two different sets of proposals. Currently, legislators are at a standoff. Strangely, the House’s delib-

erations are more balanced and less restrictive—contrary to its normal position in trade matters when compared to the Senate.

In the Senate, the Shelby-Sarbanes Bill required congressional notification when a review is initiated. It mandated a forty-five-day investigation when a foreign government-controlled entity is involved. It also required a ranking of countries based on compliance with weapons-control deals. In the House, the Blount Bill was less stringent than the Senate deliberations would have required. The House appears to have recognized to a greater extent that economic security entails encouraging foreign investment. Congressional notification would be required only upon the completion of a review. Other items also considered were the tracking of mitigation agreements that protect critical infrastructure and provide for new roles for the Department of Homeland Security and the Director of National Intelligence.⁴³

As of the 2006 mid-term elections, the Congress has not enacted any changes to the CFIUS regime. Virginia Senator John W. Warner has been a voice of reason,⁴⁴ who blocked an attempt to push through the Senate a proposal that would have toughened national security reviews of foreign takeovers of U.S. assets.⁴⁵

Conclusions

The policy challenge to the United States is to continue promoting the economic benefits of global trade and mergers within this new global dynamic. The unanswered question is whether in the coming years new national security goals will outweigh other goals that promote economic development and political development. The future of the trading system depends on the answer that the United States and others provide.

We have had a change in the political dynamics within the United States and within other countries. The role of national security and reaction against globalization are growing pieces of this new post-9/11 era. In global trade relations today, the world is more multipolar, as evidenced by the rise of the BRIC countries (Brazil, Russia, India and China) the reemergence

of Japan; and the dynamic growth of Korea. New sources of wealth from global trade and petrodollars are fueling and super-charging global mergers. New players are emerging with new interests.

Warning signs show that the global trading system could suffer a disaster. Russia is reimposing controls on foreign investors in strategic industries. India is considering controls on Chinese investment into its infrastructure and energy sectors. China is wary of foreign takeovers of its state-controlled industries. Korea is worried about foreign private equity in its industry reorganization.⁴⁶ The Ukraine is considering restricting foreign participation in the development of its Black Sea oil and gas reserves.⁴⁷

The promotion of global mergers promotes global trade, which holds the promise of aiding in transforming inefficient markets and undemocratic societies.

The current slowdown in the U.S. economy and continuous growth overseas will only enhance the activities of foreign firms and create even more fertile ground for global mergers.⁴⁸ This year's record U.S. investment abroad in foreign capital markets only adds greater fuel to cross-border takeovers to be undertaken by a range of foreign firms.⁴⁹ The declining dollar will also spur greater acquisitions of U.S. firms.

The promotion of global mergers promotes global trade, which holds the promise of aiding in transforming inefficient markets and undemocratic societies. However, a concern for national security is increasingly posing a challenge to the growth and promise of trade in the post-9/11 era. The

reemergence of latent protectionism fueled by growing reaction to global integration only adds to this situation. But if the warning signs are heeded, the global system may yet avoid a catastrophe.

There are positive global developments. While investment controls are being considered worldwide, few have been adopted. The United States has recently concluded negotiations with Russia concerning its accession to the WTO and Vietnam has won admission to the WTO.⁵⁰ The proposals to change U.S. legislation regulating foreign direct investment have stalled. U.S. policy remains anchored in the belief that global business transactions, global mergers, trade and investment are beneficial to bringing needed political and cultural change worldwide.

However, as a result of the historical victory of the Democratic Party in the mid-term elections, there is now a new uncertainty about U.S. trade policy. The Vietnam trade bill extending most-favored-nation treatment to Vietnam was initially defeated prior to its passage in the end-of-the year tax and trade bill. Congressional approval of legislation implementing Russian accession to the WTO as well as renewal of "Fast Track Authority" has become more questionable.⁵¹

The global economy seems strong; all of its horses are running. But warning signs are present. Almost a century ago an earlier era of globalization was ended by a single shot. Overreaction today could have the same result. ☹

Endnotes:

- 1 Foreign direct investment includes either mergers and acquisitions or the establishment of a new firm. This article focuses upon mergers and acquisitions. The establishment of a new firm is termed a "greenfield" investment. "Foreign Direct Investment in the United States: An Economic Analysis." (Congressional Research Service, Report RS21857) (March 23, 2005).
- 2 "U.S. Foreign-Investment Debate Goes Global." *Wall Street Journal* (May 30, 2006).
- 3 "It is now clear that globalization is no longer the preserve of the west [I]t is only recently that executives, investors and politicians in the west have become fully aware of the shift." "The Big Story—Emerging Markets Bite Back." *Financial Times* (Special Report—Corporate Finance, November 29, 2006). See generally, "Economic Nationalism in Deals." *Financial Times* (October 13, 2006). This article focuses on how different national governments protect key stakeholders.

- 4 "There's no end in sight for this year's parade of Megamergers." "Blizzard of Deals Heralds an Era of Megamergers." *Wall Street Journal* (June 27, 2006).
- 5 "Mergers Ahead." *Wall Street Journal* (June 2, 2006).
- 6 Chart, *Wall Street Journal* (April 4, 2006).
- 7 "Mergers Snapshot." *Wall Street Journal* (May 10, 2006).
- 8 "Merger Activity Sets Stage for Record Year." *Wall Street Journal* C11 (October 2, 2006). See also, "Blizzard of Deals Heralds an Era of Megamergers—Ample Credit, Foreign Rivals and High Commodity Prices Propel Push for Global Reach." *Wall Street Journal* (June 27, 2006). The value of mergers deals announced as of June has put 2006 on track to beat the record set in 2000.
- 9 U.N. Conference on Trade and Development, World Investment Report 2006—FDI from Developing and Transition Economies: Implications for Development." 3 (UNCTAD 2006).
- 10 Id.
- 11 Id. at 14.
- 12 Id. at 23.
- 13 Id. at 37.
- 14 Id. at 107.
- 15 "World Investment Report 2000—Cross-Border Mergers and Acquisitions and Development." 117 (UNCTAD, 2000).
- 16 U.S. Bureau of Economic Analysis (News Release—June 2, 2006).
- 17 New foreign direct investment into the United States remained strong through the first half of 2006. New foreign direct investment totaled \$86.82 billion, essentially unchanged from the prior years. "Foreign Direct Investment in U.S. Remains Strong." *Wall Street Journal* C4 (June 2, 2006).
- 18 "China Mobile May Buy European Wireless Company." *Wall Street Journal* (May 24, 2006). If completed this merger would have been the largest-ever foreign acquisition by a Chinese company ever.
- 19 Foreign opposition to Indian companies has surprised Indian executives. "Frustrated Indian Companies Find Their Buying Efforts Thwarted." *New York Times* (June 1, 2006).
- 20 "Tata Steel Offers \$8 Billion for Corus." *Wall Street Journal* A6 (October 18, 2006). "India appears to be emerging as not just a place for companies to outsource, but also a place for entrepreneurs to build multinational companies." "An Indian Company Wants to Be Everywhere." *New York Times* (October 18, 2006). "Brazilian Steel Maker Outbids Tata in Offer for Corus Group." *New York Times* (November 18, 2006).
- 21 India's outbound deal volume is on the verge of passing the volume of inbound deals for the first time. *Financial Times* (October 4, 2006).
- 22 Id.
- 23 "As Foreign Investment Rises, India Addresses Security Concerns." *New York Times* (August 24, 2006).
- 24 "Gazprom Stake Talk Lifts Centrica." *Financial Times* (June 9, 2006).
- 25 "French Poll Shows Support for Corporate Protectionism." *Financial Times* (June 9, 2006).
- 26 "Berlin Hushes Russian Talk" *Financial Times* (November 2, 2006). "Europe Urged to Stay Open to Russian Investment." *Financial Times* (October 13, 2006).
- 27 "State-Owned Russian Bank Buys a 5% Stake in EADS." *New York Times* (September 12, 2006).
- 28 "Gazprom Dashes Shtokman Hopes." *Financial Times* (October 10, 2006).
- 29 "Bolivia Set to Seize its Foreign-Run Gas Fields." *Financial Times* (May 2, 2006).
- 30 "U.S. Deplores Ecuador Move to Revoke Occidental Contract." *Financial Times* (May 17, 2006).
- 31 "Russian Deal to Create World's Biggest Aluminum Maker." *New York Times* (October 10, 2006).
- 32 "Trends and Recent Developments in Foreign Direct Investment." 16 (OECD Report, June 2006).
- 33 "Statement by Mr. Angel Gurría at the OECD Meeting of the International Monetary and Financial Committee." 4 (Singapore 17, 2006.) <http://www.oecd.org/dataoecd/16/51/37422695.pdf>
- 34 "Roundtable on Freedom of Investment, National Security and Strategic Industries." (OECD — June 21, 2006). http://www.oecd.org/document/45/0,2340,en_2649_34529562_37156653_1_1_1_34529562,00.html
- 35 "Preventing Investment Protection." (OECD website October 14, 2006). http://www.oecd.org/document/45/0,2340,en_2649_34529562_37156653_1_1_1_34529562,00.html
- 36 "Beijing Revises Inflow Figures up to \$72.4bn." *Financial Times* (June 9, 2006).
- 37 "Sea of Cash Flooding into the Gulf Brings an Explosion of Investment Companies." *Financial Times* 4 (October 19, 2006).
- 38 Worldwide mergers "are driven by the commodities boom, the globalization of financial markets and the protracted availability of inexpensive debt to finance takeovers." "75 bn in 24 Hours—Day Deal Fever Hit the World." *Financial Times* (November 21, 2006). Private Equity Growth Hitting Tax Revenues." *Financial Times* (October 13, 2006). The pending IPO of the Chinese bank ICBC will be the world's largest ever IPO. "Great Bank Sale." *Wall Street Journal* (October 18, 2006); "Big League Shuffle." *Wall Street Journal* C14 (October 19, 2006); "Orders Soar for China Bank's Offering." *Washington Post* (October 20, 2006).
- 39 "The Exon-Florio National Security Test for Foreign Investment." 5 (Congressional Research Service Report RS22197, February 23, 2006).
- 40 Executive Order 11858 (May 7, 1975) and amended subsequently.
- 41 50 U.S.C. app. § 2170.
- 42 "Implementation of Exon-Florio." (GAO Testimony — GAO-06-135T — October 6, 2006). Even prior to the Dubai Ports fiasco the Congress, immediately after 9/11, was concerned about national security issues under the Exon-Florio amendment. "Mitigating National Security Concerns under Exon-Florio Could Be Improved." (GAO Report — GAO-02-736 — September 2002).
- 43 Various proposals to amend the current legislation are assessed in E. Graham & D. Marchick, *U.S. National Security and Foreign Direct Investment* (2006). They include requiring a mandatory filing requirement, clarifying "foreign control" and enhancing disclosure to the Congress.
- 44 "Warner Blocks Bid to Revamp CFIUS." *Financial Times* (July 7, 2006).
- 45 Id.
- 46 "U.S. Firm Has Korea Up in Arms." *New York Times* (July 6, 2006).
- 47 "Ukraine's Offshore Prospects." *Financial Times* (October 3, 2006).
- 48 Forecasts are for the United States to attract almost 25 percent of worldwide FDI over the next five years. "U.S. to Retain Appeal for Foreign Investors." *Financial Times* (September 6, 2006).
- 49 "Appetite for Foreign Equities Breaks Records." *Financial Times* (October 11, 2006).
- 50 "Russia's WTO Bid" *Wall Street Journal* (11.11.06); "General Council & Vietnam" (WTO Press Release November 18, 2006). "U.S. Shrugs off Gas Setback as it Reassures Moscow on WTO." *Financial Times* (October 11, 2006). See also, "Bright Prospects Eclipse Concerns." *Financial Times* (Special Section — FT Investing in Russia) (October 10, 2006).
- 51 "Trade Bills Now Face Tough Odds" *New York Times* (November 16, 2006); "Will the New Congress Shift Gears on Free Trade?" *Wall Street Journal* (November 18, 2006).

National Security, Foreign Ownership and Defense Contractors

by Arun Sood

When corporations have significant non-U.S. ownership, special arrangements are made to protect the classified information.

U.S. national security interests require a determined and continuing attention to proper handling of classified information. This often requires restricting access to such information. On the other hand, technology and market considerations require that multiple corporations should have the ability to compete for classified work. When corporations have significant non-U.S. ownership, special arrangements are made to protect the classified information. This creates additional overhead in these companies, but this has not deterred these companies from undertaking classified work.

Multinational corporations often undertake classified contracts. This requires companies to adhere to rules that govern the exchange of data within the corporation, as well as restrictions on sharing of the information with corporate executives. These rules are typically incorporated into a special security agreement and approved by the Defense Security Service and the agencies for which the classified work is undertaken.

To understand the approach taken by such corporations and problems confronted by them, this article examines two companies: BAE Systems North America and Headstrong Public Sector Inc. The first is a very large multinational corporation; the second is a smaller company. Both companies undertake classified work. Their differences include diversity of customer base, fraction of revenue derived from classified work, type of work performed and type of ownership. The companies also have similarities: Both have some foreign ownership, operate in multiple countries and have become larger through mergers and acquisitions.

BAE Systems North America

BAE Systems North America (BAE-NA), with headquarters in Rockville, Maryland, is a wholly owned subsidiary of BAE Systems. The parent company has its headquarters in the United Kingdom. The North American subsidiary has twenty-six thousand employees and annual revenue of \$5 billion. BAE-NA is among the top ten defense contractors in the U.S. BAE worldwide has ninety thousand employees, with its largest employee base in the U.K. of fifty thousand and smaller operations in Germany, France, Saudi Arabia and Sweden. BAE-NA has targeted an annual growth rate of 25 percent. It manufactures and supplies high-tech equipment to U.S. government agencies. BAE-NA operates as a separate corporation with an independent board of directors. All the directors are U.S. citizens and have security clearances.

Headstrong Public Sector Inc.

Headstrong Public Sector Inc. is a wholly owned subsidiary of Headstrong Corporation, with headquarters in Fairfax, Virginia. Headstrong Corporation is a \$160 million company, with 2,600 personnel. In addition to several locations in the U.S., Headstrong has operations in India, Japan and the Philippines.

Headstrong Public Sector undertakes classified contracts. The Public Sector Division comprises forty-one personnel, twenty-eight of whom have clearances. Eight of the personnel hold high-level security clearances that allow work with intelligence agencies. Headstrong Public Sector's focus is on consulting services like enterprise architecture consulting, and even the classified work has a large high end consulting service component.

Although, BAE-NA and Headstrong are quite different, the classified work constrains the operations of both. The handling of the classified business was quite similar. This article identifies the common characteristics of the classified business operations of these companies. This focus potentially identifies characteristics that are generally applicable to firms doing classified work.

Why Does the U.S. Government Contract with Such Firms?

The U.S. government wants the best technology at the lowest cost. The U.S. technology base is rich and competitive compared to other countries; however, in some niche technology areas other countries have an advantage. If a non-U.S. manufacturer develops hardware with similar functionality but a different manufacturing process and lower cost, then it benefits the U.S. when this knowledge is acquired. Costs can be contained by increasing competition in the marketplace—by encouraging military manufacturers headquartered in allied countries to build new facilities or acquire companies in the U.S.

In the commercial sector, the scale of production is often many times greater than military demand. For this reason, the military tries to use commercial off-the-shelf products. However, software and systems are complex. Many computer systems are manufactured and assembled in other countries. Monitoring the quality of these systems and ensuring that they do not have unauthorized software installed is a challenge. This encourages systems development in the U.S., where the processes can be better managed and supervised by personnel who have been vetted.

The United States wants to build consistent and reliable relations with allies, and to encourage the sale of U.S. military hardware, software, systems and technology to allies. This happens when companies headquartered in allied countries are given opportunities to invest in the U.S.

Companies serving the intelligence community have a particularly challenging task. If a U.S. company that serves the

intelligence community merges with another company with significant foreign ownership, then often the acquiring company shifts its contracts to other firms that support the intelligence sector. On the other hand, the intelligence community interest in maintaining continuity of operations can often lead to arrangements in which related activity is compartmentalized and isolated. Government agencies have continuity of operations and reliable staff who understand the technology's applications.

Why Is This Good Business for Commercial Firms?

Some foreign defense manufacturers focus on the defense market. These companies work with ministries of defense in their headquarters' countries. Investing in the U.S. helps manufacturers increase their revenue and diversify their client base. Such investments are usually encouraged by foreign defense ministries as a way of collaborating with U.S. defense manufacturers and strengthening relations with the U.S. government. Investments in the U.S. are also an easy way to get better access to the capital markets, especially the venture capital markets. Often an acquisition of a U.S. company provides the foreign investor rapid access to a technology base that has been validated and found appropriate in the defense environment. The company gets technical staff, which helps the company in technology transfer while continuing to meet security requirements of a federal agency. The company can apply this technology to other parts of its defense operations—potentially increasing revenue for the foreign-owned company.

In some cases, the defense or intelligence-related business merges with a larger firm. Why should a U.S. corporation with worldwide operations and significant foreign ownership retain a defense-related business? Consider the case of a corporation for which the defense and intelligence business is approximately 10 percent of its revenue base. Typically, the defense and intelligence agency clients are earlier adopters of technology, and hence performance on contracts for such clients can be used as an additional selling point with civilian and commercial customers.

Technology developed for nonmilitary use can be readily moved to the secure world, but this requires increasing security levels. Additional security has increased appeal to the commercial and civilian government sectors. Successful implementation of systems in the more stringent defense environments is also recognized by foreign governments.

Some foreign-owned businesses pursue additional classified work because they want to employ a highly skilled and trained workforce. Consultants that serve commercial clients travel constantly, but those that serve a federal agency travel less—a factor in retaining high-value consultants.

Organizational Constraints

Contracts for performing classified work flow to foreign-owned companies under a special security agreement between the company and the federal agency. Typically, all the work has to be performed in the U.S. In some cases, all the classified work is done at the client site, or at the site of a federal agency contractor who has the requisite site clearances. Foreign-owned businesses can request to have their facilities cleared for security if they can demonstrate that a clearance is necessary. Usually, the manager of the corporate division performing classified work has the necessary security clearances, and this person is the contact between the federal agency and the company. A division manager makes recruitment decisions for this division. Employees are U.S. nationals with appropriate clearances. The federal agency may also require that board members have clearances. Among the division corporate officers, the only person who could be a parent company representative is the chief financial officer. The security agreement also restricts the flow of information between the foreign owner and the division performing classified work.

The security requirements often stipulate a firewall between the classified and the unclassified operations of the company, and a firewall between the foreign owners and the group performing classified work. These firewalls also limit the information

that is available to the board of directors. The chief executive officer of the entity performing classified work has to have clearances. The security agreement may require that additional members of the board also have clearances. There are restrictions on the information that can be disclosed to the entire board. Most disclosures are restricted to generic explanation of the issues, and are generally related to financial and accounting performance issues. In some cases, the sponsoring agency may restrict that the agency name not be disclosed to the board members. The board can be told that an unidentified federal agency is disputing contract payments, but the board will not have access to the reasons that lead to the dispute. As part of the company's security agreement with the federal agency, the members of the board have to agree that they can perform their fiduciary responsibility without knowing the details of the classified work.

Classified work is not the only time that the board of directors makes financial commitments with only limited knowledge of the details. Privacy considerations also lead to similar constraints. Disputes with employees under the Health Insurance Portability and Accountability Act (HIPAA) have similar constraints. The HIPAA restricts the disclosure of the distribution of health-related information about the employees or their dependents to other parties. Thus, members of the board do not have access to such information and may have to make decisions without knowing the nature of the illness, the nature of the dispute or the reasons why the employee feels that the employer is responsible. The board has to decide based on terms of the settlement, litigation alternatives, related cost estimates and the extent of corporate liability. Typically, the corporate general counsel and the chief executive officer are the only members who have access to all details. The situation is similar for the entities undertaking classified work.

Other areas in which the board acts on the basis of limited information are in merger-and-acquisition and research-and-development investment decisions. Foreign-owned businesses in the classified work

The classified work space requires particularly stringent constraints on the acquisition of commercial off-the-shelf products produced in foreign countries.

space often grow by merging with or acquiring a company in the appropriate work space. In this case, a division manager presents the relevance of the acquisition and the strategic growth plan. This includes technology assets acquisition, but not classified information. There are similar information disclosure constraints for R&D investments in the division performing classified work. Once again the board's role is strategic and includes approval of the financial implications.

Intracompany Technology Transfer

Classified work gives the foreign-owned company exposure to higher-end technology. The deployment of this technology outside the classified work space may be an advantage to the company. However, because of the classified nature of the work, there are restrictions on the transfer of technology. Commercial off-the-shelf software acquisition illustrates the technology transfer possibilities. The classified work division acquires and integrates software, and it learns the functionality and limits of the software. Working with the vendor, work-arounds are developed. Unless there are specific national security concerns, this experiential information can be transferred to personnel not employed by the classified work division. On the other hand, application-related information cannot be exchanged with the other divisions. A copy of the software used in the classified arena may not be deployed outside the classified laboratory.

If the commercial software product has been integrated with other classified soft-

ware, there are additional restrictions. In all cases the test is the impact of the transfer on national security, and the company must ensure that disclosure about the classified application or objectives is avoided; otherwise the government may debar the company from undertaking classified work. In this scenario, technical employees from the classified divisions are available to assist the adoption of commercial off-the-shelf technology for commercial and civilian government clients.

Export and Import Rules

The export control regulations apply to all exports from the U.S. Vendors interested in exporting from the U.S. must comply with these regulations. In addition to export controls, the exporters of military hardware must also meet the International Trading in Armaments Requirements. These regulations are also applicable to technical meetings with personnel who do not have clearances.

Other regulations affect the import of software and systems. The intelligence community is careful of the software that is imported and installed on its computers. Software that may be acceptable in the context of the civilian government agencies may not pass the scrutiny of the intelligence community.

The classified work space requires particularly stringent constraints on the acquisition of commercial off-the-shelf products produced in foreign countries. A concern relates to development of software and hardware when there is no control of the development process. Since so much of electronic products and software development has been outsourced to foreign locations, it is difficult to assess the contents of the system. Other concerns include installation of worms, viruses, Trojan horses or sleeper software that is triggered years after installation on the computer. Often contractors are not allowed to use foreign-developed software in support of the intelligence community projects.

Conclusions

By examining BAE Systems North America and Headstrong Public Sector key factors become apparent that are of importance to

the US government and the respective corporations in undertaking classified work. The early adopter reputation of these government agencies makes working for them particularly attractive to firms working in the high technology arena. However, classified work has to be undertaken in the context of a special security agreement, and this places restraints on operational, intra-corporate technology sharing and management disclosure. While all companies have to abide by the export control regulations, these companies must also abide by the stricter ITAR regulations.

The following are lessons for managing a defense contractor in the era of heightened national security:

- Companies undertaking classified work require an approved “special security agreement.”
- Strict firewalls are required between classified and unclassified units of the company and between related companies.
- Members of the board have very limited access to information concerning classified projects.
- Military and intelligence agencies are early adopters of sensitive technology and are valuable customers for higher-end services.
- Compliance with laws governing security and export controls of sensitive data is mandatory. Through proper corporate policies and organization they can be met by both domestic and foreign firms.



Arun K. Sood is professor of computer science at George Mason University. He received his undergraduate degree at the Indian Institute of Technology, Delhi, and his master's and doctorate at Carnegie Mellon University. Photo of Sood (left) with former Virginia governor Mark D. Warner in India.

U.S. Obligations for the Treatment of Detainees

by James P. Pfiffner

The obligations of the United States government for treatment of prisoners during wartime are defined in international law, particularly the Geneva Conventions. Uncodified “customary international law” may also bind the United States by forbidding torture of prisoners. In addition, the United Nations Convention Against Torture, which has been implemented in the U.S. criminal code, also prohibits torture. This analysis will briefly examine the legal constraints on the United States in its treatment of prisoners. It will be argued that even if the Geneva Conventions are deemed not to apply to detainees, other laws prohibit torture.

Geneva Conventions

The four Geneva Conventions of 1949 were designed to protect individuals who are captured or at the mercy of the enemy during times of war. The Third Convention protects enemy combatants who are captured as prisoners of war. The conventions apply to those countries that have signed the treaty. This includes Iraq and arguably Afghanistan, but President George W. Bush declared through executive order that U.S. obligations under Geneva do not apply to members of the Taliban in Afghanistan nor to terrorists who may have plotted against the United States. The memo stated that “as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, *to the extent appropriate and consistent with military necessity*, in a manner consistent with the principles of Geneva.” (emphasis added)¹ The First Convention deals with the wounded and sick in the field; the

The four Geneva Conventions of 1949 were designed to protect individuals who are captured or at the mercy of the enemy during times of war.

Second Convention deals with the wounded, sick and shipwrecked at sea; the Third Convention deals with prisoners of war; and the Fourth Convention deals with the treatment of civilian persons during time of war.²

Geneva Convention III

The highest level of protection is accorded to prisoners of war and provides that prisoners must be treated humanely and that, if interrogated, they cannot be forced to reveal information beyond their name, rank, date of birth, and serial number.³ The convention does not forbid interrogation, but it limits the methods that can be used to those that are humane.

The Third Convention regarding prisoners of war states that: “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind

whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”⁴ This prohibition of coercion would rule out many of the interrogation techniques and treatment of prisoners at Guantanamo Bay and at Abu Ghraib.

In order to qualify as a prisoner of war, members of states that have signed the treaty must (among other things): belong to an organized group that is a party to the conflict that is commanded by a responsible person; wear a “distinctive sign” identifying them as a combatant; must carry arms openly.⁵ If there is some doubt whether a detainee is entitled to status as a POW, the person is to be treated with prisoner of war status until a properly constituted tribunal has determined the person’s status.⁶ The United States recognized as prisoners of war those captured in the Korean, Vietnam and first Gulf wars.

Geneva Convention IV

Article IV of the Geneva Conventions applies to civilians under control of a military power. It forbids any “measure of such a character as to cause the physical suffering or extermination of protected persons . . . [including] murder, torture, corporal punishment . . .”⁷ Many of the prisoners at Abu Ghraib fall into the category of civilian detained by an occupying power.

United States Army Regulations 190-8 provides for treatment of enemy prisoners of war. It states that “all persons taken into

custody by U.S. forces will be provided with the protections of the [Geneva Convention on Prisoners of War] until some other legal status is determined by competent authority.” The regulation prohibits “inhumane treatment,” specifically “murder, torture, corporal punishment. . . sensory deprivation. . . and all cruel and degrading treatment.”⁸

Common Article 3 and Customary International Law

Each of the four Geneva Conventions has several common articles that are identical. Common Article 3 prohibits certain practices in the treatment of those persons under the control of military forces. The article requires that detained persons be treated “humanely,” and it prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,” and “outrages upon personal dignity, in particular humiliating and degrading treatment”⁹ According to Jennifer Elsea of the Congressional Research Service, “. . . Common Article 3 is now widely considered to have attained the status of customary international law.”¹⁰

Customary international law may bind the United States in its treatment of prisoners, irrespective of whether the Geneva Conventions are considered to apply. According to the *U.S. Army Field Manual of the Law of Land Warfare*, “unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law. The unwritten or customary law of war is binding upon all nations.”¹¹

Protocol I, Article 75 of the Geneva Conventions, signed in 1977 but not ratified by the United States, also is considered to be part of customary international law. Protocol I provides that some acts “shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents.” These acts include “murder,” “torture of all kinds,” and “outrages upon personal dignity, in particular humiliating and degrading treatment.”¹² Goldman and Tittmore conclude that “the core provisions of

Article 75 should also be considered to constitute a part of customary international law binding on the United States.”¹³ Thus, even if the Geneva Conventions are deemed not to apply to captured persons suspected of terrorism, customary international law binds the United States to treat detainees humanely.

U.N. Convention Against Torture

The treatment of prisoners is also constrained by the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁴ The Convention Against Torture (CAT) defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession”¹⁵ The U.N. Torture Convention provides that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹⁶

Goldman and Tittmore conclude that, based on the U.N. convention against torture and Article 75 of Protocol I (as part of customary international law) that it is “beyond question that the United States is subject to an absolute and nonderogable obligation under international human rights and humanitarian law to ensure that unprivileged combatants under its power are not subjected to torture or other cruel, inhuman or degrading treatment or punishment.”¹⁷

In 1994 the United States passed legislation to implement the U.N. Convention Against Torture (18 U.S.C., par. 2340), which provides for criminal sanctions for perpetrators of torture, including the death penalty. Section 2340 of the law defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering”¹⁸ Thus even if the Geneva Conventions are deemed not to apply and customary international law is considered not to be binding on the

United States, the U.S. criminal code prohibits torture.¹⁹

The McCain Amendment of 2005

U.S. Senator John McCain endured five years as a prisoner of war in Vietnam and suffered severe torture. Thus his publicly expressed outrage at reports of torture perpetrated by U.S. soldiers and civilians at Guantanamo, Abu Ghraib, and in Afghanistan carried a large measure of legitimacy. McCain introduced an amendment to the Department of Defense Appropriations Act for 2006 that would ban torture by U.S. personnel, regardless of geographic location. Section 1003 of the Detainee Treatment Act of 2005 provides that “no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”²⁰

President Bush threatened to veto the bill if it were passed, and Vice President Richard B. Cheney led administration efforts in Congress to defeat the bill.²¹ Cheney first tried to get the bill dropped entirely, then to exempt the Central Intelligence Agency from its provisions. The efforts were unavailing, and the measure was passed with veto-proof majorities in both houses—90 to 9 in the Senate, and 308 to 122 in the House. In a compromise, McCain refused to change his wording, but he did agree to add provisions that would allow civilian U.S. personnel to use the same type of legal defense that is accorded to uniformed military personnel.²²

However, in a signing statement, President Bush used language that called into question whether he considered himself or the executive branch bound by the law. A signing statement is a statement by the president when a bill is signed that indicates how the president interprets the bill. It is intended to provide evidence of presidential intent corresponding to the weight given by federal courts to congressional intent in interpreting the law.²³ When President Bush signed the bill, he issued a signing statement that declared: “The executive branch shall construe Title X in

Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power”²⁴ Previous memoranda of the Bush administration interpreted executive power in expansive ways that argued that the president is not subject to the law when acting in his commander-in-chief capacity.²⁵

President Bush’s memorandum excluding al Qaeda from the Geneva Accords declared that detainees would be treated humanely “to the extent appropriate and consistent with military necessity.” This presidential directive led to (or allowed) the abuses that occurred at Guantanamo and Abu Ghraib. Thus, if President Bush’s reservation to the McCain amendment is interpreted in a similar fashion, there may be a loophole that allows torture deemed by the executive branch to be a “military necessity.”²⁶

Another possible impediment to the enforcement of the McCain amendment is a provision sponsored by Senator Lindsey Graham that precluded inmates at Guantanamo from appealing their incarceration to U.S. federal courts. The Justice Department argued in court that Yemeni Mohammed Bawazir, who claimed that painful force-feeding of him at Guantanamo constituted torture, did not have standing to sue because of Graham’s provision. The Justice Department argued that even if the force-feeding was in violation of the McCain amendment, the law provides no recourse for the victim in court.²⁷ Some might conclude that if the law is unenforceable in court, it is not binding. But that conclusion seems merely to avoid the issue of the status of laws in the United States constitutional system. It would seem that U.S. officials have the obligation to obey the law, even if the victims of abuse have no standing to bring an action in court.

Supreme Court Speaks

The U.S. Supreme Court delivered several setbacks to President Bush’s claims to

executive power. Yaser Hamdi was an American citizen who was captured in Afghanistan; when he was being held in Guantanamo, he filed for a writ of habeas corpus in order to challenge the right of the government to continue to hold him prisoner. In *Hamdi vs. Rumsfeld* (159 L.Ed. 2d 578, 2004) the Court ruled that Congress had authorized the war against al Qaeda and thus the president had the authority to detain enemy combatants to prevent them from returning to the battlefield, but that “indefinite detention for the purpose of interrogation is not authorized.”²⁸

It would seem that U.S. officials have the obligation to obey the law, even if the victims of abuse have no standing to bring an action in court.

The Court declared that “the most elemental of liberty interests” is “the interest in being free from physical detention by one’s own government [“without due process of law”] . . . history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat” Thus “we reaffirm today the fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law” This requirement of due process does not apply to “initial captures on the battlefield,” but “is due only when the determination is made to *continue* to hold those who have been seized.”²⁹ In making these judgments, the Court asserted that it had jurisdiction over exec-

utive branch imprisonments and that it was willing to enforce constitutional rights even during a time of war. In *Rasul v. Bush*, the Court held that noncitizens also had the right to challenge their imprisonment through a habeas corpus petition.³⁰

On the issue of whether the United States is permitted to try noncitizen enemy combatants by military commission, the Supreme Court in *Hamdan v. Rumsfeld* ruled in the negative, overturning a U.S. Court of Appeals decision.³¹ Hamdan was a Yemeni national who was captured in Afghanistan in November 2001 and turned over to U.S. forces. He was transported to Guantanamo, where he was charged with conspiracy to aid al Qaeda (as Osama bin Laden’s driver) and was going to be tried by a military commission established by President Bush.³²

Hamdan filed a habeas corpus petition, arguing that he was entitled to be tried under the requirements of Common Article 3 of the Third Geneva Convention and that the charge of conspiracy was not a violation of the law of war. Justice John Paul Stevens, writing for the Court, after ruling on standing and justiciability, concluded that the military commissions and procedures established by President Bush were not authorized by the Constitution or any U.S. law (not the Authorization to Use Military Force, the Detainee Treatment Act, nor the Uniform Code of Military Justice, UCMJ), and thus the President had to comply with existing U.S. laws. Stevens wrote that the “structures and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949.”³³

Part of the problem was that the accused could be excluded from being present or being told of the evidence used against him. Also, the commission could use any evidence that the presiding officer thought “would have probative value to a reasonable person,” and thus might include evidence coerced through torture. The commissions also violated the Geneva Convention Common Article 3 which provides that detainees, “as a minimum” are entitled to be tried “by a regularly consti-

tuted court affording all the judicial guarantees . . . recognized as an indispensable by civilized peoples.”³⁴ The court did not say that Hamdan could not be detained for the duration of the hostilities, but if the government wanted to try him for a crime, it had to use regularly constituted courts that comply with minimal requirements of procedural due process to do so. The court concluded: “Even assuming that Hamdan is a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment.”³⁵

Perhaps the most important principle established in these Supreme Court cases was Justice Sandra Day O’Conner’s statement in the majority opinion of the *Hamdi* case: “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”³⁶

Military Commissions Act of 2006

In order to overcome the roadblock that the Supreme Court decisions threw in the way of administration policy, President Bush sought legislation that would authorize the creation of military commissions and spell out limits on the rights of detainees. President Bush argued that the types of harsh interrogation methods that he termed “the program” used by the CIA to interrogate detainees were essential to the war on terror. But *Hamdan* had called into question whether these techniques were legal and entailed the possibility that those who administered them could be charged with crimes under U.S. law.

In its argument for Senate Bill 3930 the White House reversed its previous position against the Detainee Treatment Act (DTA) sponsored by McCain. The Office of Legal Counsel analysis argued that using the DTA as the basis for interrogation policy would give the CIA interrogators more leeway than Common Article 3 of the Geneva Conventions allowed. President Bush argued strongly for passage of the administration’s proposal, say-

ing that it would provide “intelligence professionals with the tools they need.”³⁷ The allowed interrogation techniques were not specified in the law, but were said to include prolonged sleep deprivation, stress positions and loud noises, but administration sources said that “waterboarding” (simulated drowning) would not be used in the future.

After several weeks of contentious debate between the two political parties, Senate Bill 3930 was passed by both houses of Congress. President Bush signed the Military Commissions Act of 2006 (Public Law 109-366) into law on October 17, 2006. The law gave the Bush administration most of what it wanted in order to enable it to deal with detainees in ways that were prohibited by the *Hamdan* ruling. The law authorized the president to establish military commissions to try alien detainees believed to be terrorists or unlawful enemy combatants. The law defined “enemy combatant” as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents,” or “a person who . . . has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal” established by the President or Secretary of Defense (Sec. 948a). These provisions seem to allow the possibility that U.S. citizens could be declared enemy combatants.

The law denied alien enemy combatants access to the courts for writs habeas corpus concerning “any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States.” (Sec. 7 (2)). The law forbids the use of testimony obtained through “torture,” and it specifically outlaws the more extreme forms of torture. The interrogation methods of statements that can be used against the accused also exclude those methods that “amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.” (Sec. 948r)

Critics complained, however, that this language did not amount to the acceptance of

Common Article 3 of the Geneva Conventions and might be interpreted to allow very harsh treatment that could amount to torture. Techniques such as stress positions, sleep deprivation or loud noises could amount to torture, said critics, depending on the intensity and duration of their use. Proponents of the act said that waterboarding was outlawed, but the terms of the law were not explicit on these techniques. Statements obtained with these methods could be used against a detainee if the presiding officer decides that the “interests of justice would best be served” and that “the totality of the circumstances renders the statement reliable and possessing sufficient probative value.” (Sec. 948r) Although some top-level military lawyers objected to parts of the administration’s bill, Department of Defense General Counsel William J. Haynes was able to convince the top service lawyers to sign a letter stating that they “do not object” to the section of the law concerning treatment of detainees. It did, however, take several hours in a meeting for Hayes to prevail in his efforts to get them to sign the letter.³⁸

Critics of the administration argued that the new law would allow U.S. forces to capture anyone declared an “enemy combatant” anywhere in the world, including those thought to have purposefully supported hostilities against U.S. cobelligerents, and hold them indefinitely. These suspects could be held without charges being filed against them, and subjected to harsh interrogation techniques with no recourse to the courts for writs of habeas corpus, and thus there would be no check on executive actions. Critics also questioned whether the law could suspend the writ of habeas corpus as the law purported to do.³⁹

Conclusion

In the end, practical and moral arguments against torture may be more compelling than legal analysis. McCain spoke to the efficacy of torture and said that when he was asked by the North Vietnamese for the names of the members of his squadron, he gave them the names of the offensive line of the Green Bay Packers. “It

seems probable to me that the terrorists we interrogate under less than humane standards of treatment are also likely to resort to deceptive answers;⁴⁰ McCain said in November 2005. Representative John P. Murtha, a former marine officer who served in Vietnam, who was the ranking minority member of the House Appropriations Defense Subcommittee, said that, aside from questions of efficacy, “Torture does not help us win the hearts and minds of the people it’s used against If we allow torture in any form, we abandon our honor.”⁴¹ Finally, as McCain asserted, “This is not about who our enemies are, it’s about who we are.”⁴² ♪

Endnotes:

- 1 Memorandum for the Vice President, et al., Subject: Humane Treatment of al Qaeda and Taliban Detainees (February 7, 2002), signed by President Bush. The memorandum is reproduced in Kareh J. Greenberg and Joshua L. Dratel, *The Torture Papers: The Road to Abu Ghraib* (NY: Cambridge University Press, 2005), pp. 134-135.
- 2 For full legal citations see: Robert K. Goldman and Brian D. Tittmore, “Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law,” (Washington, D.C.: American Society of International Law Task Force Paper, 2002., p. 2, note 2.]
- 3 On POWs see L.C. Green, *The Contemporary Law of Armed Conflict* (Manchester: Manchester University Press, 1993, pp. 188-206., p. 197.
- 4 Article 17, paragraph 4, quoted in Jennifer K. Elsea, “Lawfulness of Interrogation Techniques under the Geneva Conventions,” Washington: Congressional Research Service Report to Congress (RL32567), September 8, 2004, p. 2.
- 5 Goldman and Tittmore, “Unprivileged Combatants,” p. 11.
- 6 Green, *Contemporary Law of Armed Conflict*, p. 190.
- 7 Elsea, “Lawfulness of Interrogation Techniques,” p. 5.
- 8 U.S. Army Regulation 190-8, quoted in Elsea, “U.S. Treatment of Prisoners in Iraq: Selected Legal Issues,” Congressional Research Service Report for Congress (RL32395), December 2, 2004, p. 10.
- 9 Elsea, “Lawfulness of Interrogation Techniques,” p. 7.
- 10 Elsea, “Lawfulness of Interrogation Techniques,” p. 8.
- 11 U.S. Law of Land Warfare, Field Manual 27, paragraph 4(b), 7(c), quoted in L.C. Green, *The Contemporary Law of Armed Conflict* (NY: Manchester University Press, 1993), p. 31.
- 12 Elsea, “Lawfulness of Interrogation Techniques,” p. 9.
- 13 Robert K. Goldman and Brian D. Tittmore, “Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law,” (Washington, D.C.: American Society of International Law Task Force Paper, 2002, p. 38.
- 14 General Assembly Resolution 39/46, Annex, 39 U.. GAOR Sup. No. 51, U.N. Doc. A.39/51 (1984).
- 15 Elsea, “Lawfulness of Interrogation Techniques,” p. 9.
- 16 Goldman and Tittmore, “Unprivileged Combatants,” p. 49.
- 17 Robert K. Goldman and Brian D. Tittmore, “Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law,” (Washington, D.C.: American Society of International Law Task Force Paper, 2002., p. 49
- 18 18 U.S.C. par. 2340, quoted in Jennifer K. Elsea, “U.S. Treatment of Prisoners in Iraq: Selected Legal Issues” Congressional Research Service Report for Congress (RL32395) December 2, 2004), p. 14.
- 19 The War Crimes Act of 1996 defines war crimes as “grave breaches” of the Geneva Conventions and violations of Common Article 3. Source: P.L. 104-192, 110 Stat. 2104 (1996), 18 U.S.C. par. 2441. Elsea, “U.S. Treatment of Prisoners in Iraq: Selected Legal Issues” Congressional Research Service Report for Congress (RL32395) December 2, 2004), p. 11.
- 20 The Act defines cruel, inhuman, or degrading treatment as “the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution, as defined in the United State Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment of Punishment done at New York, December 10, 1984.” Source: “H.R. 2863, Department of Defense Appropriations Ace, 2006 (Enrolled as Agreed to or Passed by Both House and Senate).” Found at <http://thomas.loc.gov/cgi-bin/query/F?c109:7./temp/~c109yVTxt7:e189414>:
- 21 Josh White, “President Relents, Backs Torture Ban,” *Washington Post* (December 16, 2005), p. 1.
- 22 That is, if the U.S. person undertakes interrogation practices that “were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful.” Source: “H.R. 2863, Department of Defense Appropriations Ace, 2006 (Enrolled as Agreed to or Passed by Both House and Senate).” Found at <http://thomas.loc.gov/cgi-bin/query/F?c109:7./temp/~c109yVTxt7:e189414>
- 23 The argument that the president’s intent should be given equal weight with congressional intent when interpreting the law is undermined by the first words of Article I of the Constitution, “All legislative Powers herein granted shall be vested in a Congress of the United States” For an analysis of signing statements, see Phillip J. Cooper, “George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements,” *Presidential Studies Quarterly* Vol. 35, No. 3 (September 2005), pp. 515-532.
- 24 The White House, “President’s Statement on Signing of H.R. 2863, the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006.” December 30, 2005. Found on White House Web site, <http://www.whitehouse.gov>.
- 25 For analysis of these constitutional issues see, James P. Pfiffner, “Torture and Public Policy,” *Public Integrity* Vol. 7, no. 4 (Fall 2005), pp. 313-330.
- 26 Even though Iraq was officially covered by the Geneva Conventions, the Schlesinger Report concluded that the techniques used at Guantanamo migrated to Abu Ghraib.
- 27 Josh White and Carol D. Leonnig, “U.S. Cites Exception in Torture Ban,” *Washington Post* (March 3, 2006), p. A4.
- 28 *Hamdi et al. v. Rumsfeld*, 159 L.Ed. 2d 578, 2004.
- 29 *Hamdi et al. v. Rumsfeld, Secretary of Defense* 159 Lawyers Edition 2nd 578 (2004).
- 30 *Rasul V. Bush* (159 L. Ed. 2nd 548 (2004).
- 31 *Hamdan v. Rumsfeld*, No. 05-184 (decided June 29, 2006), Slip Opinion, Supreme Court Web site.
- 32 The commissions were established by Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” Federal Register: Vo. 66, no. 222 (November 16, 2001), pp. 57831-57836.
- 33 Slip Opinion, p. 4.
- 34 Slip Opinion, pp. 4, 6
- 35 Slip Opinion, p. 7.
- 36 *Hamdi et al. v. Rumsfeld*, Secretary of Defense 159 Lawyers Edition 2nd 578 (2004). In remarks after she had retired from the Supreme Court, Justice O’Conner said about the intimidation of federal judges, “we must be ever-vigilant against those who would strongarm the judiciary into adopting their preferred policies. It takes a lot of degeneration before a country falls into dictatorship, but we should avoid these ends by avoiding these beginnings.” Her remarks were reported by Nina Totenberg of National Public Radio according to Raw Story, “Retired Supreme Court Justice hits attacks on courts and warns of dictatorship,” (March 10, 2006), Web site: rawstory.com.
- 37 R. Jeffrey Smith, “Beehind the Debate, CIA Techniques of Extreme Discomfort,” *Washington Post* (September 16, 2006), p. A3; R. Jeffrey Smith, “Detainee Measure to Have Fewer Restrictions,” *Washington Post* (September 26, 2006), p. 1; Charles Babington and Jonathan Weisman, “Senate Approves Detainee Bill Backed by Bush,” *Washington Post* (September 29, 2006), p. 1.
- 38 Mark Mazzetti and Neil A. Lewis, “Military Lawyers Caught in the Middle on Tribunals,” *New York Times* (September 16, 2006), p. 1, A11.
- 39 See Scott Shane and Adam Liptak, “Shifting Power To a President,” *New York Times* (September 30, 2006), p. 1; Kate Zernike, “Senate Approves Broad New Rules to Try Detainees,” *New York Times* (September 29, 2006), p. 1; Tim Grieve, “The pres-



James Pfiffner is a professor at George Mason University School of Public Policy. He is a leading authority on public management, American presidents, and the American system of government. He has published ten books and lectures extensively on these topics to audiences in Europe and in the United States.

ident's power to imprison people forever," Salon, (September 26, 2006); Michael A. Fletcher, "Bush Signs Terrorism Measure," *Washington Post* (October 18, 2006), p. A4.

- 40 Scott Shane, "McCain Pays A Tribute At Funeral Of Ex-P.O.W.," *New York Times* (December 15, 2005), p. A14.
- 41 Eric Schmitt, "House Backs Ban on Inmate Abuse," *New York Times* (December 15, 2005), p. 1, A14.
- 42 Scott Shane, "McCain Pays A Tribute At Funeral Of Ex-P.O.W.," *New York Times* (December 15, 2005), p. A14.

Human Rights and Counterterrorism: A Tale of Two Districts

by Michael I. Krauss

The First Amendment gives more extensive protection to those who are not government employees, so any restriction on their freedom to publish information must be narrowly drawn and subject to “close judicial scrutiny.”

Sometimes it seems that our country is composed of two contingents that have no common understanding of the crucial nexus between our ongoing war on Islamist terrorism and our need to protect the human rights that the Islamist terrorists wish to eradicate. Two federal district court rulings—one in Virginia and one in Michigan, rendered within days of each other in August 2006—are poster children for this division of our society. I believe that both decisions are incorrect. One is a careful literalist opinion that gives too short shrift, in my opinion, to fundamental individual rights; the other is a stunning piece of judicial activism that abstracts totally from the fact that our country is involved in a war against those who would obliterate these rights.

***United States v. Rosen*¹: Espionage, or Exercise of the First Amendment?**

This case involves two former employees of the American Israel Public Affairs Committee, a political action committee that exists to publicize to Congress and the American public the defense needs of the State of Israel and what it describes as a moral and historical affinity between our country and the Jewish state.² The two employees were charged with conspiring to communicate “information relating to the national defense” to a person “not entitled to receive it,” in violation of Section 793 of the Espionage Act.³ From the charge, one might imagine that the defendants snuck onto a secret military installation and took secret photographs, which they then proceeded to sell to a foreign nation. The defendants did nothing of the sort. They were charged with doing what lobbyists, reporters, researchers and authors do all the time:

contacting government employees to elicit useful information.

The indictment lists many meetings between the lobbyists and an employee of the U.S. Department of Defense. Some meetings were by phone, and other meetings were at a baseball stadium and a train station, where the DOD employee allegedly gave classified information to lobbyists. The defendants allegedly turned over the information to their superiors at AIPAC and to a “senior fellow at a Washington, D.C. think tank.” The lobbyists moved to dismiss the case, arguing that either Section 793 did not cover their behavior or was void as violative of their First Amendment rights to free speech and to petition the government.⁴ The motion to dismiss was filed by a group of distinguished attorneys that included Viet Dinh, a former U.S. assistant attorney general for legal policy, who was largely responsible for the drafting of the Patriot Act.⁵

On August 9, 2006, in the Eastern District of Virginia, Judge T.S. Ellis III denied the defendants’ motion to dismiss the case. The judge conceded that most defendants under the Espionage Act are government employees who have taken oaths of secrecy (such as the DOD employee, who had already pleaded guilty in a different proceeding). Government employees have diminished First Amendment rights, and may clearly be subjected to prosecution if they abuse their position of trust to disclose national security information to someone not entitled to receive it.⁶ The judge concluded that the plain text of Section 793, which has remained “largely unchanged since the administration of William Howard Taft,”⁷ applied to people outside government as well. He found this obligation allowed under the Constitution

both by “common sense” and by “the relevant precedent.”⁸ The First Amendment gives more extensive protection to those who are not government employees, so any restriction on their freedom to publish information must be narrowly drawn and subject to “close judicial scrutiny.”⁹ The judge’s scrutiny was not, however, as close as the defendants wished. So long as the recipient knows that he or she is receiving national defense-related information that the provider of the information was not legally entitled to communicate, and so long as the information “could cause injury to the nation’s security,”¹⁰ the outside recipient who recommunicates the information is committing espionage. Ellis balanced the sweep of government’s legitimate interest in protecting the national security against the fear that might be engendered in anyone who communicates with a government employee, and found that the law’s “effect on First Amendment freedoms is neither real nor substantial as judged in relation to this legitimate sweep.”¹¹

The judge was troubled by his ruling, and he invited Congress to review and revise the statute.¹² The defendants were researching a national security issue (the Pentagon’s attitude toward Israel, compared with its attitude toward Arab states) in order to do their job—to petition the federal government on behalf of American citizens favorable to Israel. They found a DOD employee so disgruntled about his employer’s recent behavior that he was willing to leak it to these lobbyists. Similarly, any journalist or author looking into national security questions now risks indictment if his or her research results in the disclosure of classified material. In *Rosen* the details of what was disclosed by the AIPAC lobbyists remains unpublished; we know only that some of it pertained to “a foreign government’s [Iran’s?] covert actions in Iraq” and to “potential attacks upon United States forces in Iraq.”¹³ Presumably the information released by the press almost every day about secret prisons in Eastern Europe, or about mining of data from select international phone calls, or about tracking certain interna-

tional money transactions, are even more obvious violations of the Espionage Act.

The defendants in *Rosen* did not republish any secret document or produce any tape or “smoking gun.” They were given what Ellis called “intangible information”—they repeated what they were told about American defense operations. Judge Ellis held that when intangible information is disclosed, the government must prove that defendants had “reason to believe the disclosure could harm the United States or aid a foreign government”¹⁴ in order to obtain a conviction under Section 793. Defendants must have either intended this harm/aid or been in reckless disregard of it.¹⁵ This does not seem to immunize newspapers that publish, for example, information about secret prisons—even if their principal purpose is to inform the American public, the newspapers know or should know (and therefore are presumably at least recklessly indifferent to the fact) that the revelation of this classified information will help enemy states. Indeed, in *Rosen*, defendants’ primary purpose was to do their job. To more effectively lobby the American government about its support of Israel, they needed to know as much Israel-related information as they could find.

What if the *New York Times* had been prosecuted instead of AIPAC? Would the former have received constitutional protection that has now been denied the latter, even though petitioning the government is explicitly protected by the First Amendment? It is highly significant that two individual lobbyists who did nothing more than receive and use classified information from a disgruntled defense employee are prosecuted for using it, while newspapers that routinely do exactly the same thing continue unmolested. The former, unlike the latter, can ill afford the legal fees that are required now that a full trial has been ordered. Will they be tempted to plea bargain to avoid a lengthy prison term? If they do, a travesty of individual rights may have occurred here. Ellis was clearly uncomfortable with these implications. But I submit he could have interpreted the First Amendment

more extensively than he chose to do. He could have held that the plain meaning of Section 793 cannot withstand constitutional scrutiny in cases such as *Rosen*.

ACLU v NSA¹⁶: War on Terror? What War on Terror?

In a stunning ruling on August 17, 2006, Eastern District of Michigan Senior Judge Anna Diggs Taylor ruled that the warrantless surveillance of international phone calls between foreign Al Qaeda members located abroad and “U.S. persons” by the National Security Administration is an unconstitutional violation of the Fourth and First amendments. This decision—perhaps the most poorly reasoned federal court ruling this author has ever read—contrasts markedly with the carefully articulated view of Judge Ellis, who in my opinion nonetheless errs in favor of the government. Here, though, Judge Taylor has concocted an absurdity.

Taylor discusses at length “The History of Electronic Surveillance in America.”¹⁷ She gets this history all wrong, though. She averred that the *Katz* case in 1967¹⁸ held that wiretaps “conducted without prior approval by a judge or magistrate were per se unreasonable”—but she omitted footnote 23 of *Katz*, which expressly exempted “national security” wiretaps from the entire holding.¹⁹ She relies repeatedly on the 1972 *Keith* case²⁰ to support her ruling—but *Keith* required warrants only for *purely domestic* national security wiretaps, and expressly declined to rule on “the activities of foreign powers, within or without this country,” or their “agents” inside the United States. In the 1990 *Verdugo* case, the Supreme Court held that the Fourth Amendment does not apply to “actions of the Federal Government against aliens outside the United States territory,”²¹ which arguably immunizes the NSA program—all phone intercepts took place abroad. As no warrant was needed to listen in on Al Qaeda abroad, the fact that one party is located in the United States is purely collateral.²²

Taylor outlandishly opined that the Fourth Amendment “requires prior warrants for any reasonable search, based on prior-

existing probable cause.”²² As my colleague Robert Turner of the University of Virginia has pointed out,²³ it is established that airport screenings are Fourth Amendment “searches,” and firearms are found in only about 0.0004 percent of searches—hardly “probable cause.” Judge Taylor’s ruling would shut down the airline industry.

Taylor also held that the National Security Agency’s electronic surveillance program also violates the *First* Amendment by abridging the freedom of speech of those who, inside the United States, communicate with Al Qaeda operatives abroad. Taylor claimed this conclusion followed from the *Bates* case, where the Supreme Court struck down an Arkansas requirement that the National Association for the Advancement of Colored People submit a list of its members to a government body.²⁵ *Bates* correctly found that the government may not frighten off potential members and contributors to the NAACP.²⁶ Judge Taylor seems here to believe that for this reason the government may not try to frighten off potential members and contributors to Al Qaeda. And, of course, the Little Rock publication requirement was overt while the NSA program was covert, so the entire basis of the *Bates* analogy is flawed.

Taylor invoked the Constitution’s separation of powers to ground her argument, claiming that the president must “faithfully execute” all laws, including the Foreign Intelligence Surveillance Act (FISA), which establishes a mandatory procedure for national security wiretaps. Incredibly, Taylor declined to decide whether or not the FISA was unconstitutional to the extent it infringed on inherent presidential power, calling that question “irrelevant.”²⁷ She failed to recall that:

- *Federalist 64*²⁸ left the president free “to manage the business of intelligence in such a manner as prudence may suggest.”
- Upon enactment of the FISA, President Carter’s Attorney General Griffin Bell insisted that the law would not deprive

No governmental
interest is stronger
than national security.

the president of his constitutional powers (as a Carter campaign worker and Carter judicial appointment, the judge might perhaps have remembered this).

- The FISA-established federal appeals panel noted in 2002 that, FISA notwithstanding, every court ever to consider the issue has found that “the president did have inherent authority to conduct warrantless searches to obtain foreign intelligence information.”²⁹

Taylor blithely concluded that searches always require “probable cause” and “warrants.” Her conclusion blissfully ignored Supreme Court decisions allowing many kinds of searches in the absence of one or both.³⁰ From health inspections to sobriety checkpoints to airport and border searches, inspections have been allowed. The *Von Raab* case itself quoted from a 1974 case in which the court held, “When the risk is the jeopardy to hundreds of human lives and millions of dollars of property interest in the pirating or blowing up of a large airplane, that danger alone meets the test of reasonableness.”³¹

Finally, Taylor acknowledged that the “state secrets privilege” requires a judge to dismiss a case if the “very subject matter of the action” is a state secret.³² But since the government admitted that the NSA program existed, the judge concluded it was no longer “secret,” even though its details (who was being listened to, when, and

how) remain classified. Time after time after time, the Supreme Court has indicated that in cases involving safety, the balance between governmental interests and individual privacy can justify warrantless searches.³³ No governmental interest is stronger than national security.

Judicial Watch has revealed³⁴ that, according to her 2003 and 2004 financial disclosure statements, Taylor served as secretary and trustee for the *Community Foundation for Southeast Michigan* (CFSM). She was reelected to both positions in 2005. CFSM made a recent grant of \$45,000 to the American Civil Liberties Union of Michigan, a plaintiff in this case. According to CFSM’s Web site, “The Foundation’s trustees make all funding decisions at meetings held on a quarterly basis.” [CFSM donated \$180,000 in 2003 to the Arab Community Center for Social and Economic Service, a defendant in another case on Taylor’s docket.³⁵] There is no indication that the judge informed the parties of her connection here, which might well have prompted a recusal motion. This does not appear to explicitly violate canons of judicial ethics, but it does give the appearance of bias. Many judges probably either belong to the ACLU or have given it some support, but in this case Taylor, as an officer of an organization that is a major benefactor to the Michigan chapter, has presided over a lawsuit the Michigan chapter brought.

Conclusion

Within three weeks, one carefully reasoned district court opinion arguably gave too little weight to the First Amendment, while a second ruling from a different district court arguably gave no weight at all to precedent or to the president’s constitutional role defending national security. Both cases are being appealed, and the



Michael I. Krauss is a professor of law at George Mason University School of Law; a member of the board of governors of the National Association of Scholars; and a fellow of the Foundation for the Defense of Democracy (DC), Manhattan Institute (NY), and Virginia Institute for Public Policy.

NSA case will surely be overturned. Thankfully, a circuit court panel quickly suspended its effect.³⁶ For now, the simultaneous publication of both decisions highlights the tremendous division in American politics and law—how to reconcile individual rights with an unprecedented war on terror. ☞

Endnotes:

- 1 No. 1:05CR225, 2006 U.S. Dist. LEXIS 56443 (E.D. Va. Aug. 9, 2006).
- 2 American Israel Public Affairs Committee, Who We Are, <http://www.aipac.org/whoWeAre.cfm> (last visited Oct. 8, 2006).
- 3 18 U.S.C. § 793 (2000).
- 4 *Rosen*, 2006 U.S. Dist. LEXIS 56443, at *11-12, 22.
- 5 Pub. L. No. 107-56, 115 Stat. 272.
- 6 *Rosen*, 2005 U.S. Dist. LEIX 56443, at *90.
- 7 *Id.* at *121.
- 8 *Id.* at *94-95.
- 9 *Id.* at *82.
- 10 *Id.* at *112-13.
- 11 *Id.* at *113-14.
- 12 *Id.* at *121-22.
- 13 *Id.* at *8, 9.
- 14 *Id.* at *88.
- 15 *See id.* at *57.
- 16 438 F. Supp. 2d 754 (E.D. Mich. 2006).
- 17 *Id.* at 771-73.
- 18 *Katz v. United States*, 389 U.S. 347 (1967).
- 19 *Id.* at 358 n.23.
- 20 *United States v. United States Dist. Court*, 407 U.S. 297 (1972).
- 21 *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990).
- 22 If a wiretap is legal, it may also record the statements of every person who communicates with the legally wiretapped individual, without showing any second “probable cause.”
- 23 *ACLU*, 438 F. Supp. 2d at 775.
- 24 R. Turner, “Shaky Surveillance Ruling,” *Washington Times*, August 27, 2006, p. A15.
- 25 *ACLU*, 438 F. Supp. 2d at 776 (referencing *Bates v. City of Little Rock*, 361 U.S. 516 (1960)).
- 26 *Bates*, 361 U.S. at 527.
- 27 *ACLU*, 438 F. Supp. 2d at 781.
- 28 THE FEDERALIST No. 64 (John Jay).
- 29 *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002).
- 30 *E.g.*, *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).
- 31 *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974).
- 32 *ACLU*, 438 F. Supp. 2d at 762 (citing *Kasza v. Browner*, 133 F.2d 1159, 1166 (9th Cir. 1998)).
- 33 *See, e.g.*, *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).
- 34 <http://www.judicialwatch.org/5862.shtml>
- 35 Case 06-10968, Mich. E.D.
- 36 *ACLU v. NSA*, No. 06-2095, 2006 WL 2827166 (6th Cir. Oct. 4, 2006) (granting a stay of the district court’s order pending appeal).

Book Review

by Stuart S. Malawer

TO OPPOSE ANY FOE—The Legacy of U.S. Intervention in Vietnam.

Edited by Ross A. Fisher, John Norton Moore and Robert F. Turner. (Carolina Academic Press, 2006)

Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe, to assure the survival and success of liberty.

—From John F. Kennedy's Inaugural Address, January 21, 1961.

How dated this quote now sounds: "To assure the survival and success of liberty." Didn't that attitude get us into Vietnam, and now Iraq? Isn't the foe today global terrorism, not another nation? This book examines the influences of the Vietnam War on contemporary policy issues. The editors intend that the reader assess the Zeitgeist of the Vietnam era and its implication for American foreign policy almost a half a century later.

Most of the book's essays were written for a fifteen-year University of Virginia Law School seminar on the Indochina War. Professors John Norton Moore and Robert F. Turner, cofounders of the U.Va. Center for National Security Law, taught the seminar.

The book contains three sections assessing the historical, legal and contemporary aspects of the U.S. intervention in Vietnam. The historical section of the Vietnam legacy contains essays on the Kennedy administration, global security, the Paris Agreement, and the Khmer Rouge and Cambodia. The legal legacy section has essays on early legal advice, naval interception and command responsibility (My Lai). The third segment on con-

temporary policies has essays on gradualism and Somalia.

The book could have benefited from a general conclusion about the implications of Vietnam on current policy. Nevertheless, the individual essays are uniformly excellent and present an informative interdisciplinary discussion of the Vietnam War's aftermath. Ross Fisher, in his insightful and chilling essay on the Kennedy administration and the overthrow of President Ngo Dinh Diem, concludes that had Diem lived, American involvement in Vietnam would have been substantially different. How many American lives could have been saved if that had been the case?