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*Editor's Note: In this issue we present essays on a range of topics, beginning with **Judge Richard Posner**'s thoughts on terrorism, the courts, and surveillance. **Meredith Fuchs** and **Gregg Webb** follow with a proposal for the appointment of independent experts to assist judges in cases involving sensitive information. **Endy Zemenides** provides a review of a new book on private military contractors, and **Major General Charles Dunlap, USAF**, discusses the participation of senior military officers in public debates. We conclude with **Lauren Stone**'s summary of a conference on the privatization of national security, and a summary of **Benjamin Powell**'s remarks concerning the Office of the Director of National Intelligence.*

The Constitution vs. Counterterrorism

Hon. Richard A. Posner

In August, a federal district judge in Detroit ruled that the National Security Agency's conduct of electronic surveillance outside the boundaries of the Foreign Intelligence Surveillance Act is illegal. As a judge, I cannot comment on the correctness of her decision. But I can remark on the strangeness of confiding so momentous an issue of national security to a randomly selected member of the federal judiciary's corps of almost 700 district judges, subject to review by appellate and Supreme Court judges also not chosen for their knowledge of national security.

A further strangeness is that the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review (which hears appeals from FISC) have been bypassed, with regard to adjudicating the legality of the NSA program, in favor of the federal district court in Detroit. The reason is that the jurisdiction of those courts is limited to foreign intelligence surveillance warrants, and the NSA program under attack involves warrantless surveillance.

In June, the Supreme Court in the *Hamdan* decision invalidated the military commissions that the Defense Department had established to try captive

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Greasing the Wheels of Justice: Independent Experts in National Security Cases

Meredith Fuchs
G. Gregg Webb

A complaint is filed in federal court alleging that the defendant participated in a secret, illegal program that spied on vast quantities of American citizens' telephone and Internet communications in violation of federal statutes and the United States Constitution. The President confirms the basic allegations, but the Executive Branch contends that the federal court cannot adjudicate the claim of wrongdoing because the details must remain secret. The Executive Branch argues that the harm caused by exposing the alleged secrets far outweighs the benefits of public disclosure and that only current government officials can assess the risks of release. Thus, the government demands deference from the courts.

That is the problem foisted on Chief Judge Vaughn Walker of the Northern District of California in *Hepting v. AT&T Corporation*, a suit claiming that AT&T helped the National Security Agency conduct illicit surveillance. On July 20, 2006, Chief Judge Walker ordered the parties in *Hepting* to explain why an independent expert should not be appointed "to assist the court in determining

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Counterterrorism

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terrorists – commissions that had never succeeded in conducting any trials. And the pending Senate bill to revise the Foreign Intelligence Surveillance Act contemplates the submission of NSA programs to the Foreign Intelligence Surveillance Court for an opinion on their legality – a problematic procedure because federal courts are not permitted to render advisory opinions. A court might even hold that a surveillance "program," as distinct from the surveillance of specific individuals, was a "general warrant," which the Fourth Amendment forbids.

Five years after the 9/11 attacks, the institutional structure of U.S. counterterrorism is in disarray. The Department of Homeland Security remains a work in progress – slow and painful progress – and likewise for the restructuring of the intelligence community decreed by Congress in the Intelligence Reform and Terrorism Prevention Act of 2004. And now, in the wake of *Hamdan* and the Detroit case, we learn that we do not have a coherent judicial dimension to our efforts to combat terrorism. (One reason may be that there is no official with overall responsibility for counterterrorism policy.) Other than the judges assigned to the two foreign intelligence courts, federal judges do not have security clearances and, more to the point, have no expertise in national security matters. Moreover, the criminal justice system is designed for dealing with ordinary crimes, not today's global terrorism, as is shown by the rules, for example, that entitle a person who is arrested to a prompt probable-cause hearing before a judge and require that criminal trials be open to the public.

Other countries have greater flexibility in tailoring their judicial procedures to the special problems posed by terrorism. We are boxed in by our revered 18th-century Constitution as interpreted by the Supreme Court. The *Hamdan* decision suggests that a majority, albeit a bare majority, of the court is unsympathetic to arguments that our understanding of certain provisions of the Constitution needs to be revised to meet contemporary needs. The court that resisted Roosevelt's New Deal in the 1930s eventually bowed, and so may the court in the current era, but we cannot wait for that to happen.

The dilemma of defeating terrorism while respecting essential civil liberties can perhaps be resolved by a change of focus from the adjudicative process to executive and congressional oversight. This would mean less effort at trying to prevent terrorism by means of criminal prosecutions, whether in regular courts or in ad hoc military tribunals, and less use of devices, such as the warrant, that are used mainly in criminal-law enforcement. It is telling that no one was ever tried by the military commissions set up in the wake of 9/11, and that criminal prosecutions of terrorists have been few and have seemed to have had little impact on the terrorist menace.

Terrorists are difficult to deter and locking them up has only a limited preventive effect because the supply of terrorists is virtually unlimited. Fortunately, if a terrorist plot is detected it will usually be possible to neutralize the plotters without prosecuting them. Some can be deported, some held in administrative detention, some "turned" to work for us, some discredited in the eyes of their accom-

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plices, some sent off on wild-goose chases by carefully planted disinformation, and some carefully monitored in the hope that they will lead us to their accomplices.

Monitoring, even when it takes the form of wiretapping or other electronic interceptions, need not be conducted under a warrant. The Fourth Amendment restricts warrants, as I have said, but warrantless searches are permissible as long as they are reasonable. The potential abuses of warrantless surveillance can be minimized, without judicial intervention, by rules limiting the use of intercepted communications to national security, requiring that the names of persons whose communications are intercepted (and the reasons for and results of the interception) be turned over to executive and congressional watchdog committees, and imposing draconian penalties on officials who violate civil liberties in conducting surveillance.

Mr. Posner, a federal circuit judge and a senior lecturer at the University of Chicago Law School, is the author of "Uncertain Shield: The U.S. Intelligence System in the Throes of Reform" (Rowman & Littlefield, 2006). This essay appeared originally in the Wall Street Journal.

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whether disclosing particular evidence [about the formerly secret program] would create a 'reasonable danger' of harming national security." Judge Walker called his proposal for expert assistance a "procedural innovation" and cited the "complex" and "weighty" issues presented by the controversial case as grounds for pursuing independent advice.

Though Judge Walker has deferred a final decision on the question, his call for a court-appointed expert highlights a rarely used administrative alternative for courts hearing national security cases, especially those involving the state secrets privilege or release of sensitive documents via the Freedom of Information Act. In such cases, the legitimacy of the government's secrecy claim is not subject to the adversarial testing that is standard in civil litigation because the non-governmental party is not entitled to any information that is classified. A few federal judges tackle the classified documents themselves by conducting *in camera*, *ex parte* review. More commonly, courts simply defer to the litany of potential harms asserted in the government's briefs and deny access to the disputed records. Unfortunately, the first approach only partially rebalances the adversarial process, since plaintiffs are excluded from the *ex parte* exchange between the court and the government lawyers. Meanwhile, the second path forfeits the courts' vital role in preventing executive overreaching. Using court-appointed experts to untangle competing claims for secret information represents an underappreciated and underutilized middle ground. Expert support enables courts to fulfill their judicial review responsibilities while protecting national security.

Do courts have the authority to appoint independent experts in national security cases?
Yes. At least three distinct sources of authority exist for the appointment of independent experts to assess government secrecy claims.

First, judges can appoint a special master pursuant to Federal Rule of Civil Procedure 53, which empowers courts to seek the assistance of a master when it is "warranted by some exceptional condition" or where pretrial matters "cannot be addressed effectively and timely by an available district judge . . . ." Several courts have endorsed the use of Rule 53 special masters to dissect secrecy claims in national security cases. Congress, in the legislative history of the FOIA, anticipated "the use of a special master where voluminous material is involved." Furthermore, special masters have become a popular tool for judicial administration in a wide range of cases in recent years.

Special masters are the most malleable and powerful category of experts. Rule 53 empowers special masters to find facts and make legal recommendations to a trial court pursuant to judicial order. Special masters may also preside over evidentiary

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hearings and perform investigatory or enforcement duties. In the national security realm, special masters provide courts with a time-saving alternative to *in camera* review of voluminous or highly technical classified materials. For example, a special master can analyze government exemption claims under the FOIA and untangle arguments on both sides over their continued classification.

The D.C. Circuit endorsed just such a role for a master in *In re Department of Defense*, a 1980s FOIA case in which The Washington Post and the National Security Archive sought 14,000 pages of classified documents related to hostage-rescue operations in Iran. When the government refused to release any documents, the district court appointed a former Justice Department lawyer with extensive intelligence experience as a special master to produce a representative sampling of the records and summarize the arguments for and against their release. The D.C. Circuit affirmed the trial court decision, citing the judge's inability to review such a large number of documents and the non-adversarial nature of the proceeding as justification for the appointment. The master's intervention led to a faster and more efficient settlement than if the judge had been forced to conduct the review himself, as well as the disclosure of a majority of the withheld documents.

The second source of authority for judges selecting independent experts is Federal Rule of Evidence 706, which permits a court to "appoint expert witnesses of its own selection." This is the option that Judge Walker raised in *Hepting*. No court has yet appointed its own expert witness to assist in analyzing potential harms from releasing classified information in a FOIA or state secrets case; however, there is nothing in the Rules of Evidence to prevent courts from doing so. Independent expert witnesses are often used in cases demanding technical expertise, such as pollution and patent suits, where a judge may lack the specialized knowledge needed to resolve the parties' claims. Such an expert would be responsive to the government's frequent argument in national security cases that judges do not have the competence to assess secrecy claims. Appointing expert witnesses under FRE 706 constitutes just the sort of "procedural innovation" that the D.C. Circuit and others have encouraged to rebalance the adversarial process in suits involving sensitive information.

The chief purpose of an expert witness is to educate the court. Expert witnesses appointed under the Federal Rules of Evidence could provide independent assessments of government classification decisions. Expert witnesses, however, can be subjected to the adversarial process, including both direct and cross-examination and party depositions. The *Hepting* defendants argued against the appointment of an expert witness, in part, on the grounds that the proposed expert's exposure to the adversarial process could increase the risk of classified information being compromised. Such concerns are over-stated. Numerous procedures already exist in the federal courts to safeguard witness testimony and to prevent inadvertent disclosure of information, including *in camera* testimony and trials, sealed records, and court-imposed limitations on questioning.

Finally, American courts have long recognized that judges can appoint independent "technical advisors" pursuant to their inherent judicial power. Justice Brandeis explained this authority in a 1920 case, declaring that "[c]ourts have . . . inherent power to provide themselves with appropriate instruments required for the performance of their duties. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties." Technical advisers have been a fixture in cases involving complex scientific evidence for decades, and courts generally describe their role as that of a "tutor," helping judges interpret scientific evidence from the parties and their partisan experts.

Technical advisers differ from both Rule 53 special masters and Rule 706 expert witnesses. First, technical advisers cannot recommend findings of fact or conclusions of law, as masters are authorized to do under Rule 53. Second, technical

advisers cannot generate new evidence like a court-appointed expert witness. Rather, the role of a technical adviser, as the First Circuit has described, is simply "helping the jurist to educate himself in the jargon and theory disclosed by the testimony and to think through the critical technical problems." Cases involving classified documents and assertions of privilege over secret evidence often present a maze of specialized terminology and complex classification practices. Technical advisers steeped in information security can serve as invaluable guides for lay judges who would otherwise navigate these issues alone.

Who should be an independent expert?
Not just anybody. Experts appointed in national security cases should possess both a deep understanding of the basic policy challenges related to document classification and release as well as the independence to question government classification decisions. Experts must hold, or be qualified to obtain, appropriate security clearances to access the sensitive materials that they are charged with reviewing. Furthermore, an independent expert must be truly autonomous, lacking any current or known future relationship with either the government or plaintiffs. Finally, the expert should be a lawyer. Even in cases where an expert makes no legal recommendations to the court, the expert must still be able to conduct his or her activities with an organic understanding of the legal posture of the case and the legal issues presented.

Is there a downside?
Only if courts are not careful. Using independent experts in national security litigation can inject a measure of adversarial process into what is now a one-sided contest. However, experts are not a cure-all for distracted or disoriented courts. They are precision tools of judicial administration, whose use should be molded to the specific needs and circumstances of individual cases. Judges must still make the hard decisions over what information is rightfully released to private litigants and the public and what information remains with the government alone. The chief danger in appointing third parties to assist busy courts is that the courts will delegate too much Article III judicial power to outsiders. Improper delegation is not the insurmountable problem that critics make it out to be. Both Rule 53 and Rule 706 require courts to carefully circumscribe the duties of special masters and expert witnesses through judicial appointment orders outlining the scope of their responsibilities and the extent of their discretion. Rule 53 further requires courts to conduct a *de novo* review of any finding of fact or conclusion of law made by the master if a party has objected. Finally, appellate review serves as a final and ultimate protection against improper delegation. Technical advisers, for their part, pose few delegation concerns because theirs is a purely advisory role. They lack the decision-making powers and the evidence-producing authority that the Federal Rules vest in special masters and expert witnesses.

Even with these procedural protections, the best way for courts to avoid delegation problems is to narrowly tailor the duties of national security experts to the individual case. Experts should be used primarily as case administrators and educational resources, winnowing down voluminous classified records into representative samples or helping inexperienced judges navigate the arcana of agency classification procedures. Where an expert serves merely as a support mechanism for the court, there is little room for the expert to usurp the judge's constitutional authority.

Jurists like Judge Walker in *Hepting* should continue to explore the capabilities of independent experts in the national security setting. The growing number of classified documents and invocations of the state secrets privilege by the government, along with wider use of the FOIA and other open-government laws by the public, means that the need for such experts will only continue to grow. Courts should embrace this tool and employ experts to improve both the quality and the quantity of their judicial review over government secrecy claims.

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A Review of Robert Young Pelton's *Licensed to Kill: Hired Guns in the War on Terror*

Endy Zemenides

On March 31, 2004, Americans watching the news saw images that were reminiscent of Mogadishu over a decade earlier. Four Americans had been killed in combat in Fallujah, Iraq that day, and their remains were paraded through the streets and then hung from a bridge. Unlike the Army Rangers that fell in Mogadishu, the American casualties in Fallujah were not military men. The American public soon learned that Wesley Batalona, Jerry Zovko, Michael Teague and Scott Helvenston worked for a corporation named Blackwater. We were introduced, in a most gruesome manner, to the world of private security contractors.

In his new book, Robert Young Pelton provides an inside look at the shadowy and ever-expanding industry of private security contractors. This industry is not a new phenomenon. It emerged with the end of the Cold War, encouraged by the trend of privatizing government functions, the downsizing of professional armies, and increasing political instability in areas where the Cold War had kept the lid on hostilities. The War on Terror, and specifically the war in Iraq, has created a "sellers market" for private security contractors. As of late 2003, the Pentagon estimates that there were 60 private security companies with approximately 25,000 employees in Iraq alone. To understand the significance of this number, recall that the new Iraqi Army could only turn out two brigades (of approximately 700 soldiers each) for the latest attempt to pacify Baghdad. The sheer size of this industry leads to many questions: Where did this industry come from? Who are these contractors? What role do they play in the War on Terror? What are the implications of this role for the future of national security, peacekeeping, and warfare?

Pelton touches on all these questions, and many others, in a first-hand account that often reads like an action-adventure novel. The cast of characters that Pelton introduces us to, and the detailed recount of Alamo-like combat operations in An Najaf and Al Kut would make Jerry Bruckheimer envious, but this is real. In addition to his first hand accounts and in-depth interviews, *Licensed to Kill* is full of facts and analysis that together provide an intimate and unsettling account of this burgeoning industry.

To uncover the genesis of private security contractors, Pelton takes his readers back to the CIA's dirty wars and introduces us to Billy Waugh, a former mercenary contracted by the CIA. This is also where Pelton tries to distinguish between mercenaries and security contractors by telling us that "Mercenaries fight, while security contractors protect…" Waugh describes his former life with nostalgia, and then regretfully describes how the license to kill was reined in by the backlash against Vietnam. He indicates that Osama Bin Laden would have been killed long before September 11, 2001 (he recalls an opportunity he had himself) if it wasn't for this "anti-assassination" and overly legalistic culture.

September 11 and the launching of the War on Terror changed everything. For the war in Afghanistan, the CIA went to independent "contractors" like Waugh, who in turn recruited more independent contractors and paramilitaries. Pelton points out that in 2001, no American corporation specialized solely in the provision of trained ex-military contractors. But the market – which was created by the war in Afghanistan and burst at the seam as a result of the war in Iraq – identified a demand for services like protection of foreign leaders (e.g., Hamid Karzai) and operatives hunting for Bin Laden. The CIA's decision to provide a $5.4 million, six month contract to bolster personal protection teams for CIA officers would lead to the birth of a whole new type of corporation.

Blackwater USA is the private security corporation that Pelton gives the most attention to, since the War on Terror "began Blackwater's transformation from a minor steel-target manufacturer and shooting-range into a massive security conglomerate." Pelton travels with Blackwater contractors escort-

ing VIP's down "Route Irish" to the Baghdad Airport – "the most perilous eight-minute drive in the world," gets inside their security details, goes to the American Society for Industrial Security convention with the company, visits Blackwater's training facilities and talks to Blackwater contractors about their yearning for revenge after the incident at Fallujah.

Pelton's work is impressive – both in terms of his style and his analysis – and important. It is all the more so since the explosion in the private security industry is so recent, and is happening so fast. Furthermore, despite the humane and sometimes funny treatment of his subject matter (and his dedication to "The unheralded heroes of the War on Terror, the contractors who have sacrificed their lives in service to their client"), Pelton also provides a look at the dark side of this rapidly expanding industry, and raises very important questions.

The question of where these personal security contractors come from will linger for years. Pelton comes across former Special Forces, SEALs, retired police, and some with far more questionable backgrounds. Their motivations for becoming contractors (Pelton recalls "the common Special Forces joke that after twenty years in the service, an SF operator will have only a topaz ring, a Harley, an ex-wife, and can apply for a job as a Wal-Mart greeter") might reveal much about the industry. Their pay ($600 a day in Iraq), the opportunity to carry better equipment than some parts of professional armies, and the fact that contractors can choose where to be deployed raises the possibility of fewer professional soldiers choosing full careers in the military when this more lucrative (and in some ways, less dangerous) alternative is available.

A second unsettling question that Pelton starts to address focuses on a blurring of the line between contractor and mercenary. His early distinction between protecting and fighting didn't hold up as the book progressed. The lack of a legal regime placing some sort of restrictions on this industry does not help the situation. Pelton dissects Paul Bremer's Order 17, which stated: "Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any subcontract thereto." In his Epilogue, Pelton notes that as of the spring of 2006, "there has not been one single contractor charged for any crime that occurred in Iraq, though hundreds of soldiers have been court-martialed for offenses ranging from minor violations of military code to murder." All this despite the fact that contractors had *reported* four hundred serious incident reports over a nine month period in 2004-2005. In those reports, contractors had reported shooting into sixty-one vehicles, with only seven incidents of shooting back or other retaliation. Order 17 became the license to kill. There is, however, another side to this coin.

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License to Kill...

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Contractors seem to fall into the same grey area as "unlawful combatants." They are not military personnel, but they are often engaged in combat. As things stand now, captured contractors are in the position of having their status defined by their captors. How would the military, or the United States public, react if a large number of contractors were held in the Mahdi Army's version of Guantanamo? This dilemma has yet to play out in Iraq, but three contractors working for California Microwave Systems who crashed in Colombia have been held by the FARC for over three years without any assurance of Geneva Convention protections.

One interesting omission from the book's index is any mention of the United States Congress. Other commentators – most notably P.W. Singer of the Brookings Institution – have pointed out that the Bush Administration has avoided Congressional oversight by using the private security industry. This glaring lack of oversight cannot leave one comfortable with the possible answers to the above questions.

The most unsettling question raised by Pelton is what happens if the United States is not hiring these contractors. One of the best chapters of the book, and certainly the most disturbing, is the "Bight of Benin Company." Pelton tells the story of contractors turned mercenaries/coup plotters in newly oil-rich Equatorial Guinea. After reading this chapter, you cannot help but wonder what happens to this industry once we are out of Iraq. Blackwater alone is on track to train 35,000 men, and has 1,800 contractors deployed in seven countries. Is it unconceivable that multinational corporations may use these contractors as their own private armies? Given the inherent instability of oil politics, don't BP, Shell, Exxon-Mobil and others have great incentive to avail themselves of the services of Blackwater and others to protect their investments in the Middle East, in Central Asia, or against threats of nationalization from leaders like Hugo Chavez?

Pelton has taken a first step in providing transparency in an industry that desperately needs it. For anyone interested in the future of warfare, or anyone involved in the debate over a revolution in military affairs, this book is a must read. Hopefully, Pelton's work motivates policy makers to start addressing the serious questions he raises.

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Voices from the Stars? America's Generals and Public Debates

Maj. Gen. Charles J. Dunlap, Jr., USAF

Military officers rarely relish the prospect of testifying before Congress, particularly if it means disagreeing with the Commander-in-Chief. As I can personally attest, it is absolutely excruciating when headlines like "Military Lawyers Fault Bush Plan for Terror Suspects" follow your testimony. Loyalty to one's commander is a bedrock value of the profession of arms, and seeming to deviate from it is counterintuitive to every officer's makeup. Respectful disagreement with policy drafts is not, one hopes anyway, viewed as disloyalty.

The protocol of Congressional testimony is, I learned, for Administration officials to clear an officer's opening statement. However, once questioning begins, the process permits personal opinions identified as such. That is what happened when senior military lawyers (judge advocates – "JAGs") testified before the House Armed Services Committee (HASC) hearings in early September on the complicated issue of the legal architecture for military commissions.

As only a democracy like America's can tolerate, the concerns of the JAGs received a very public airing. Opponents of the Administration's plan understandably seized upon the critical portions of the testimony as demonstrating the proposal's

flaws. Shortly thereafter, however, those same opponents were perplexed when the judge advocates who had testified vigorously against key parts of the draft nevertheless signed a letter saying they did not object to two other portions of the proposal (purporting to clarify the meaning of Common Article 3 of the Geneva Conventions).

Why the consternation? Unbeknownst to the military attorneys, the "do not object" language was touted by some advocates of the Administration's proposal as indicating support for harsh CIA interrogation techniques. Of course, this JAG (and likely the others) had not only never subscribed to that view, he had never been asked to opine upon it. The letter was signed wholly in the context of a JAG's knowledge and expertise, that is, the armed forces, not the activities of intelligence agencies to which he is not privy.

Such is the nature of Washington politics. In an article aptly headlined "Military Lawyers Caught in Middle on Tribunals" the *New York Times* observed that the experience "demonstrated the perils of active-duty officers' speaking openly about sensitive subjects." Regardless, the two main opponents in this controversy eventually achieved a compromise that included rectifying the key problems the JAGs had identified in their HASC testimony, as well as in earlier Congressional hearings.

JAGs are not the only senior officers who find avoiding political minefields difficult, especially in an election year. Consider the situation of General George Casey, America's top commander in Iraq. At a Pentagon news conference last June, he insisted that setting a timetable for withdrawal would "limit his flexibility" and "send a terrible signal" to Iraq's new government of national unity.

This presumably strictly military opinion also happened to dovetail perfectly with the view of one side of a highly-politicized debate. Yet hardly a day later media reports claimed that a drawdown was, in fact, under consideration by the general, much to the delight of the other side of the argument.

Others may determine there is no real inconsistency, but the question remains: what is the proper public role of active duty officers? Most active duty generals fully appreciate the dangers of an overly-assertive military caste. The deeply-ingrained American tradition of an apolitical military subservient to civilian control properly instills reticence, especially in the senior ranks.

Generals also know the risks of disagreeing with the civilian leadership. Accepted wisdom holds that officers should invariably reflect the views of the Executive Branch. Stray from the official line? The treatment of Army General Eric Shinseki after testifying honestly (and, as it turns out, accurately) about troop requirements for Iraq's occupation is widely viewed as an object lesson of the most negative type.

Some believe generals can speak their minds so long as they limit themselves to purely military matters. The problem? There is really no such thing as "purely" military matters. Clausewitz famously observed that war is "a continuation of political intercourse…by other means." With war's enormous demand on blood, treasure, and national honor, military matters intertwine every dimension of a nation's life, including politics.

Instinctive loyalty to - and respect for - the chain of command disinclines military professionals from airing their personal views. This is as it should be, unless and until that loyalty and respect becomes interpreted publicly as ideological agreement that contradicts their true professional judgment. The Supreme Court rightly advocates insulating the armed forces from "the reality or appearance of acting as a handmaiden for partisan political causes."

A fundamental misunderstanding of the real meaning of civilian control also confuses the issue. Of course, it requires prompt, respectful, and complete obedience to lawful orders. But it does not mandate open support – or even silent acquiescence –

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to the partisan views of the military's civilian masters.

Actually, unlike the militaries of some nations, American military officers do not take an oath of fealty to any particular individual or political party, but rather to the Constitution itself. The Constitution, in turn, tasks all the three branches of government with civilian-control responsibilities.

The Executive and Legislative branches usually predominate because they are subject to the electorate as the courts are not. For this process to work properly, however, elected officials and, ultimately, the people themselves, need the fullest possible exposition of the issues. In America's democracy, the First Amendment facilitates the kind of public discourse that produces the world's most powerful military.

Logically, the expert views of senior military leaders, including its JAGs, would seem to enhance a discussion of any other national security matter. For many reasons, career military officer-lawyers have views distinct from their civilian counterparts. Because they are military officers, JAGs strive to be independent and nonpartisan in ways a civilian lawyer who is a political appointee need not be nor, especially, ought to be.

And there is more. Long-term service in uniform gives JAGs a depth of understanding of armed forces – the "separate society" in Supreme Court parlance – to a degree impossible to acquire otherwise. As fellow military members subject to the same altruistic "unlimited liability contract" that everyone in uniform undertakes, they have a special bond with those with whom they serve that simply cannot be replicated.

All of this creates a different mindset in JAGs. In an especially insightful recent article in *Slate* (http://www.slate.com/id/2150050/) Professor Richard Schragger captures an example of this unique perspective that JAGs acquire:

> Military lawyers seem to conceive of the rule of law differently [than civilian counterparts]. Instead of seeing law as a barrier to the exercise of their clients' power, these attorneys understand the law as a prerequisite to the meaningful exercise of power. Law allows our troops to engage in forceful, violent acts with relatively little hesitation or moral qualms. Law makes just wars possible by creating a well-defined legal space within which individual soldiers can act without resorting to their own personal moral codes.

In any event, a nation dependent upon an enormous all-volunteer force ought to know what their military leaders are thinking. Indeed, opening their generals' opinions to public scrutiny might serve a democracy's long-term interests. Nevertheless, should concepts of duty and decorum exclude generals from public dialogue? Absolutely, if the subject is, for example, the suitability of civilian leadership. Likewise, security and operational concerns can appropriately close mouths.

The danger of unsettling the troops also obliges caution. Lt. Gen. John Vines, then a senior commander in Iraq, reportedly characterized the mere existence of last winter's Congressional debate about Iraq as "disturbing." This is indeed sobering commentary because everyone understandably fears undermining the morale of soldiers far from home.

Yet real support of the troops might demand a frank, national debate, however painful. Still, should America's generals participate? If so, how? Occasional congressional hearings seem to be an appropriate forum, but are such hearings the only proper outlet? Uncertain of their authority to speak openly, some generals may talk privately to the press, members of Congress, or to another proxy - including officers in the retired ranks.

But is this the way Americans ought to divine the views of their still-serving generals? Plainly, few fully accepted paths exist. The electorate and their political leaders need to decide when and how they want to hear from their generals, if at all. Once they decide, it is then for the generals to salute smartly and obey.

Charles Dunlap is Deputy Judge Advocate General of the Air Force. These are his personal views and not necessarily those of the Department of Defense.

"Understanding the Privatization of National Security" Conference Executive Summary

Lauren Stone

On May 11-12, 2006, experts from the government, military, private security industry, legal profession, academia, public health, and law enforcement met at the McCormick Tribune Foundation Cantigny Conference Center in Wheaton, Illinois to discuss the trend toward the privatization of national security functions traditionally performed by the government. The McCormick Tribune Foundation underwrote the conference entitled "Understanding the Privatization of National Security," which was organized by the American Bar Association Standing Committee on Law and National Security and the National Strategy Forum. Following is a summary of key issues raised by participants during the conference discussion.

What is Privatization? The privatization of U.S. national security is the delegation of tasks traditionally performed by the government to the private sector. The US government has engaged mercenaries and private forces since the Revolutionary War. Today, the use of private forces has grown into a billion dollar private security industry, and the trend toward privatization continues to expand.

The Role of Private Contractors. Private contractors are on the periphery of combat operations. The U.S. government depends on private military companies (PMCs) and private security companies (PSCs) to fill gaps in military functions; supply cost-effective, efficient, and rapidly deployable forces; and provide security functions, including high-tech equipment and operators, logistical support (food, water, electricity, and laundry) private bodyguards, and watchmen.

Factors Driving Privatization. There is an array of factors and trends that drive the expansion of privatization.

- **Military downsizing.** US government policy since the 1990s has focused on cutting costs by downsizing the military into a smaller, more efficient force supplemented by private contractors.
- **Cost-effectiveness.** There is disagreement regarding the assertion that privatization saves money. Some argue that it costs more to maintain military personnel on active duty than to outsource operations. On the other hand, price gouging and specific types of contracts (i.e.: no-bid, cost plus contracts) are argued to be cost-inefficient.
- **New threats to US national security.** Government needs enhanced resources to respond to an array of new threats and emergencies, including terrorism, crime organizations, drug cartels, regional and inter-state conflicts, and natural disasters.
- **Surge capacity and "the need for speed."** There is a need to mitigate bureaucratic inefficiencies. Private contractors provide effective surge capacity, speed, and flexibility in the event of emergencies.
- **Technological skills and niche expertise.** The US government relies on private industry for complex weapon systems and skilled operators. The need for technical specialists and expertise will result in greater outsourcing.

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- **Reducing political costs.** There may be politically risky and controversial missions for which the government cannot deploy the military. The use of private contractors as a proxy force for certain missions draws less public scrutiny but reduces transparency.

Privatizing Homeland Security. Private contractors are involved in the following homeland security areas:

- **Critical infrastructure protection (CIP)**. The private sector is responsible for approximately 90 percent of the nation's critical infrastructure. Participants debated to what extent should government share responsibility for CIP with the private sector.
- **Public health emergency incidents**. There have been public-private coordinated initiatives to improve public health emergency preparedness. Participants debated how the private sector can continue to assist government efforts.
- **Information and intelligence sharing.** Private contractors are capable of performing domestic intelligence-related functions because private companies employ many former counterterrorism professionals. However, there are concerns regarding non-governmental personnel handling sensitive information.
- **Emergency preparedness and response.** Government response within the first 72 hours of a catastrophic incident is crucial. Private companies are capable of providing rapid, flexible, and efficient responses to catastrophic incidents – terrorist attacks and natural disasters.

Bright Lines: Limitations to Outsourcing

There is a need for "bright lines" – boundaries that separate what should and should not be outsourced. Where does government draw the line? Government needs to develop an analytical decision-making model that addresses the following questions:

- What are exclusive government functions?
- What are appropriate uses of private contractors?
- Are there any missions that it would be unethical to outsource?
- How are outsourcing decisions made?
- Should limits be imposed on a case-by-case basis?
- Can boundaries be modified once they are set?

Accountability Standards. Are private contractors held accountable? To whom are private contractors responsible – employers (PMCs and PSCs), clients (the US government), and/or the American public? There is a need to strengthen existing accountability mechanisms, including industry self-regulation, and create common industry and government standards.

- **A common framework for accountability.** There needs to be a common set of rules and regulations for all players in the contracting process: government agency employers (contracting officers), military personnel (field commanders), and private contractors.
- **Industry self-regulation**. The market deters unethical behavior and provides performance incentives. The question is whether industry self-regulation provides sufficient accountability and oversight.
- **Media oversight.** The media can serve as a vehicle for educating the public with accurate information about private contractors and their operations. Private industry needs to reach out to media outlets with the facts to mitigate negative and sensational reporting.
- **Chain of command.** There is a need to bridge the communication gap between private contractors, agency contracting officers, and military commanding officers. Coordination and communication between government and private

contractor personnel can be improved if private contractors are incorporated into a military unit.

- **Better acquisition practices.** TheGovernment needs to streamline acquisition practices and establish higher training and professionalism standards for agency officials who hire private contractors and write contracts.
- **Congressional oversight.** Private contractors' actions should be subject to Congressional oversight to protect against abuses and ensure industry and government transparency.

Understanding the Legal Issues. PMCs operate in a legal vacuum. The deployment of private contractors raises complex questions regarding their legal status and responsibility.

- **Private contractors' legal status.** The legal status of private contractors is ambiguous. The integration of private contractors into a viable legal framework is crucial to ensure the protection of contractors on the battlefield, the authority of commanding officers, and appropriate liability.
- **Legal "gray areas."** Private contractors fall between international law (The Geneva Conventions and laws of war) and domestic laws (contract and civil laws). How can private contractors gain lawful combatant status?
- **Criminal behavior and consequences.** Private contractors are subject to domestic criminal law. Court-martial can be convened for private contractors only during a declared war. The following US laws apply to private contractors:
    - *Military Extraterritorial Jurisdiction Act of 2000 (MEJA)* Private contractor violations committed overseas may be criminally prosecuted (except for less serious problems, such as insubordination, failure to perform and disobedience).
    - *War Crimes Act of 1996* creates criminal accountability in the federal courts for any American citizen who is the victim of or perpetrator of "grave breaches" of international law, including The Geneva Conventions.
    - *USA Patriot Act of 2001* expands jurisdiction "over crimes committed by or against" U.S. nationals on lands or facilities designated for use by the United States government.
    - *Torture Victims Protection Act of 1991* subjects individuals who engage in torture or extrajudicial killing to civil action and recovery of damages.
    - *Alien Tort Claims Act (ATCA)* grants jurisdiction to U.S. Federal Courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

- **Improved contracts**. Commanding field officers cannot compel private contractor personnel to act during battle outside of contract provisions. Contracts need to place private contractors under the military chain of command.

Future Implications of Privatization. The trend of privatization is expanding. There are embedded privatization issues that need to be addressed. What are the short- and long-term implications of privatization?

- **Erosion of military talent.** Privatization drains government talent to the private sector and could greatly diminish core government and military capabilities. There needs to be forward-thinking

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and planning regarding what core capabilities should remain within the military.

- **Culture clash: PMCs and the US military.** Military personnel adhere to military code and doctrine, whereas private contractors are guided by economic incentives. The government should promote cross-training, greater interface, and relationship-building to create cohesion and coordination between military and private personnel on the battlefield.
- **Employing foreign nationals**. PMCs and PSCs need to ensure that foreign nationals, who comprise 80 percent of PMC and PSC employees, are subject to thorough security reviews before giving clearances. There is a need for best practices and industry-wide regulations with regard to foreign nationals.
- **Misperceptions and public image**. Private contractors are associated with the pejorative term "mercenary," which does not accurately describe their functions or legal status and creates a negative public perception. Industry officials should initiate a public relations campaign to educate the public and promote transparency within the industry.

Next Steps and Recommendations. The trend toward greater privatization of national security requires continued examination of existing problems and discussion of how to manage future issues. Conference participants identified the following next steps and recommendations:

- Establish industry-wide accountability standards and regulations
  - Industry standards and best practices
  - Training
  - Code of conduct
  - Industry accreditation
- Create a formal reporting and dissemination system for rating and tracking PMC and PSC performance
  - A scoring system similar to a Better Business Bureau could facilitate industry standards
- Encourage better public education and more informed public discussion and debate
- Integrate private contractor personnel into the military chain of command on the battlefield
- Initiate cross-training to foster trust and cohesion between the military and PMCs
- Improve training of government acquisition officers and contracting policy, procedures, and oversight
- Examine and clarify the legal status of private contractors overseas
- Evaluate and define the missions and functions that should not be outsourced
- Examine the use of private contractors for homeland security missions

Lauren Stone is the Editor of the National Strategy Forum. The Conference was sponsored by the McCormick Tribune Foundation, and organized by the American Bar Association Standing Committee on Law and National Security and the National Strategy Forum (May 11-12, 2006).

Remarks by Benjamin Powell, General Counsel of the Office of the Director of National Intelligence, Breakfast Program Sponsored by the Standing Committee

Summary by Michael Van Hall

Benjamin Powell, the General Counsel for the Director of National Intelligence (DNI), spoke on June 22 at the American Bar Association's Standing Committee on Law and National Security monthly breakfast meeting in Washington, DC. Powell began by describing the context of the global threat facing the United States and quoted the Director of National Intelligence, Ambassador John Negroponte. According to Negroponte, the most dramatic challenge of the past twenty-five years is the increase in the number of targets and topics that the intelligence community must identify, develop, track and analyze.

Powell made clear that terrorism is the biggest threat facing the United States, but pointed out that there have been serious successes as a result of the hard work of the intelligence community.

Turning to what he labeled a secondary threat, Powell cautioned that the proliferation of weapons of mass destruction could quickly become a primary threat to the security of the United States if nuclear materials found their way into the hands of terrorists. Failed states can only compound this situation.

Next, Powell showed how the institutional aspects of the Office of the Director of National Intelligence (ODNI) have developed. As the most far reaching intelligence-related legislation since 1947, the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) created ODNI and granted the DNI "cradle-to-grave" budget authority over the national intelligence program and its 100,000 member community. This includes "procurement authority over major intelligence community systems; insuring compliance with the laws of the United States by the Central Intelligence Agency and other elements of the intelligence community; authority over collection requirements and tasking authority; authority over analysis, including the National Intelligence Council, which includes the senior officers of the analytical community who deliver the authoritative judgments of the intelligence community; creation of the FBI's National Security Branch; responsibility for the National Counterterrorism Center, and many other authorities covering virtually every facet of the intelligence community, including personnel standards, training, security and clearances."

After describing the composition of the DNI and its various authorities, Powell explained how the general counsel supports the DNI in its daily operations. The general counsel's office is tasked with giving guidance on nearly every aspect of the collection network, from mundane budget matters to challenging constitutional issues.

To illustrate, Powell discussed the National Counterterrorism Center, which receives intelligence from 28 different government networks and distributes data to over 5,000 analysts stationed around the world. On a related note, he mentioned that the DNI has had considerable successes in developments related to information-sharing technologies and other IT issues.

This is not to say that Powell does not recognize the necessity of balancing the strategic need for intelligence with public concern. He argued that not every issue should be bogged down with Memoranda of Understanding and like agreements, that require legal analysis and complicate procedures to ensure compliance with information-sharing processes. While the general counsel makes sure there are standards in this regard, it is important that the office facilitate intelligence collection since intelligence analysts are not and should not be required to have law degrees. In this regard, Powell said that the DNI staffing model is helpful because it transcends department lines, allowing his staff to be composed of intelligence professionals from a variety of backgrounds, to increase his understanding of the needs of the entire intelligence community.

In closing, Powell noted the personal side of intelligence collection should not be ignored. Each day, collection specialists all over the world face considerable danger in the field. The debate on the topic of intelligence reform should not overshadow the hard and dangerous work they do to protect the United States.

Michael Van Hall of the Columbus School of Law, Catholic University of America, provided this summary of Mr. Powell's remarks.

In Case You Missed It …

Staying current in the field of national security law is never easy. Every week there are significant new opinions, statutes, indictments, reports, articles, and any number of other developments. Many of these items prompt coverage in the major media outlets, but some fly beneath the radar. In an effort to assist practitioners and scholars in keeping up to date with these events – and in particular to provide ready access to primary sources in electronic format – Professor Robert Chesney of Wake Forest University School of Law maintains a listserv for professionals and academics working in this area. "In Case You Missed It…," featuring selected posts from that listserv, will be a recurring item on the back page of the National Security Law Report. Those interested in subscribing to the listserv may do so by contacting Professor Chesney at robert.chesney@wfu.edu.

- *United States v. Iqbal* (E.D.N.Y.) - Indictment charging two defendants with material support violations, as well as violations of the United Nations Participation Act, in connection with an effort to provide access to Hezbollah's satellite channel in the U.S.:
  http://natseclaw.typepad.com/natseclaw/files/UnitedStates.v.Iqbal.pdf

- Foreign Intelligence Surveillance Oversight and Resource Enhancement Act of 2006 - Legislation proposed by Senator Specter relating to the Foreign Intelligence Surveillance Court and judicial review of the Terrorist Surveillance Program:
  http://natseclaw.typepad.com/natseclaw/files/S4051.pdf

- *Boumediene v. Bush; Al Odah v. United States* (D.C. Cir.) - Briefs filed by Guantanamo detainees and by the government concerning the impact of the Military Commissions Act of 2006 on pending habeas corpus petitions:
  Government's brief: http://www.opiniojuris.org/files/Al_Odah_Government.pdf
  Detainee briefs:
  http://natseclaw.typepad.com/natseclaw/files/al.odah.pdf
  http://www.scotusblog.com/movabletype/archives/new%20boumediene.pdf

- *Al-Marri v. Wright* (4th Cir.) - Government's motion to dismiss the habeas petition brought on behalf of Ali Saleh Kahlah Al-Marri (a Qatari national held in the United States as an enemy combatant) on grounds arising out of the Military Commissions Act:
  http://natseclaw.typepad.com/natseclaw/files/AlMarriMotionDismiss.pdf

- Transactional Records Access Clearinghouse report concerning the rate at which FBI referrals for prosecution in international terrorism cases are accepted for prosecution:
  http://trac.syr.edu/tracfbi/newfindings/current/