



National Security Law Report

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Japan-U.S. Military Cooperation Still Essential

The end of the Cold War has brought many changes to East Asia and the western Pacific but U.S.-Japanese military cooperation remains essential, according to Lt. Gen. Charles W. "Bill" Dyke, the President of International Technology and Trade Associates, Inc., who addressed a Standing Committee breakfast audience on February 20. General Dyke, who served as Commanding General of the U.S. Army in Japan from 1985 to 1988, said factors that call for continued U.S. military presence in Japan as well as South Korea include the aggressive posture of and potential nuclear proliferation by North Korea and the problematic future of mainland China and the former Soviet Union.

Because of its economic and trade strength, and its 121 million highly educated and motivated people, Japan is of great strategic importance to the United States. But the Japan-U.S. bilateral military relationship has a special importance. The U.S. Seventh Fleet operates out of bases in Japan, and U.S. forces rely heavily on Japanese repair, storage and communications facilities. Japan is the "hinge-pin" for the maritime and air defense of the western Pacific Ocean.

Japan presently has a 250,000-person self-defense force (155,000 ground, 50,000 air, and 45,000 naval). Much of Japan's military equipment is first-class, including, for instance, the F-15J aircraft manufactured under U.S. license. Japan's annual defense budget of \$34-36 billion is larger than that of France or Great Britain, and is in line with defense budgets of nations with similarly sized military forces. In contrast, America's projected annual defense budget is in the area of \$265 billion.

There is a small yet very vocal militaristic element in Japanese society which seeks a buildup in Japan's military forces commensurate with the nation's great economic strength. General Dyke expects this group to continue calling for sharp increases in Japan's military forces even if Russia finally returns to Japan control over the islands of the Northern Territories which the Soviets occupied at the end of World War II. General Dyke stated that Japan's long-ruling Liberal Democratic party and the bureaucracy are opposed to a massive military buildup. He has never heard of a desire on the part of military leaders to return to the "glory days" of old, and views the fears in other Asian nations about a revival of Japanese militarism as exaggerated.

General Dyke believes, however, that Japan still needs to do more in the military area than at present.

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Treasury Issues Final Exon-Florio Regulations

By Lucinda A. Low

On November 21, 1991, the Treasury Department issued final regulations implementing the so-called "Exon-Florio" legislation, dealing with mergers, acquisitions and takeovers of U.S. persons by foreign persons that threaten U.S. national security. 56 Fed. Reg. 58774 (November 21, 1991). Coming more than two years after the close of comments on proposed regulations issued in July of 1989, these final regulations have been long awaited by the legal community.

The Exon-Florio legislation was passed in 1988 as part of massive omnibus trade legislation enacted that year. The statute allows the President to take measures to prevent foreign acquisitions of control of U.S. persons where those acquisitions impair or threaten to impair U.S. national security. The concept of "national security" was purposefully left undefined in the statute, thereby giving the President wide discre-

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Book Review

By Alex L. Parrish

The Political Economy of Defense Contracting

by Kenneth R. Mayer,
Yale University Press,
New Haven and London, 1991

Kenneth Mayer presents an intriguing thesis in his new book, *The Political Economy of Defense Contracting*. Mayer argues that political expediency has far less to do with America's defense spending and contracting decisions than most observers assume. Such a proposition is hardly of mere academic interest, particularly in view of today's historic debate over national security priorities in the post-Cold War era.

Since 1980, the Pentagon has awarded about \$120 billion annually in weapons contracts, making defense procurement by far the largest class of discretionary governing spending. The defense industrial base consists of well over 100,000 companies, employing more than 2 million Americans and, if all direct and indirect military and civilian positions are included, the defense budget supports more than 7 million jobs.

Nearly 50 years ago, Sidney Hillman wrote that politics is the science of "who gets what, when and why." If that is true (even if only for much of the time), then it is hardly surprising that conventional wisdom holds that political considerations are pervasive in defense spending and contracting decisions. In other words, why should government action in this area be any different than it is in others?

Kenneth Mayer strongly questions this conventional wisdom. He points out that, with rare exception, existing scholarly work on congressional voting behavior concerning defense issues shows that local economic benefits have little or no bearing on members' support of either particular weapons programs or defense spending as a whole. Furthermore, he says that the notion that politics pervades defense spending and contracting decisions is a function of the widespread acceptance of certain "political myths." These myths are that:

- Congress is loath to cancel weapons programs because doing so sacrifices economic benefits associated with defense jobs;

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tion. Counterbalancing this wide discretion, however, were strict timetables for action and a requirement that the President make certain findings as a prerequisite to action, including a "last resort" criterion that there be no other legal basis that could be used to eliminate the national security threat.

Authority to implement the statute was delegated to the inter-agency Committee on Foreign Investment in the United States ("CFIUS"). Headed by the Treasury Department, this eight-member committee is comprised of representatives of the Departments of Commerce, Defense, Justice, State, the Office of the U.S. Trade Representative, the Office of Management and Budget, and the Council of Economic Advisors.

Congress left it to the implementing regulations to determine the contours of a number of critical issues, including defining the range of transactions caught by the regulations and the concept of control, and determining to what extent the term "national security" would be defined and the mechanics of notification. The proposed regulations took a first — and very broad — cut at these issues, provoking a storm of critical comment.

The final regulations represent in most respects only a minor calibration of the proposed regulations. In several cases, those calibrations are helpful -- such as when they clarify which foreign lending transactions will be caught. Ultimately, however, they do little to address the fundamental issues raised by this legislation. These are some highlights of the final regulations:

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Japan-U.S. Military Cooperation

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It is unable to defend itself. Much obsolete equipment needs to be replaced. Further, Japan needs to achieve the goal of absorbing 100% of the "yen-based" costs of keeping U.S. forces in Japan. In the current fiscal year, Japan is paying more than \$2.5 billion for the support of U.S. forces, or approximately 34%.

Efforts to increase the support of U.S. forces and to continue modernizing Japan's self-defense forces are strongly resisted by many in Japan. There remains in the Japanese public a huge, genuine and deep-seated antipathy to the use of force, even under United Nations auspices. There is still the widespread belief that the military was responsible for World War II's disastrous outcome for Japan. The aversion to military force is so pervasive that the political challenge for obtaining parliamentary support for United Nations-sponsored peacekeeping operations is formidable. Moreover, according to General Dyke, any consideration of the size and "self-defense" nature of the Japanese military must take into account the national constitution and other restraints on Japan's military put into effect by the occupation administration of General Douglas MacArthur after 1945.

General Dyke lamented that "Japan-bashing" is growing in the United States, as the economic recession feeds American resentment concerning the imbalances in the U.S.-Japanese economic and trade relationship. He expressed the hope that rational minds will prevail.

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- National Security - Continuing the approach of the statute and the proposed regulations, the final regulations make no attempt to define the term "national security." Rather, the decision whether a particular transaction affects U.S. national security will be made on a case-by-case basis. Despite pressure from commentators, the Treasury Department likewise declined to give categorical exemptions from the statute for certain industries, or for transactions involving a small dollar amount. Further, while the Department encourages informal contact with the CFIUS staff, it likewise refused suggestions that CFIUS should issue summaries

of decisions or formal advisory opinions on transactions so as to give the public guidance on its interpretation of "national security."

- Transactions Covered - Under the final regulations, the statute encompasses both stock and certain types of asset acquisitions (i.e., where a transfer of technology, through personnel or otherwise, will occur). It also applies to joint ventures, proxy contests, and the acquisition of convertible voting securities, provided a transfer of "control" is involved. The statute does not encompass certain start-up (co-called "greenfield") investments, or acquisitions made solely for the purpose of investment. As a result of changes in the final regulations, it also should not encompass most "garden variety" lending transactions unless and until a lender acquires actual control, for example, through foreclosure.
- Control - Exon-Florio is triggered only when there is an acquisition of "control" by a foreign person. The final regulations retain a broad, functionally based definition of control, and continue to eschew any "bright-line" test.
- Definitions of "Foreign" and "U.S." Persons - The final regulations take what might be characterized as a territorial,

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Conference on "Intelligence in a Post-Cold War World"

The revolution in the Soviet Union has profoundly changed the context of United States national security policy. One result is a major national debate as to the future of the national security process, including intelligence. On April 30 - May 1 the Standing Committee will sponsor a conference at the International Club in Washington, D.C. on "Intelligence in a Post-Cold War World."

The purpose of this conference will be to invite some of the Nation's top intelligence experts to explore the need for and shape of an intelligence capability in the changing world environment. Senator David L. Boren, the Chairman of the Senate Select Committee on Intelligence, has already agreed to be one of the conference keynote speakers, and an all-star cast of heads and

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- Campaign contributions can yield congressional support for certain weapons programs and particular contractors;
- The Defense Department steers programs to particular contractors in order to win the support of key legislators;
- Certain legislators can require DOD to award contracts to their pet firms.

Mayer takes on each of these "myths." The first chapter of the book pokes holes in the substantial available anecdotal evidence that supports the notion that Congress is reluctant to cancel weapons programs because of local economic considerations. He notes that the anecdotal explanations tend to ignore examples that run counter to the expected role of "pork barrel" influence (e.g., Senator Cranston's opposition to the B-2 bomber) and are based upon the assumption that "Congress as an institution bases its weapons procurement decisions on economic impact simply because one or two members are found to have done so."

Regarding the impact of campaign contributions, Mayer says congressional critics too often equate the existence of contributions with the conclusion that influence has been achieved. He continues that, to measure such effects properly, one must hold constant for other vote influences, such as party, ideology and constituency interest. Mayer attempts to apply such a behavioral analysis to two case studies: (1) the Army's unsuccessful attempt to second-source the M-1 tank engine and (2) the 1982 congressional vote to replace the Lockheed C-5B with the Boeing 747. He also generally analyzes defense PAC contributions from 1978 through 1989 (including the timing of such contributions) and concludes that such contributions generally had no effect on how members voted.

Mayer then analyzes 1987 congressional voting on amendments to de-fund two Nimitz-class carriers (multi-billion dollar projects involving over 130,000 subcontract jobs alone over the life of the contracts) and concludes that parochial concerns had minimal effect on the outcome.

If politics and parochialism have so little to do with the outcome of defense spending decisions, however, how can one explain the seemingly contrary behavior of all of the key participants? For example, consider the substantial level of PAC contributions made by defense contractors and the periodic charges by members of Congress

(and contractors themselves) that particular spending or contracting decisions were politically motivated and unfair. Also, consider the political tactics used by the White House and the military establishment when key weapons projects are threatened.

According to the Mayer, the answer to all of this is that much of this activity is "largely for show and has little substantive impact on the process." He says, for example, that it is really in Congress' interest "to maintain the illusion that the process is political." This allows a member to take credit when his or her state or district benefits and to blame others when it does not. Mayer implies that it is in contractors' interests too (by providing "cover" for management when a contractor is on the losing side of awards).

But is it really likely that the defense industry would willingly "fork over" millions of dollars each year in PAC money simply for "show" (not to mention additional millions for sizable government affairs staffs)? One would hardly think so. And could all the key players described above, as well as journalists, lobbyists and others, be so out of touch with reality?

After reading the book, I was left with the impression that while Mayer may be on to some-

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former heads of intelligence agencies and committees and other experts on intelligence has been invited. Panels include: "Intelligence in Context: Historical Background, Contemporary Context, and the Experience in Other Democratic Nations;" "An Assessment of Intelligence Goals and Tasks;" "Intelligence and the New Arms Control Agenda;" "Intelligence, War Avoidance and Crisis Action;" "Intelligence and Its Relation to Economic and Business Interests;" "Assisting Democratic Control of Intelligence Agencies in Former Warsaw Pact Nations;" "Intelligence Organization for the Future;" and "Roundtable Discussion: Intelligence in a Post-Cold War World."

This conference will be held at the International Club, 1800 K Street, N.W., Washington, D.C. For further information please contact James Arnold Miller, Staff Director of the Standing Committee, at (703) 242-0629.

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thing, it is equally plausible that his book merely demonstrates that the current state of political science simply has not yet advanced to the point where it can accurately measure what everyone "knows" to be the case.

And this points to what I consider the weakness of Mayer's book: while he raises substantial questions regarding the conventional understanding of what drives the process of defense spending and contracting in this country, he fails to advance a well-developed explanation of his own—other than by negative implication, i.e., if political expediency is not the determinant, then principled national interest must be. Of course, that is not necessarily the case. In fact, it is perhaps equally plausible that the driving force is neither expediency nor national interest, but rather "confusion" -- something a Pentagon veteran singled out (not completely tongue-in-cheek) years ago when I joined the Army's legal staff there.

Mayer does concede that defense spending and contracting decisions always contain an irreducible political dimension and that participants strive to extract as much political advantage as they can from them. But, in his view, while "political considerations may shape the manner in which issues are approached," the institutions as a whole pay more attention to national interests than they are given credit for.

In the important current debate on national security priorities, Mayer believes that political strategies, such as well-placed PAC contributions, strategic subcontract distributions and the like, will make little difference in the outcome. He says such tactics (and the parochialism that would justify them) are likely to have little effect in the absence of a strong public consensus in favor of more defense spending.

Mayer has already been proven substantially correct regarding overall spending levels. President Bush is proposing a \$50 billion reduction in defense spending over the next five years and Congress appears poised to enact further cuts. However, the more interesting question is whether political strategies can result in the saving of one program over another. I believe Mayer's answer is that they would not make a difference. Yet participants with large stakes in the process will no doubt continue to abide by conventional wisdom and pursue such political strategies as a matter of routine and, despite Mayer's insightful analysis, I am fairly certain that few people would dismiss the use of such strategies as largely a waste of time.

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asset-based approach to the determination of nationality. Under that approach, a business that was foreign-owned but U.S.-based could be a "U.S. person" for purposes of the statute. The acquisition of that business by another foreign-owned, U.S.-based business could fall under the statute if the second U.S. business satisfied the test for foreign control and was therefore treated as a "foreign" person.

- **Procedural Issues** – The proposed regulations established a voluntary, rather than mandatory, notification scheme. A notice could be filed either by a party (or all parties) to the transaction, or by a member agency, acting on its own initiative. The final regulations continue this basic

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Calendar of Events

April 16

Breakfast Meeting
University Club
Washington, D.C.
Speaker: Assistant Secretary of State Richard Schifter

April 30 - May 1

Conference on Intelligence in a Post-Cold War World
International Club
Washington, D.C.

For further information on these events, please contact the Standing Committee office at 703-242-0629.

CNSL Summer Institute On National Security Law

The Center for National Security Law at the University of Virginia is seeking applicants for its second annual institute on the teaching of national security law. This Institute, which will be taught in Charlottesville, Virginia, and Washington, D.C., is scheduled from Sunday, June 7th, until Saturday, June 20th.

This intensive program is designed to provide educators and lawyers with an overview of salient issues in the field of national security law. Among the issues to be discussed by leading governing policy-makers and legal theorists will be the following: use of force law; the First Amendment and national security; trends in intelligence law; the Fourth Amendment and international law, and rule of law engagement strategies in the 1990s and beyond.

The deadline for applications to the institute is April 15. For further information and to apply, please contact: Professor John Norton Moore, Director, Center for National Security Law, Room 150, University of Virginia School of Law, Charlottesville, Virginia 22903.

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approach. However, in an effort to ensure the accuracy and completeness of submissions, they require that all parties to a transaction sign the notice even if it is being submitted by only one of the parties. This may affect the use of Exon-Florio in hostile takeover situations. The Treasury Department has otherwise rejected numerous suggestions to judicialize and formalize the agency processes.

- No Limitations Period for Divestment Authority – When the President finds that the national security is threatened by a transaction, his statutory remedies include the ability to force divestment of a previously completed acquisition. This authority has only been exercised once since the passage of the statute, but has been a matter of great concern to buyers because of the obvious uncertainty and risks to investment values it creates.

Although strongly urged by commentators to establish a sunset on the President's divestment authority, the Treasury Department declined to do so in the final regulations. The only concession made to this concern is the three-year limit on agency notification.

- Confidentiality – The final regulations bring no more sunshine to Exon-Florio investigations than has existed previously. The Treasury Department's ability to do so is limited at the outset by the statute's dictate of confidentiality. As noted above, moreover, the Department declined even to publish summaries of notified transactions, on the ground they might be misleading. The reason given for such confidentiality is, of course, the need to protect national security; the Department attempts in the preamble to the final regulations to assuage any concerns that confidentiality will be a cloak for illegal discrimination against or among foreign persons.

The Exon-Florio statute represents an effort to accommodate the perceived needs of national security with the historical openness of the United States to foreign investment. Given those inherently conflicting goals, the regulations were bound not to satisfy everyone. In crafting the final regulations, the Treasury Department has been more deferential to the needs of national security than the needs of commerce. Although CFIUS has shown restraint in its application of Exon-Florio to date, such restraint cannot completely neutralize the chilling effect of this legislation on foreign investment in the United States. Whether this chilling effect is beneficial or not depends largely on one's perspective. If one could be confident that only the "wrong" transactions were being deterred, then one would undoubtedly view the legislation as a success. But without some clear articulation of what "national security" means in this context, and with a process that has substantial room for executive branch discretion, yet is shrouded in fog, it would be too much to hope that only the "wrong" transactions will be deterred.

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