# COMMITTEE NEWSLETTER | WINTER 2017

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The Other Cyber War: Law Enforcement Access to Transnational Digital Information

By Timothy P. Zintak, J.D., M.S.F.S.

Much of the press, academia, and public attention surrounding cybersecurity has focused on two fronts, the first being the limits and privacy concerns collection of data by government intelligence agencies, and the second being the use of internet connectivity by nation states, criminals, or non-state/terrorist actors to ‘hack’ into private or government computer systems for illicit gain. And this focus is for good reason; these areas will continue to be major sources of cyber-related security challenges for the foreseeable future.

But on a less public front, another cyber war continues to emerge, a cyber war whose major players includes some of the most economically developed and influential countries on the planet, often pitting longstanding allies against each other. This battle is over which government or governments, and under what procedural and factual circumstances, can use legal process to access data which crosses international boundaries for law enforcement purposes.

Like the other cyber conflicts which implicate national, homeland, and criminal security concerns, the problem is driven by technological growth and an erosion of international borders when data is concerned. In the past, the traditional notion of territorial jurisdiction logically applied to search warrants and subpoenas: if relevant records were physically located in Country A, the courts and/or law enforcement officials in Country A had the lawful authority to order those records produced subject to the procedures and protections of Country A’s laws (probable cause, privacy considerations, warrants, etc.). If law enforcement officials from Country B wanted to see those records in Country A, Country B’s officials would typically need assistance from Country A to get those documents. The traditional letters rogatory process used (time-consuming) diplomatic channels to allow letters from a court of one country’s jurisdiction to make a request for assistance from the courts of another. Today’s globe-crossing web of bilateral and multilateral Mutual Legal Assistance Treaties, or MLATs, are intended improvements on this system which allow non-judicial government officials of one country to contact the other outside of formal diplomacy to ask for the assistance in obtaining these materials.

As history progressed into the growth of transnational corporations, especially in the finance and banking sector, the problem with this initial model became more evident – companies doing business in Country A and in Country B could physically keep records in Country B of activity done in Country A. In response to this, various court cases established a balancing test to deal with potential conflicts of laws and other parameters of when a person (actual or corporate) could be compelled to produce evidence located outside of the United States. The state of the law today can best be explained by the balancing test of Restat. 3d of the Foreign Relations Law of the U.S., § 442, “Requests for Disclosure: Law of the United States”.

The technological innovations of internet-based communication and data storage have exponentially compounded the complexity of transnational record keeping. Today, an email message sent from one person to another in the same country may transit through one or more
third countries. Internet-based data storage providers frequently own data storage servers which are located outside of the United States for cost-effectiveness purposes. Further, cloud-based data services may partition an individual database into parts and store those

Instead of primarily consisting of attack and surveillance technologies, the main tools of battle in this cyber war are investigative and grand jury subpoenas, search warrants, Stored Communications Act processes, and their counterparts in non-U.S. jurisdictions. Some governments, like the United Kingdom and Brazil, have gone so far as to legislate that all businesses operating in their jurisdiction are subject to production of all stored content of that business, wherever in the world that data is stored. In response to this compelled production of evidence for law enforcement purposes, many countries have imposed direct blocking statutes which make it illegal for any person to submit evidence out of the jurisdiction to comply with another court’s Other responses from various frustrated governments have included personal “contempt of court”-like consequences for noncompliance against individuals, mandatory anti-encryption processes (colloquially known as “back doors”) to facilitate access, and even some “hacking” like software to access data without legal process.

But perhaps the most relevant defense against legally-compelled production of transnational data is mandatory data localization legislation. Such laws and/or regulatory schemes mandate that content/communications of a country’s residents remain stored in that country. This imposes costs of compliance and increases the number of copies that must be retained of relevant data. Such data localization provisions have been floated as potential programs under free trade and investment treaties, such as TPP, TTIP, etc., but the economic downsides to this compulsion could have serious negative impacts on such prospects. In a similar fashion, the European Parliament of the EU has recently issued a new directive which intends to create a system where non-EU law enforcement mechanisms seeking EU data would need to make those requests through already-existing MLAT processes, not extraterritorially.

While the battles rage on between governments, other actors remain deeply involved. Privacy advocates have been concerned that, given the greater number of states involved in potentially exercising judicial process for disclosure of these materials (especially states with serious due process deficiencies), the potential for rights abuses have increased. Frequently caught in the middle of this other cyber war are internet service providers and social media networks, who have to choose between violating a court order to produce documents in one country or violating a law in the country where the data is stored which prohibits the extraterritorial production of that data.

The consequences of this situation, if left unchecked, could lead to a fractious internet with omnipresent data localization requirements, constant blocking statutes, and fewer transnational crimes investigated, solved, and prosecuted. A recent case which rejected a Stored Communications Act request to search emails stored on a server in Ireland shows that the ability of the judiciary to grapple with these contentious challenges is not effective, and that legislative instruction was a necessity to clarify the situation. See In re Warrant to Search a Certain E-mail Account Controlled & Maintained by Microsoft Corp., 829 F.3d 197 (2d Cir. 2016).

What are the potential solutions to this problem, one which will likely only worsen as technology advances? Some have discussed a multilateral, global-scope treaty which would set the
standards and provide a system of due process. Others, concerned that the protections for privacy would still be watered down in such a broad-based treaty, have contemplated a bilateral or small-scale, MLAT-like approach governing how data would be shared. Such a system would be labor-intensive, but could tailor relations between a few nations with similar privacy protections and be institution-specific. Such a provision is being considered between the United States and the United Kingdom.

The future of law enforcement access to transnational data is unclear, but the growing role of the internet and transnational data flows suggests that the Other Cyber War may continue to escalate before there are more concrete steps to address it.


Timothy P. Zintak currently works in Office of the Special Prosecutor, Republic of Palau, Koror, Republic of Palau.
NEWS AND ANNOUNCEMENTS >>

Homeland and National Security Committee Event Review – Enemy at the Gate: Emerging Security, Economic, and Legal Challenges to Airport Security

The American Bar Association Young Lawyers Division Homeland and National Security Committee (ABA YLD HNSC) had the privilege to coordinate as the sponsoring committee an exceptionally well-attended and fascinating event. Titled *Enemy at the Gate: Emerging Security, Economic, and Legal Challenges to Airport Security*, the event took place on Friday, October 21, 2016 as a part of the ABA YLD 2016 Fall Meeting in Detroit, Michigan. The event was co-sponsored by the ABA YLD Air and Space Law Committee.

The topic was a timely one for the future of security in the civilian aviation sector. Considering the impact of the Brussels and Istanbul attacks directed at airports prior to embarkation, combined with the recent surge in wait times in airport security lines with the TSA, the goals, methods, and legal mandates for airport security have come under recent scrutiny. As the United States leads the globe in air transit, carrying 798,230,000 air passengers in 2015 (World Bank), the vital international infrastructure of airports requires new focus to promote secure travel from the pre-security concourse to the destination baggage claim. The difficult legal prospect is to promote equitable treatment and efficiency while maintaining security best practices.

Detroit Metropolitan Wayne County Airport is one of the major international air hubs for the United States. Also noteworthy for the Greater Detroit and Michigan area are the Michigan community of Middle Eastern recent immigrants and descendants, with an eye towards anti discrimination issues, and the arrest and trial in federal court in Michigan of the Eastern District of Michigan of Umar Farouk Abdulmutallab, the attempted airline bomber apprehended on Christmas Day, 2009.

The program was certified for Continuing Legal Education credit, and consisted of a panel of three experts in the fields related to airport security and a moderator who is also a leader in the ABA YLD. The biographies of the panelists and moderator are given below.

Panelist: Mr. Kevin G. Houlihan, Esq.

Kevin Houlihan serves as Assistant Chief Counsel for Transportation Security Litigation in the Office of Chief Counsel for the Transportation Security Administration, U.S. Department of Homeland Security. Kevin served as Senior Counsel and lead TSA attorney for In re September 11th Litigation, the consolidated tort litigation involving claims arising out of the terrorist-related aircraft crashes of September 11, 2001. Kevin has also served as Special Legal Assistant to the Chief Counsel and Attorney-Advisor in TSA’s Enforcement Division. Prior to joining TSA, Kevin was as a manager for the Center for Economic Organizing working with the Office of the Election Officer appointed by the U.S. District Court for the Southern District of New York to ensure free and fair elections for the International Brotherhood of Teamsters. Kevin attended Queen Mary, University of London, as a Drapers’ Scholar and earned an LL.M. in Comparative Law. He obtained his J.D. from the College of William & Mary, and has M.A. and B.A. degrees in English Literature from George Mason University.
Panelist: Brigadier General Michael C.H. McDaniel

Brigadier General Michael C.H. McDaniel joined the Cooley Law School full-time faculty as a professor in the Constitutional Law Department in 2010. He will be responsible for developing an LL.M. program in Homeland Security Law.

McDaniel most recently served as the Deputy Assistant Secretary for Homeland Defense Strategy, Prevention and Mission Assurance. His responsibilities included supervision of the Department of Defense Critical Infrastructure Protection Program and Global Anti-Terrorism/Force Protection Policy.

McDaniel was appointed by Michigan Gov. Jennifer Granholm as her Homeland Security Advisor in 2003 and served in that capacity until July 2009. At the same time, he also served as the Assistant Adjutant General for Homeland Security, Michigan National Guard.

He served as the liaison between the governor’s office in Michigan and all federal, state and local agencies on homeland security with responsibility for developing statewide policy on homeland security preparedness. His duties included coordinating efforts to protect the state and its critical infrastructure from terrorist attacks.

McDaniel served as a member of the National Governors Association’s Homeland Security Advisors Council where he was elected to the Executive Committee in 2006 and 2008. He was named by the Office of Infrastructure Protection, Department of Homeland Security, as Chair of the State, Local, Tribal, and Territorial Government Coordinating council in 2007.

McDaniel was promoted to Brigadier General in 2007 and has been a member of the Michigan National Guard for over 26 years, previously serving as a military judge. He was formerly the Assistant Attorney General for Litigation in the executive division of the Michigan Department of Attorney General.

He received the Zimbardo Award, given to the Center for Homeland Defense and Security graduate who best embodies high academic achievement, outstanding leadership, and innovation in homeland security thinking.

Panelist: Lena F. Masri, Esq.

Lena F. Masri, Esq., Senior Staff Attorney for the Council on American-Islamic Relations, Michigan (CAIR-MI), focuses her practice in the area of civil rights litigation.

She is licensed to practice law in Michigan, New York, and Washington, D.C. She has been admitted to practice in the Michigan Supreme Court, the New York Court of Appeals, the District of Columbia Court of Appeals, the 6th Circuit Court of Appeals, the U.S. District Court for the District of Columbia, the U.S. District Court for the Eastern District of Michigan, and the U.S. District Court for the Western District of Michigan. She holds a Juris Doctorate degree from Indiana University - Indianapolis, School of Law, where she focused her studies in International
& Comparative Law and International Human Rights Law. She received her Bachelor of Arts degree in Political Science and Near Eastern Studies from the University of Michigan.

In 2014, she was awarded the RARE Everyday Hero Award by Winning Futures for her “extraordinary commitment, integrity, selflessness and courage to changing lives and inspiring others.” She has also been honored by the U.S. District Court for the Eastern District of Michigan in 2013 and 2014 for her pro bono work on behalf of poor and indigent clients. She was awarded the Norman Lefstein Award of Excellence as a Gold Level Participant in the Pro Bono program and a Certificate of Recognition for United Nations Human Rights Reporting Initiative & Advocacy. She has also been recognized by several community organizations, including the Syrian American Medical Society, Syrian Expatriates, the American Muslim Diversity Association, among others, for her civil rights and humanitarian work and empowering the youth.

Prior to joining CAIR-MI, she worked in different areas pertaining to national security, and international human rights, including ethnic cleansing, genocide, enforced disappearances, arbitrary detentions, torture, use of child soldiers, money laundering, and sex trafficking. She holds a Certificate from the University of Oxford in Investigating, Monitoring, and Reporting on Human Rights Violations. In 2008, she principally authored and presented a shadow report to the United Nations Committee on the Elimination of Racial Discrimination and delivered a speech before the United Nations Special Rapporteur on Contemporary Forms of Racism, concerning U.S. violations related to arbitrary arrests and detentions, use of secret evidence in closed proceedings, secret detentions, refoulement, and proxy torture.

She has worked with the Center for Justice & Accountability in San Francisco, California; Akeel & Valentine, PLC, in Birmingham, Michigan; the Neighborhood Christian Legal Clinic in Indianapolis, Indiana; and the Oakland County Circuit Court in Pontiac, Michigan.

She has lectured across the United States on issues related to human rights, civil rights, and Islam. She was featured in several documentaries and on major media outlets including Michigan Lawyers Weekly, Huffington Post, HBO, FOX, CBS, Al Jazeera, the Associated Press, National Public Radio, WWJ Radio, the Detroit Free Press, the Detroit News, and HuffPost Live.

In addition to her work with CAIR-MI, she serves as a volunteer attorney for the Family Law Assistance Project, the Legal Aid Defender Association, and Lakeshore Legal Aid, representing poor and indigent clients and victims of domestic violence.

**Moderator: Dayan M. Hochman**

Dayan M. Hochman is an associate at the Washington DC office of Eckert Seamans, Cherin & Merlott, LLC practicing in the firm’s aviation regulatory group. She is a 2015 graduate of the Master’s in Law program at the McGill University Institute of Air & Space Law in Montreal, Canada specializing in aviation safety and security issues. She is also a former Chair of the American Bar Association Young Lawyers Division Air & Space Law Committee and YLD Scholar. Dayan is currently licensed to practice law in the State of New Mexico and is pending admission to the District of Columbia.
We of the HNSC leadership are proud of this exceptional program and expect to continue to offer content-rich programs and opportunities in the future. A review of primary source materials and topics of discussion for the event is available for download at www.americanbar.org/content/dam/aba/administrative/young_lawyers/committee_newsletters/HNSC%20CLE%20Airport%20Security%20Fall%202016%20Materials.pdf. For more information on the ABA YLD HNSC, visit http://www.americanbar.org/groups/young_lawyers/committees/homeland_security.html.

The HNSC offers our sincere thanks to our panelists, our moderator, and for the assistance of ABA YLD headquarters staff and ABA YLD Air and Space Committee Chair Philippine Dumoulin for their assistance in coordinating and participating in such a tremendous panel.

Homeland and National Security Committee Event Preview – Aviation, Regulatory and Security Issues with the Growth in Drone Use

Building on its successful event at the Fall Conference in Detroit, the American Bar Association Young Lawyers Division Homeland and National Security Committee (ABA YLD HNSC) is excited to co-sponsor an event on drone aircraft spearheaded by the ABA YLD Air and Space Law Committee.

“It's a Bird... It's a Plane... No, It's a Drone! The Integration of Unmanned Aircraft Systems in the National Airspace System – Legal Challenges, Security Risks, and Opportunities for Growth,” is scheduled for the upcoming ABA Young Lawyers Division Spring Conference in Montreal, QC. It is set for Friday, May 5, 2017 between 10:45am and 11:45am at Le Westin Montreal (270 Saint-Antoine Quest, Montreal, QC H2Y OA3 Canada).

The panel will be comprised of Leslie Cary, Programme Manager, RPAS at ICAO in Montreal, QC; Kenneth Quinn, Partner and head of the Aviation practice at Pillsbury Winthrop Shaw Pittman LLP in Washington, DC; Ayman Idlbi, Avocat at Norton Rose Fullbright Canada in Montreal, QC; and Rene David-Cooper, Judicial Law Clerk at the Federal Court of Appeal in Ottawa, ON.

The topics to be covered are highly relevant. Unmanned aircraft systems (UAS) continue to become more prevalent in the national airspace system (NAS). The U.S. commercial drone sector is expected to create more than $80 billion in economic impact through 2025, creating thousands of jobs. With the FAA’s new rule for the commercial operations of small UAS (also called drones), which took effect on August 29, 2016, and the expected FAA Notice of Proposed Rulemaking for UAS operations over people, challenges and opportunities of regulating UAS is a primary concern for both the UAS industry, regulators, and aviation lawyers. UAS also implicate homeland security and criminal prosecutorial challenges.

Please stay tuned for developments. For more information on the ABA YLD HNSC, please visit http://www.americanbar.org/groups/young_lawyers/committees/homeland_security.html. For more information on the ABA YLD Spring Meeting in Montreal, please visit http://www.americanbar.org/groups/young_lawyers/events_cle/2017_spring_conference.html.

We hope to see you in Montreal!