National Security

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I. Cluster Munitions*

The Convention on Cluster Munitions[1] (CCM) seeks to reduce the weapon's propensity to cause significant humanitarian damage. Cluster munitions scatter a number of submunitions over a large area, enabling one sortie to destroy numerous targets.[2] When a submunition impacts a target, its shell breaks into shrapnel that travels with enough force to pierce armor.[3] The weapon has become a significant feature of the Pentagon's military strategy: the United States has stockpiled at least 5.5 million cluster munitions that include a total of 728.5 million submunitions.[4]

The inaccuracy and high dud rates of cluster submunitions raise concerns under IHL. Additional Protocol I of the Geneva Conventions (Protocol I) establishes standards for the protection of civilians during armed conflict.[5] Generally, Protocol I prohibits weapons that are incapable of distinguishing between military targets and civilians.[6] Failure rates for submunitions range from two to thirty percent.[7] These duds have the effect of landmines, with the potential to explode at the slightest contact.[8] In Laos, an estimated nine to twenty-five million submunitions of those dropped during the Vietnam War failed

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1. Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, Convention on Cluster Munitions, May 30, 2008, http://www.mineaction.org/downloads/1/CCM77_ENGLISHfinaltext_001%5B1%5D.pdf [hereinafter CCM].

2. *See, e.g.*, U.N. INST. FOR DISARMAMENT RESEARCH, THE HUMANITARIAN IMPACT OF CLUSTER MUNITIONS 1, U.N. Doc. UNIDIR/2008/1 (2008); Mark Hiznay, *Operational and Technical Aspects of Cluster Munitions*, 4 DISARMAMENT F. 15 [2006], *available at* http://www.unidir.org/pdf/articles/pdf-art2530.pdf; Thomas Michael McDonnell, *Cluster Bombs Over Kosovo: A Violation of International Law*, 44 ARIZ. L. REV. 31, 42 (2002).

3. McDonnell, *supra* note 2, at 46.

4. Hiznay, *supra* note 2, at 18.

5. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 48, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

6. *Id.* art. 48.

7. Hiznay, *supra* note 2, at 22.

8. *See* Human Rights Watch, *Cluster Munitions a Foreseeable Hazard in Iraq*, Mar. 18, 2003, *available at* http://www.hrw.org/en/reports/2003/03/18/cluster-munitions-foreseeable-hazard-iraq.

to explode—these submunitions have caused over 10,000 civilian casualties since the war, with new victims every year.[9] Failed submunitions cannot discriminate between military targets and civilians and therefore render cluster munitions suspect under Protocol I.

On May 28, 2008, 111 states agreed to final terms to the CCM after two years of negotiations in an effort to prevent future humanitarian consequences from cluster munitions.[10] The CCM does not set a blanket prohibition on cluster munitions. Instead, it creates a heightened sophistication standard for submunitions. The definition of a cluster munition excludes cluster munitions that satisfy Protocol I by being able to "detect and engage a single target" and that include self-destruct and self-deactivation capabilities.[11] The Convention provides guidelines for clearing unexploded submunitions, educating populations at risk, establishing a victim assistance program, and enforcing the treaty.[12] The CCM permits states parties to "engage in military cooperation and operations with States not party" to the treaty, a victory for participants who are also members of NATO.[13] Article 21 of the CCM thereby allows parties to engage in military operations and peacekeeping missions with non-state parties that have cluster munitions in their arsenal.[14]

The United States insists that cluster munitions are effective weapons "when properly targeted and employed"[15] and that the removal of cluster munitions from its arsenal is simply not tenable from a military standpoint.[16] But the United States "recognizes the need to minimize the unintended harm to civilians and civilian infrastructure associated with unexploded ordnance from cluster munitions."[17] The Pentagon's new policy on cluster munitions calls for the development of a new generation of submunitions that will reduce the risk of collateral damage. Unfortunately, the new generation of cluster munitions is not scheduled to be available until 2018.[18] The CCM became open for signature on December 3, 2008.[19]

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9. Hiznay, *supra* note 2, at 17.

10. CCM, *supra* note 1. *See* Convention on Cluster Munitions, Oslo Process, http://www.clusterconvention.org/pages/pages_vi/vib_osloprocess.html (last visited Apr. 8, 2009).

11. CCM, *supra* note 1, at art. 2(2)(c).

12. *Id.* arts. 4, 5, and 8.

13. *Id.* art. 21(3).

14. Some states that use or produce cluster munitions and are not likely to endorse the CCM are the United States, Russia, China, and Israel. *See* Eamon Quinn & John F. Burns, *U.K. Drops Opposition to Cluster Bombs Ban*, INT'L HERALD TRIB., May 28, 2008.

15. DEPARTMENT OF DEFENSE, REPORT TO CONGRESS: KOSOVO/OPERATION ALLIED FORCE AFTER-ACTION REPORT 90 (Jan. 31, 2000), http://www.dod.mil/pubs/kaar02072000.pdf.

16. *See id.* at 90; Alejandro D. Wolff, Deputy U.S. Permanent Representative, U.S. Mission to the U.N., Statement at the Security Council on the Protection of Civilians in Armed Conflict (May 27, 2008), http://geneva.usmission.gov/CD/updates/0527CiviliansArmedConflict.html.

17. Memorandum from Robert M. Gates, U.S. Sec'y of Defense, to the Sec'ys of the Military Dep'ts., et al. on DOD Policy on Cluster Munitions and Unintended Harm to Civilians (June 19, 2008), http://www.globalsecurity.org/military/library/policy/dod/d20080709cmpolicy.htm.

18. *See id.*

19. *Miles A. Pomper, Cluster Munitions Treaty Announced*, ARMS CONTROL ASS'N, June 2008, http://www.armscontrol.org/act/2008_06/Cluster.

II. *Gates v. Syrian Arab Republic*—A Test for the Foreign Sovereign Immunities Act*

On September 26, 2008, Judge Rosemary M. Collyer, U.S. District Court for the District of Columbia, handed down a judgment for over $400 million to the survivors of Jack Armstrong or Jack Hensley, two American contractors brutally murdered by al-Qa'ida in Iraq (AQI).[20] The judgment was rendered against the Government of Syria—held liable for the murders in a federal cause of action under the recently amended Foreign Sovereign Immunities Act (FSIA) for Syria's material support to AQI. The recent amendment is one of a series of congressional acts to strengthen private causes of action against state sponsors of terrorism, dating to 1996. With an increasing number of civilians working in combat zones, it is very possible that the number of causes of action against state sponsors of terror will increase exponentially in the coming years. As a result, *Gates v. Syrian Arab Republic* serves an important initial benchmark of the current state of the law.

In 1996, Congress amended the FSIA to allow civil suits by U.S. victims of terrorist acts such as torture, extrajudicial killing, aircraft sabotage, and hostage taking, and created a cause of action via a further amendment against "an official, employee, or agent of a foreign state designated as a state sponsor of Terrorism."[21] In 2004, the U.S. Court of Appeals for the District of Columbia held that the law only provided a cause of action against individual agents in their personal capacity, rather than against the foreign state itself—forcing claimants to seek remedy under domestic state law, if available.[22] The 2008 National Defense Authorization Act (NDAA) amended the FSIA to provide a private right of action against a state that has been identified as a state sponsor of terrorism.[23] The amendment allows for recovery of money damages to include economic damages, solatium, pain and suffering, and punitive damages, and "in any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents."[24]

In *Gates*, Armstrong and Hensley were civilian non-combatants employed by a private sub-contractor in Iraq, in September 2004, when they were kidnapped by AQI. AQI leader Abu Musan al-Zarqawi murdered both men in grisly beheadings that were videotaped and later posted on the internet as a propaganda tool. Syria was found to have provided material support to AQI:

> Syria was the critical geographic entry point for Zarqawi's fighters into Iraq. . .and served as a "logistical hub" for Zarqawi. . . . Syria supported Zarqawi and his organization by: (1) facilitating the recruitment and training of Zarqawi's followers and their transportation into Iraq; (2) harboring and providing sanctuary to terrorists and

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20. Gates v. Syrian Arab Republic, 580 F. Supp. 2d 53 (2008).

21. Flatow Amendment, Civil Liability for Acts of State-Sponsored Terrorism, Pub. L. 104-208, tit. V, § 589a, 110 Stat. 3009,172 (1996) (codified as amended at 28 U.S.C. § 1605 (a)).

22. Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024 (D.D.C. 2004).

23. 2008 National Defense Authorization Act, Pub. L. 110-181, § 1083(a)(1), 122 Stat. 3 (amending ch. 97, 28 U.S.C. § 1605(c)).

24. *Id.*

their operational and logistical supply network; and (3) financing Zarqawi and his terrorist network in Iraq.[25]

The court held that under the NDAA amendment, the Government of Syria was the only defendant against which damages could be sought, a dismissal of state-law claims was required, but that Syria was subject to suit under the terrorism exception to FSIA. The court awarded economic damages, solatium, pain and suffering, and punitive damages of over $4 million.

The court's application in *Gates* of the new FSIA amendment does not produce remarkable results, yet it is probably a harbinger for the future of this type of litigation. If material support can be proven, the state will be liable. Should the executive branch reverse its trend of fighting private actions and rather choose to use these private suits as levers against state sponsors of terror, FSIA could have an impact of not only compensating victims, but also causing state sponsors of terror to recalculate the costs of their behaviors.

III. Pursuing Claims and Accountability over Private Security Contractors in Iraq*

The need for stronger accountability over private security contractors in Iraq gained much attention in 2008, since the U.N. mandate for foreign troops in Iraq was to have expired in December 2008, and the Status of Forces Agreement between Iraq and the United States may subject U.S. contractors to Iraqi legal jurisdiction for violations of criminal laws.[26] The Iraqi government's demand for jurisdiction over U.S. contractors arose as a result of incidents involving contractors and potential violations of international or U.S. laws.[27] And, in an effort to seek redress and accountability for these incidents, purported victims and their families have filed numerous civil cases against the companies and their employees in U.S. courts.

The Center for Constitutional Rights is heading two cases on behalf of Iraqis detained at Abu Ghraib prison–*Saleh v. Titan Corp.* and *al-Janabi v. Stefanowicz*–claiming that CACI Premier Technologies, Inc. (CACI) and L-3 Communications Titan Corporation (Titan)

25. Gates v. Syrian Arab Republic, 580 F. Supp. 2d at 59.

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26. *See Iraq: Whose Law Must Mercenaries Obey?*, ECONOMIST, Aug. 21, 2008; David Isenberg, *Emerging Threats: Private Military Contractors Fret Over Iraqi-U.S. Status of Forces Agreement*, UPI, Oct. 31, 2008, *available at* http://www.upi.com/Emerging_Threats/2008/10/31/Private_military_contractors_fret_over_Iraqi-US_Status_of_Forces_Agreement/UPI-43971225496635/ (noting that Iraq and United States were negotiating SOFA, clarifying terms for U.S. military operating in Iraq, including deadline for troop withdrawal and legal jurisdiction over U.S. contractors; the Iraqi government demanded that SOFA subject U.S. contractors to Iraqi criminal jurisdiction).

27. *See* CONGRESSIONAL RESEARCH SERVICE, CRS REPORT, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 11-14 (Aug. 25, 2008), *available at* http://fpc.state.gov/documents/organization/88030.pdf (incidents include shooting of Iraqi civilians by Blackwater contractors at Nisur Square and firing at Iraqi civilians by Triple Canopy employees, possibly resulting in one death); Scott Horton, *Can't Win With 'Em, Can't Go to War Without 'Em: Six Questions for P.W. Singer*, HARPER'S MAG., Sep. 30, 2007, *available at* http://harpers.org/archive/2007/09/hbc-90001311 (incidents include abuse by contractors of Iraqi prisoners at Abu Ghraib; firing at Iraqi civilians by Zapata contractors, undermining efforts at winning Iraqi support for U.S. forces).

and their employees engaged in torture; cruel, inhuman and degrading treatment; war crimes; assault and battery; sexual assault; negligent hiring and supervision; and intentional and negligent infliction of emotional distress.[28] Plaintiffs in *Saleh*—consisting of twelve Iraqis and the estate of one deceased Iraqi—additionally claim extrajudicial killing, crimes against humanity, and wrongful death.[29] Both cases seek accountability against the individual employees involved in the alleged incidents and against the companies who employed them.[30] The *al-Janabi* case received some additional attention because it involves one of the alleged "ghost detainees"–prisoners never recorded as detained and hidden away when Red Cross personnel visited the prison.[31]

Similarly, a group of attorneys from Atlanta filed suit on behalf of seven Iraqis alleging that they or their deceased spouses were tortured at Abu Ghraib.[32] This litigation seeks to disgorge from CACI and Titan the "profits derived from unlawful torture, to prevent [them] from receiving future payments under existing contracts with the [U.S.] government, and to prohibit [them] from engaging in future contracts with the [U.S.] government."[33] Furthermore, other lawyers are pursuing claims against Blackwater Lodge and Training Center, Inc., and its affiliated companies (Blackwater) for the shooting deaths and injuries of Iraqi civilians in Nisur Square on September 16, 2007.[34] The complaint alleges that Blackwater committed war crimes and also pursues several torts claims, seeking compensatory damages and punitive damages meant to strip Blackwater of profits earned from its alleged misconduct.[35]

An obvious goal of these cases is to force accountability on the corporate entities for their actions and those of their employees, especially since prosecution by the U.S. government has not been forthcoming.[36] In August 2008, several Blackwater employees received target letters from the Department of Justice, indicating that indictments against them may be on the horizon.[37] But given the difficulty of pursuing criminal cases outside the United States, especially in a war zone, the best avenue for accountability may ultimately be the civil cases. Whatever the method, accountability should be demanded.

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28. *See* First Amended Complaint, al-Janabi v. Stefanowicz, No. CV08-2913 (C.D. Cal. May 20, 2008); Saleh v. Titan Corp., 436 F. Supp. 2d 55, 56, 59 (D.D.C. 2006).

29. *Saleh*, 463 F. Supp. 2d at 59.

30. *Id.* at 56–57; First Amended Complaint, *supra* note 28, at 3,18-19.

31. First Amended Complaint, *supra* note 28, at 15, 8.

32. *See* Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 11 (D.D.C. 2005); R. Robin McDonald, *Federal Judge Lets Abu Ghraib Suit Against Government Contractor Go Forward*, FULTON COUNTY DAILY REP., Nov. 13, 2007.

33. *See* Second Amended Complaint at 2, Ibrahim v. Titan Corp., No. 1:04-cv-01248 (D.D.C. Sep. 7, 2005).

34. *See* Second Amended Complaint at 1-3, Abtan v. Blackwater Lodge & Trng. Ctr., No. 1:07-cv-01831 (D.D.C. Mar. 28, 2008).

35. *Id.* at 16–19.

36. Horton, *supra* note 26 (noting no Abu Ghraib contractors have been prosecuted).

37. *See* Del Quentin Wilber & Karen DeYoung, *Justice Dept. Moves Toward Charges Against Contractors in Iraq Shooting*, WASH. POST, Aug. 17, 2008, at A1.

IV. 2008 Amendments to the Foreign Intelligence Surveillance Act*

The Foreign Intelligence Surveillance Act (FISA)[38] was enacted in 1978 in the wake of the revelations of past abuses of electronic surveillance undertaken in the name of national security. The Act provides a statutory framework for the collection of foreign intelligence information, including through the use of electronic surveillance. Prior to its amendment in 2008, FISA required an individualized warrant from the Foreign Intelligence Surveillance Court (FISC) for such electronic surveillance. To obtain such a warrant, the government had to establish probable cause that: 1) the "target" was a foreign power or an agent of a foreign power; 2) a facility was being used by that target (e.g., a telephone number); and 3) the government was using minimization procedures to protect the privacy interests of U.S. persons.[39]

After 9/11, the Bush Administration ignored FISA's warrant requirement and secretly "authorized the National Security Agency to intercept communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations."[40] Following the furor over these revelations, the government proposed modernizing FISA to allow such surveillance. This led to an extensive debate in Congress and the eventual passage of the FISA Amendments Act in July 2008.[41]

The FISA amendment debate raised issues of fundamental importance: 1) whether gathering foreign intelligence information through electronic surveillance that could compromise the privacy interests of U.S. persons should require an individualized probable cause inquiry or whether a generalized authorization was sufficient; and 2) whether such surveillance should be authorized by a court or by executive branch officials.

Section 702(a) of the FISA Amendment Act (FAA) permits the Attorney General (AG) and the Director of National Intelligence (DNI) to "authorize jointly, for a period of up to one year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information." This authority is subject to certain strictures. Substantively, the acquisition may not intentionally target people known to be in the United States, target persons outside the United States with the purpose of targeting a person in the United States, target a U.S. person outside the United States, or acquire a communication where all parties are in the United States; it must also be exercised consistent with the fourth amendment to the Constitution.[42]

Procedurally, the acquisition must be conducted in accordance with targeting and minimization procedures adopted by the AG and the DNI. The targeting procedures must be reasonably designed to ensure that acquisitions are "limited to targeting persons reasona-

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* This section was written by Faiza Patel King, Director for Foundation Relations at the Brennan Center for Justice.

38. Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-511, 92 Stat. 1783 (1978) (prior to 2008 amendments).

39. *Id.* §105(a).

40. U.S. DEPT. OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006), *available at* http://www.usdoj.gov/ag/readingroom/surveillance9.pdf.

41. FISA Amendments Act of 2008, Pub. L. 110-261, 122 Stat. 2436 (2008) [hereinafter FAA].

42. § 702(b)(1)-(5). This submission focuses on section 702 of the FAA; sections 703 and 704 regulate acquisitions where the target is a U.S. person located abroad. *Id.* § 702(b)(5).

bly believed to be located outside the United States" and prevent the intentional acquisition of purely domestic communications, and the minimization procedures must meet the definition of minimization procedures in the pre-amendment FISA.[43] Both are subject to review by the FISC; however, if the Court finds the procedures deficient, the government has the option of correcting them or suspending surveillance.[44]

In addition, the government must, generally prior to surveillance, certify in writing to the FISC that: targeting and minimization procedures and guidelines are in place and are consistent with the fourth amendment; a "significant purpose" of the acquisition is to obtain foreign intelligence information; the acquisition involves the assistance of an electronic communication service provider; and complies with statutory requirements.[45] The FISC reviews the certification only to determine whether it contains all the required elements."[46]

Finally, the FAA enacted "telecom immunity." Telecommunications companies that had cooperated with the Administration's warrantless surveillance program received retroactive immunity against the various civil suits that had been filed against them for intercepting their customers' private communications. The FAA provided for the dismissal of the pending civil actions if the AG certified that such assistance was in connection with an activity that was authorized by the President between September 11, 2001, and January 17, 2007, was designed to detect or prevent a terrorist attack or preparations for one, and was authorized in writing by the President.[47] Such a certification must be given effect unless a court finds that "it is not supported by substantial evidence."[48]

In sum, the 2008 amendments eliminated FISA's requirement for an individualized warrant and replaced it with a system in which the executive branch can authorize surveillance.

V. Military Commissions: *United States v. Hamdan**

United States v. Hamdan, the first U.S. military war crimes tribunal since World War II, concluded on August 7, 2008. The future of Military Commissions is in doubt even though Hamdan received due process that greatly exceeded the Nuremburg tribunal and is comparable to protections received in The Hague.[49]

Captured in a village near Kandahar, Afghanistan in November 2001, Salim Hamdan's detention and litigation lasted for six and a half years.[50] Prior to the start of his trial on

43. *Id.* § 702(d)(1), (e)(1).
44. *Id.* § 702(i)(2)(C).
45. *Id.* § 702(g)(1)(A), (g)(2).
46. *Id.* § 702(i)(2).
47. *Id.* § 802(a).
48. *Id.* § 802(b).

* This section was authored by Keith A. Petty, a Judge Advocate in the U.S. Army and a prosecutor at the Office of Military Commissions.

49. David B. Rivkin & Lee A. Casey, *Justice at Gitmo*, WALL ST. J., Aug. 1, 2008, at A13. *See also Those Gitmo Surprises*, CHICAGO TRIBUNE, August 16, 2008, available at http://archives.chicagotribune.com/2008/aug/16/opinion/chi-0816edit2aug16 [hereinafter *Gitmo Surprises*].

50. David Alexander, *Prisoner Helped Bin Laden Elude Capture: FBI*, REUTERS, December 6, 2007, available at http://www.reuters.com/article/topNews/idUSN06202451200712O7?feedType=RSS&feedName=topNews&page.

July 21, 2008, Hamdan achieved several procedural victories, including a landmark Supreme Court ruling,[51] dismissal of his case for lack of personal jurisdiction,[52] and a prisoner of war status determination under the Third Geneva Convention.[53] On the eve of trial, however, D.C. District Court Judge James Robertson denied a defense request for a preliminary injunction, stating that "Article III judges do not have a monopoly on justice, or on constitutional learning. A real judge is presiding over the pretrial proceedings in Hamdan's case and will preside over the trial."[54]

Besides challenging the process, Hamdan was able to contest the reliability of his confessions, some of which the military judge deemed unreliable.[55] In the same ruling, however, the military judge declined to suppress the accused's statements taken at Guantanamo as long as the Government produced the interrogator that elicited the statements.[56]

Hamdan was charged with conspiracy[57] and material support for terrorism.[58] At trial, the Government presented evidence—none of which was hearsay—that Hamdan knowingly transported and guarded bin Laden before, during, and after the 9/11 terror attacks; transported weapons and ammunition for al Qaeda including two surface-to-air missiles; and received weapons training.[59] The defense countered that he was not guilty and compared him to Hitler's driver who was never charged with any offense.

Ultimately, Hamdan was convicted of material support for terrorism and acquitted of conspiracy. Controversy surrounded the military judge's panel instructions, which even he admitted may have been erroneous. At issue was whether it was a violation of the law of war for Hamdan, previously determined to be an unlawful combatant, to target U.S. soldiers. The military judge answered in the negative and, as a result, it became a legal impossibility to find that Hamdan conspired to kill "in violation of the law of war."

The six officers of the military jury (panel) delivered truth and fairness.[60] In fact, one panel member later commented that the prosecution "was kind of like using the hand grenade on the horsefly,"[61] apparently adopting the defense argument that Hamdan was merely a chauffeur. Ultimately, there was no evidence of a "show trial" that critics often cite as justification for shutting down the military commissions.[62]

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51. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

52. Order Dismissing for Lack of Jurisdiction, *United States v. Hamdan* (June 4, 2007), http://www.icj.org/IMG/Hamdan_Order.pdf.

53. Ruling on Defense Motion for Article 5 Status Determination, United States v. Hamdan (December 17, 2007), http://www.defenselink.mil/news/Dec2007/HAMDAN%20ARTICLE%205%20RULING%2017%20Dec%202007.pdf.

54. Hamdan v. Gates, 565 F. Supp. 2d 130, 137 (D.D.C. 2008) (denying preliminary injunction).

55. Ruling on Motion to Suppress, *United States v. Hamdan* (July 20, 2008), http://www.defenselink.mil/news/Ruling%20on%20Motion%20to%20Suppress%2029%20and%20D-044%20Ruling%201%20(2).pdf.

56. *Id.*

57. Military Commissions Act, 10.U.S.C. § 950v(b)(28) (2006).

58. *Id.*

59. Referred Charge Sheet, *United States v. Hamdan* (May 1, 2007), http://www.defenselink.mil/news/May2007/Hamdan_Charges.pdf.

60. *Gitmo Surprises*, *supra* note 49.

61. *Id.*

62. Julia Hall, *Eight days in Guantanamo: The Trial of Salim Hamdan and the Degradation of American Justice*, BALTIMORE CITY PAPER, August 27, 2008, *available at* http://www.citypaper.com/news/story.asp?id=16213.

The panel sentenced Hamdan to five and a half years confinement. Based on the military judge's instructions that he be credited with time served, Hamdan will complete his sentence of confinement on December 31, 2008. The prosecution requested that the military judge reconsider his ruling providing credit for time served on the basis that Hamdan "was independently detained under the law of armed conflict as an enemy combatant."[63] The motion to reconsider was denied on October 29, 2008.[64]

As Judge Robertson stated at the injunction hearing, "Justice must be done [in Guantanamo Bay], and must be seen to be done there, fairly and impartially."[65] To the honest observer it was apparent that justice was done in *United States v. Hamdan*.[66]

VI. Executive Order 13470: Restructuring National Intelligence*

In July 2008, the President issued Executive Order (EO) 13470 amending[67] the landmark EO 12333.[68] The result of a long-rumored development process among the White House, the Office of the Director of National Intelligence (DNI), and the intelligence community at large, EO 13470 is aimed at modernizing U.S. intelligence activities consistent with the Intelligence Reform and Terrorism Prevention Act (IRTPA).[69] The EO also is intended to incorporate lessons learned by DNI since the office's creation. On the surface, the EO does not seem to alter DNI's authority, appearing merely to delineate the specific responsibilities of DNI as provided in the IRTPA. But in reality, the EO may well be interpreted to provide additional and significant powers to the DNI.

Enacted in 2004, IRTPA made the most significant overhaul of the intelligence community since the National Security Act of 1947.[70] Among other reforms, IRTPA established the DNI as head of the intelligence community, created an independent board to investigate civil liberties violations, and emphasized the need for cooperative intelligence-sharing among agencies.[71] In short, the IRTPA reformed the fundamental premise of the intelligence community, supplanting the Director of Central Intelligence ("DCI") with the considerably more powerful DNI and effectively abandoning the compartmentalized, competition-based model of EO 12333 for a cooperative approach. DNI outlined the principles of this approach in its "Vision 2015" mission statement.[72]

63. Peter Finn, *Detainee's Time Served Is Challenged*, WASH. POST, Oct. 18, 2008, at A11.

64. Ruling on Motion for Reconsideration and Resentencing, *United States v. Hamdan* (Oct. 29, 2008), http://www.scotusblog.com/wp/wp-content/uploads/2008/10/hamdan-sentence-order-10-29-08.pdf.

65. Hamdan v. Gates, 565 F. Supp. 2d 130, 137 (D.D.C. 2008).

66. Frank Harvey, *A Silver Lining for Guantanamo Detainees*, GLOBE AND MAIL, June 14, 2008, *available at* http://www.theglobeandmail.com/servlet/story/RTGAM.20080613.wcoessay0614/BNStory/specialComment/.

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67. Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (July 30, 2008).

68. Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981), *reprinted in* 1981 U.S.C.C.A.N. B 102.

69. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 § 6001, 118 Stat. 3638, 2742 (2004).

70. *See id.*

71. *See id.*

72. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, VISION 2015: A GLOBALLY NETWORKED AND INTEGRATED INTELLIGENCE ENTERPRISE, http://www.dni.gov/Vision_2015.pdf (last visited Apr. 9, 2009).

But IRTPA failed to identify many specific responsibilities for DNI. EO 13470, by contrast, identifies twenty-four specific authorities in addition to those granted in IRTPA,[73] though many of the duties described in EO 13470 simply mirror or clarify those delegated in IRTPA. For example, EO 13470 restates that DNI serves as principal advisor to the President on national intelligence matters. Further, in addition to DNI's statutory authority to participate in the appointment of certain intelligence officials, the EO gives DNI the authority to recommend the removal of the DCI, as well as to consult on or recommend removal of other officials. Moreover, as required under the IRTPA, the EO stresses that DNI should consult other intelligence community leaders on certain matters.[74] The EO, however, further amplifies this provision, outlining the procedure by which agency heads can appeal DNI decisions to the National Security Council and, ultimately, the President.[75]

Nevertheless, certain elements of EO 13470 could reignite the turf wars blamed for past intelligence breakdowns. Most notably, the EO gives DNI the authority to "manage and direct the tasking, collection, analysis, production, and dissemination of, national intelligence."[76] DNI may also appoint "Mission Managers" to serve as "principal substantive advisors on all or specified aspects of intelligence."[77] In short, DNI has authority to direct the intelligence activities of both CIA and DOD, which previously enjoyed largely autonomous authority on intelligence matters.

Further, EO 13470 authorizes DNI to establish and conduct intelligence arrangements with foreign governments,[78] a responsibility historically assigned to the CIA's Chiefs of Station. In 2005, DNI began appointing its own representative at certain outposts, though in each instance designating the Chief of Station to serve in a dual role. CIA officials had expressed concern that the EO would give DNI authority to appoint its own representatives from outside the CIA, potentially giving other agencies a larger role in CIA operations and relationships with foreign agencies.[79] While the EO does not directly address this issue,[80] its broad language suggests that DNI has authority to appoint representatives that, at least technically, would have authority to overrule the Chief of Station.

In this respect, EO 13470, while giving DNI authority to harmonize intelligence activities across the community, could complicate the mission by reviving the very turf wars that DNI is charged with preventing.

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73. *See* Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (as amended by Exec. Order No. 13,470, 73 Fed. Reg. 45,325).

74. *See, e.g., id.* at pt. 1.3(b)(2); *see also* Intelligence Reform and Terrorism Prevention Act of 2004 § 1018.

75. *See* Exec. Order No. 12,333, 46 Fed. Reg. 59,941, pt. 1.3(c).

76. *Id.* at pt.1.3(b)(17).

77. *Id.* at pt.1.3(b)(12)(B).

78. *Id.* at pt.1.3(b)(4).

79. Pamela Hess, *Agencies Fight for Spy Control*, USA TODAY, May 28, 2008, *available at* http://www.usatoday.com/news/washington/2008-05-28-spyagencies_N.htm.

80. Press Release, White House, Background Briefing by Senior Administration Officials on the Revision of Executive Order 12333 (July 31, 2008), http://www.whitehouse.gov/news/releases/2008/07/20080731-8.html.

VII. Recent Developments in Anti-Terrorism Sanctions: North Korea*

This section reviews key developments with respect to sanctions against North Korea and certain entities.

In June 2008, the United States began to relax wide-ranging sanctions against North Korea. North Korea had taken steps to open and dismantle its nuclear weapons program, releasing a report detailing its plutonium production at the Yongbyon plant and dynamiting the cooling tower at the reactor. President Bush released a memorandum stating that North Korea had not provided any support for international terrorism in the previous six months and had provided assurances that it would not support future acts of international terrorism.[81] Key developments from June 2008 included:

- Presidential authorization for the Department of State to remove North Korea from the list of state sponsors of terrorism. Removal from the list of state sponsors of terrorism would make impoverished North Korea eligible for U.S. support for financial assistance from the World Bank and International Monetary Fund, among other things.
- A Presidential proclamation lifting the application to North Korea of the Trading With the Enemy Act (TWEA);[82] and
- An Executive Order that ensured that certain restrictions, including property blocking, remained in effect despite the lifting of TWEA sanctions against North Korea.[83]

Then, in August, the progress towards nuclear openness and disablement (on North Korea's part) and sanctions relaxation (on the United States' part) was threatened. The United States objected to North Korea's resistance to outside verification of disabling efforts and stated that North Korea would remain on the list of state sponsors of terrorism. North Korea announced that it would cease disabling efforts and begin rebuilding the Yongbyon reactor.[84] By October, however, progress had resumed. On October 11, North Korea was removed from the list of state sponsors of terrorism.[85] The Commerce Department's Bureau of Industry and Security (BIS) is expected to amend its regulations soon to reflect this development.[86]

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81. Memorandum on Certification of Rescission of North Korea's Designation as a State Sponsor of Terrorism, 44 WEEKLY COMP. PRES. DOC. 912 (Jul. 1, 2008).

82. Proclamation No. 8271, 73 Fed. Reg. 36785 (June 27, 2008).

83. Exec. Order 13,466, 73 Fed. Reg. 36787 (June 27, 2008). The Executive Order declared a national emergency under the International Emergency Economic Powers Act (50 U.S.C. §§ 1701-07), citing "the current existence and risk of the proliferation of weapons-usable fissile material on the Korean Peninsula." *Id.*

84. Blaine Harden, *N. Korea, Angry Over Terror List, Threatens to Rebuild Nuclear Program*, WASH. POST (Aug. 27, 2008).

85. Press Release, U.S. Dep't of State, U.S.-DPRK Agreement on Denuclearization Verification Measures (Oct. 11, 2008), http://merln.ndu.edu/archivepdf/northkorea/state/110922.pdf.

86. Foreign-made items containing just ten percent controlled U.S. content (by value) are currently subject to BIS's North Korea trade controls. The amendment will raise the U.S.-origin content threshold to twenty-five percent. Certain export and reexport license exceptions may also become available, although many existing restrictions regarding, e.g., trade, property blocking, and North Korean vessels, may remain in place.

Not all recent developments focused on the state sponsors of terrorism. In September, the government announced a highly coordinated, multi-agency action against entities and individuals involved in a worldwide network that sought to acquire U.S.-origin dual-use and military components for the government of Iran and for Mayrow General Trading Company (Mayrow). Mayrow was already subject to sanctions because of its role as a supplier of components for improvised explosive devices (IEDs) used against U.S. and allied forces in Iraq and Afghanistan. BIS added seventy-five entities to the Entity List, as a result of which they are subject to a general policy of denial for exports or re-exports of items subject to the Export Administration Regulations (EAR).[87] The U.S. Attorney for the Southern District of Florida simultaneously unsealed an indictment charging sixteen individuals and corporations with conspiracy and violations involving numerous economic and trade sanctions laws.[88] And the Treasury Department's Office of Foreign Assets Control imposed sanctions against six Iranian military end-users that bought the items from those named in the indictment.[89]

VIII. The Iran Divestment Act 2008*

On September 26, 2008, Congress approved comprehensive legislation against Iran to deter it from proliferating nuclear weapons.[90] House Resolution 7112, titled the *Comprehensive Iran Sanctions, Accountability and Divestment Act of 2008*, provides for greater economic sanctions against Iran.[91] The legislation expands the Iran Sanctions Act to incorporate industries related to oil and natural gas.[92]

Broadly, the legislation expands export and import bans on goods to and from Iran; freezes assets in the United States held by specific individuals close to or within the Iranian government; imposes liability on U.S. companies if they utilize foreign subsidiaries to circumvent sanctions; empowers the Treasury Department with greater authority to combat terrorist financing; increases export controls on nations involved in transnational shipments of sensitive technologies to Iran; requires the U.S. Administration to report all foreign investments of $20 million or greater in Iran's energy sector to determine if any specific investment merit sanctions; and authorizes state and local governments to divest assets in their pension funds and investments in corporations that invested greater than $20 million in Iran's oil industry.[93]

87. Press Release, U.S. Dep't of Commerce, Bureau of Industry and Security, Commerce Department, Government Partners, Break up Iranian Ring Charged with Procuring IED Components (Sept. 17, 2008), http://www.bis.doc.gov/news/2008/bis_press09172008.htm.

88. Press Release, U.S. Dep't of Justice, Sixteen Foreign Nationals and Corporations Indicted on Charges of Illegally Exporting Potential Military and Explosive Components to Iran (Sept. 17, 2008), http://www.usdoj.gov/opa/pr/2008/September/08-nsd-828.html.

89. Press Release, U.S. Dep't of the Treasury, Treasury Designates Iranian Military Firms (Sept. 17, 2008), http://www.treas.gov/press/releases/hp1145.htm. These entities had already been subject to sanctions for their roles in the Iranian nuclear and ballistic missile programs. *Id.*

* This section was authored by Sheheryar Sardar.

90. Cyndee Todgham Cherniak, *New U.S. Extra-territorial Legislation Includes Tougher Iran Sanctions*, TRADE LAW., Sept. 28 2008, http://tradelawyersblog.com/blog/archive/2008/september/article/new-us-extra-territorial-legislation-includes-tougher-iran-sanctions/?tx_ttnews%5Bday%5D=28&cHash=a06425d4d9.

91. H.R. 7112, 110th Cong.(2008).

92. Cherniak, *supra* note 90.

93. *Id.*

The Iran Divestment Act 2008 is a culmination of legislative developments during the year.[94] It expands the definition of persons subject to economic and trade sanctions, including financial institutions, insurers, and export credit agencies.[95] Its codification and expansion of indirect export and import bans is in accordance with the export prohibitions enumerated in the International Emergency Economic Powers Act.[96] Most notably, the Act requires the President to freeze assets of Iranian officials under U.S. jurisdiction if such individuals are deemed to be involved in nuclear proliferation activities.[97] Under previous law, the President could exercise discretion.[98] Similarly, the severity of penalties arises in the context of commercial transactions, whereby a U.S. parent company will be held liable to sanctions if it "establishes or maintains a subsidiary to circumvent" sanctions.[99] This restriction curbs the prior ability of a foreign subsidiary of a U.S. company to invest in Iran without violating U.S. law.[100]

The Act further authorizes voluntary divestment from Iran, subject to certain conditions. It authorizes local and state governments to divest from private companies that have invested $20 million or more in Iran's energy sector.[101] The most striking change affecting divestment is the amending of the Investment Company Act of 1940 to prohibit legal action against asset managers who choose to divest.[102] Legislative intent enjoins specific laws and mandates federal agencies such as the Securities and Exchange Commission to ease the process of divestment and its disclosures without fear of reprisal.[103]

The Act also strengthens efforts prevent the illegal diversion of sensitive technologies to Iran. The intent behind this section is to identify countries of "Possible Diversion Concern."[104] The Act mandates U.S. assistance to those countries engaged in the transshipment, re-exportation, or diversion of sensitive technologies to an entity owned or operated by Iran.[105] This includes strengthening export controls, coordinating data exchange, and creating enforcement mechanisms.[106] If such countries fail to cooperate, they may be subject to additional licensing requirements.[107]

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94. Sen. Chris Dodd (D-CT) and Richard Shelby (R-AL) announced wide support for the legislation in July 2008. Press Release, Chris Dodd, U.S. Senator for Conn., Dodd, Shelby Announce Bipartisan Iran Sanctions Legislation (July 15, 2008), http://dodd.senate.gov/index.php?qN%de/4504.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. For example, Halliburton's foreign subsidiary, Halliburton Products and Services Ltd., lawfully conducts business in Iran. The Act would presumably make such conduct illegal. Lisa Myers, *Halliburton Operates in Iran Despite Sanctions*, MSNBC, Mar. 8 2005, http://www.msnbc.msn.com/id/7119752/.

101. Dodd, *supra*, note 93.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*