

THERE ARE 3 SIDES TO EVERY STORY: YOURS, MINE, AND THE TRUTH MEDIATION: UNIONIZATION OF SECRET AGENTS v. GOVERNMENT

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The scriptural phrase inscribed over the United States Central Intelligence Agency's portals in Langley, Virginia reads: "Ye shall know the truth, and the truth shall make you free."¹ The United States defines espionage towards itself as "The act of obtaining, delivering, transmitting, communicating, or receiving information about the national defense with an intent, or reason to believe, that the information may be used to the injury of the United States or to the advantage of any foreign nation."² Espionage is a violation of 18 United States Code 792-798 and Article 106, Uniform Code of Military Justice. In the following mediation, three of the most famous and idealized secret agents have united and joined forces to attempt to settle a dispute with the Government.

Meet the parties

James Bond was created in 1952 by author Ian Fleming as a fictitious debonair secret agent for the British Secret Intelligence Service. He travels the world with beautiful women at his side often using his wits, fighting ability, and high-tech gadgets to defeat villains focused on world domination. Jack Bauer was created as the protagonist for the American television series *24* as a government agent employed by the Counter Terrorist Unit Los Angeles. He has helped thwart major potential terrorist attacks against the United States, and in doing so, saved the lives of both civilians and government leaders. Jason Bourne was created in 1980 by author Robert Ludlum as a volunteer for

¹ "Counting Knows." The New York Times. 11 March 1994.
<http://query.nytimes.com/gst/fullpage.html?res=9C00EFDB153DF932A25750C0A962958260>

² U.S. Department of Defense. http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf. Joint Publication 1-02 Department of Defense Dictionary of Military and Associated Terms. 12 July 2007

Operation Treadstone, a “black-ops program,” where he learned CIA protocols and tradecraft. He is highly adept at hand-to-hand combat, skilled at handling vehicles and demonstrates an innate ability to utilize lateral thinking to solve problems. These three agents, all with the initials “JB,” have formed a coalition hereinafter referred to as “JB Dream Team”.

Meet the mediator

The mediator presiding over this dispute is Sun Tzu. As the author of the influential Chinese treatise, *The Art of War*, Sun Tzu craftily described military strategy with applicable life lessons. According to the Florida state statute, “the role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives.” Section 44.1011(2), Florida Statutes. The Uniform Mediation Act defines a “mediator” as “an individual, of any profession or background, who conducts a mediation.”³ In discussing the role of the mediator in this dispute, it is appropriate to examine Sun Tzu’s skills, abilities and other attributes that are required to perform the role effectively.

Sun Tzu wrote extensively on the importance of positioning in strategy. He claimed that one’s position is affected both by objective conditions in the physical environment and by the subjective opinions of competitive actors in that environment. A thorough understanding of this factor is essential to one’s role as a successful mediator. Sun Tzu emphasized the importance of knowing when to move forward and when to

³ Alfini, James J. *Mediation Theory and Practice*. Newark: LexisNexis, 2006. p. 109

retreat.⁴ This applies both in a military setting and in mediation law. He believed that planning requires the ability to quickly respond to changing conditions. This can certainly apply to mediation law, as unexpected events or issues will often arise in the mediation, which were not anticipated by the parties or by the mediator. Sun Tzu wrote: “[T]he general who wins a battle makes many calculations in his temple before the battle is fought...many calculations lead to victory, and few calculations to defeat. It is by attention to this point that I can foresee who is likely to win or lose.”⁵ With this knowledge and belief structure, he has been asked to mediate the following dispute between JB Dream Team and Government.

Issue in dispute

The life of an agent is centered on secrecy, trust, and danger. During one’s mission, agents may believe to be acting in the best interests of their country but at the same time those actions may violate Government protocols. Agents may also retire for a variety of reasons. Furthermore, an agent’s undercover identity may be exposed to the spy community or even to the general public.

In June 2003, high-ranking officials of the George W. Bush administration exposed the employment of a classified covert Central Intelligence Agency officer, Valerie Plame Wilson. Once exposed to various reporters within the media community, Wilson’s name and status as an operative was exposed to the general public in a

⁴ Beirne, Martin D. & Marrs, Scott D. “The Art of War and Public Relations: Strategies for Successful Litigation.” <http://library.findlaw.com/2005/Dec/28/231115.html>

⁵ Sun Tzu. *The Art of War*. Chapter VI. Weak Points and Strong, 19.

newspaper column by Robert Novak.⁶ Valerie Plame's husband, Ambassador Joseph C. Wilson, stated numerous times that members of the Bush administration knowingly revealed his wife's covert status as retribution for his article entitled "What I Didn't Find in Africa."⁷

In April 2000, a British top-secret spy-agency document, entitled "Libyan Intelligence Service activity in the UK," was posted on the Internet which was believed to reveal the identities of a number of covert MI6 and MI5 British officers working in Libya. The document was classified as "Top Secret Delicate Source UK Eyes A," which meant that it was restricted even from cooperating intelligence services such as the CIA.⁸ The British Intelligence Agency contacted the Florida Internet service provider that hosted the Website where the material was published and asked that the material be removed from its servers. The agents' identities, however, were still sacrificed. The British Intelligence Services blamed the leak of the document on a former MI5 officer. This officer, however, denied responsibility for the leak and stated that this situation represented the most serious breach of government security.

From the Government's perspective, this simple yet complex issue then arises: "What do we do with them, and how do we or don't we protect these male and female agents whose identity may have been exposed?" From the agent's perspective, they want reassurance that they will be "taken care of" financially as well as from a security standpoint. "The most powerful interests are basic human needs...Basic human needs

⁶ Novak, Robert. "Mission to Niger." <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/20/AR2005102000874.html> 14 July 2003.

⁷ Wilson, Joseph C. "What I Didn't Find in Africa." <http://www.nytimes.com/2003/07/06/opinion/06WILS.html?pagewanted=1&ei=5007&en=6c6aeb1ce960dec0&ex=1372824000&partner=USERLAND> 6 July 2003.

⁸ Knight, Will. "British spy-agency file posted on Web." 25 April 2000. http://news.zdnet.com/2100-9595_22-520174.html

include security, economic well-being, a sense of belonging, recognition, and control over one's life."⁹

Government Options

In trying to resolve this issue between JB Dream Team v. Government, one must understand and analyze different government options that will be discussed during this mediation. First, the act of elimination is the harshest and probably most criticized method at the Government's disposal. Following this option, the agent's whereabouts are unknown to the world including his or her family. Within the agent community, death is believed to be the likely cause. Second, the method of termination halts the agent's position without further pay or benefits. The employment is discontinued and the agent is dismissed. Third, the act of neutralization revokes all authority from the agent. For example, the British Government would rescind James Bond's 007 "license to kill" status if this neutralization method was chosen. However, this would be a public act where James Bond would not be able to "save face." JB Dream Team has expressed complete disapproval with these previously discussed Government options.

Dialogue

The following is an excerpt from the Mediation conducted by Sun Tzu involving the Unionization of Secret Agents v. Government.

Mediator Sun Tzu: *Let me repeat what JB Dream Team just stated. You are not satisfied and are in fact, angered by the Government's preferred methods of elimination, termination, or neutralization.*

⁹ Fisher, Roger & Ury, William. *Getting to Yes*. New York: Penguin Books, 1991. p. 48

Jason Bourne: *That is correct. Should we wish to retire at an earlier stage in our lives or should our undercover status be sacrificed, these current options are not appropriate.*

Jack Bauer: *I cannot agree more. I have sacrificed my life in order to save my country from terrorists and from corrupt politicians. I have saved the life of our Secretary of Defense not to mention the life of our past President. And due to my work, my wife was killed by a former agent who was cooperating with the terrorists. I even had to maintain a drug addiction in order to preserve my cover with the Salazars. But, I have not asked for anything in return.*

Government: *We appreciate the sacrifices these agents have made to their respective countries. In most cases, we believe that a public revocation of authority would be appropriate using the neutralization method. Mr. Bond, your 007 status would simply be revoked, and so long as there were not sufficient grounds for termination, then your pay and benefits would continue.*

Jason Bourne: *Throughout our lives, we have been kept out of the public spotlight. I have lived a life of secrecy, where I do not even know my true identity. Now, you are saying that I would just be exposed. This is contrary to everything we have been taught.*

James Bond: *I believe I can speak for the JB Dream Team. We are not satisfied with this revocation of authority as a public spectacle as was the case with Valerie Plame Wilson. We have reputations to uphold and we need to save face.*

Mediator Sun Tzu: *Mr. Bond, the previously mentioned term “saving face” is extremely important in my culture. I can see why this may be of interest to JB Dream Team in this situation. For the other parties in this mediation, I believe Mr. Bond is referring to the act of avoiding a loss of dignity, prestige, or respect.*

Government: *I understand Mr. Bond's concern, but I do not see another way of dealing with this issue.*

Mediator Sun Tzu: *Perhaps, if both parties were to agree, we can create some type of private treaty.*

Jason Bourne: *Would our positions be terminated?*

Government: *Actually, they would not have to be. We could term the act to be more of a "retirement."*

Jack Bauer: *I of course will continue to serve my country with honor, but this will provide me with the reassurance that I will be taken care of. And it demonstrates the Government's appreciation for my sacrifices and life-long service.*

Mediator Sun Tzu: *Allow me to summarize. We would be able to conduct a private treaty with each agent, where he or she shall not be terminated, eliminated, or neutralized so long as there are not any willful or wanton acts of bad faith on the part of the agent.*

James Bond: *I certainly do not need any personal safety, but I would like to raise the issue of security for my fellow 00X agents.*

Mediator Sun Tzu: *Has either party thought about a similar "witness protection" program for retired or ex-agents?*

Government: *This certainly could be a viable option, and it would fit well with the private treaty. The costs of this project would be our only concern.*

Jack Bauer: *JB Dream Team would certainly be in favor of this agreement.*

Mediator Sun Tzu's Comments

As the mediator in this dispute, it was difficult to draw the line between creativity and empowerment. At first, I tried to allow both parties to suggest possible resolutions. Since we were not making progress, I remembered my written passages on positioning and adaptation from *The Art of War*. I then tried to become more creative in my thinking. Even though I suggested a private treaty as a possible resolution, I tried to empower the parties by stating, "Perhaps, if both parties were to agree..." I understood that it was ultimately the parties' choice, and thus, I wanted to leave responsibility for the outcome with the parties. In mediating this dispute between such powerful parties, I wanted the parties to feel that they have worked out the settlement terms themselves. They then would be more likely to understand them, believe they are fair and workable, and also feel compelled to honor them.¹⁰ In addition, the mediation began to progress and run more smoothly when the parties took the power and strength of their opponents and put it into the process. I tried to indirectly encourage and support this "martial arts" approach.

It was difficult to remain impartial on the issue of "saving face" because it is such an important part of my eastern culture. Saving face is an inseparable part of the social dynamics of an Asian society where business and personal ties often crisscross.¹¹ I felt a strong connection to JB Dream Team's position on this specific issue. I understood the importance of preserving valuable social capital and providing opportunities for long-

¹⁰ Alfini, James J. *Mediation Theory and Practice*. Newark: LexisNexis, 2006. p. 140

¹¹ "I'll see you...at mediation!" *The Singapore Law Review*. 11 August 2007.

<http://www.singaporelawreview.org/2007/08/%E2%80%9Ci%E2%80%99ll-see-you%E2%80%A6-at-mediation%E2%80%9D/>

term synergy and harmony. It was also surprising that this philosophy has begun to evolve and influence the western culture as such a prevalent part in one's decision-making process. This mediation could have progressed more quickly had I realized in the beginning that saving or restoring face was one of the underlying interests of JB Dream Team. This issue added a dimension to the substantive negotiations which I as the mediator should have identified sooner.

Throughout the mediation, I had to pay specific attention to the emotions of the parties—anger, hurt, frustration, under-appreciation. This was an integral part of the conflict process. For this type of mediation, I prepared myself to work with these expressions of emotion as the dispute unfolded. For example, I was glad that Jack Bauer described his troubled past including the loss of his wife. The description of the facts behind the feelings revealed specific points that the parties were struggling with.¹² Furthermore, it allowed me to fully understand the situation and allowed it to be understood by the other party. I focused on specific statements (verbal and non-verbal) from the parties about how they wanted to be seen, what was important to them, why those issues mattered, and what choices they wanted to make.

At times, it was difficult to determine my exact function as the mediator in this dispute. According to Lon Fuller, he views the mediator's role as that of assisting the parties to "free themselves from the encumbrance of rules and of accepting, instead, a relationship of mutual respect, trust, and understanding..."¹³ However, in this dispute, both parties are accustomed and may prefer strict rules and regulations. I fulfilled my role with the idea that mediation should be directed towards bringing about a more

¹² Baruch Bush, Robert A. & Folger, Joseph P. "Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice." 13 *Mediation Q.* 263, 266-75 (1996).

¹³ Alfini, James J. *Mediation Theory and Practice*. Newark: LexisNexis, 2006. p. 149

harmonious relationship between the parties, whether through an explicit agreement, through a reciprocal acceptance of the social norms, or simply through helping the parties gain a new and more perceptive understanding of one another's problems.¹⁴

I decided that it was unnecessary to meet separately with each of the parties in this case. The parties were making progress and working together. Thus, there was no need to possibly halt that momentum and hold a caucus with each party individually. In addition, there initially seemed to be a low level of trust between the parties. As a result, it seemed that there would be no resolution to the dispute unless each party saw and heard from one another exactly why they should accept specific settlement terms.¹⁵ Both parties were guarded and suspicious of each other's motives from the beginning. In mediation between spy agents and government, secrecy in a caucus setting could add to the fire rather than resolve the central issue. Negotiating breakthroughs that happen while one party is not present would have probably been viewed with suspicion. Thus, a "private treaty" settlement agreement may not have been accepted by both parties. In light of these details, it was best to keep the parties together in one room.

Chinese origins of mediation and influence on Sun Tzu

Lu Jiouyuan, a local Confucian officer in the Northern Song dynasty always urged his people who were in disputes to make peace in accordance with Confucian morality.¹⁶ Sometimes people heeded this advice and tore up their complaints. The use of mediation was prevalent among family clans and local communities. In the Ming

¹⁴ Fuller, Lon L. "Mediation—Its Forms and Functions." 44 S. Cal. L. Rev. 305, 307-308, 315, 318, 325-326 (1971).

¹⁵ Alfani, James J. *Mediation Theory and Practice*. Newark: LexisNexis, 2006. p. 132

¹⁶ Pei, Cao. "The Origins of Mediation in Traditional China." *Dispute Resolution Journal*. May 1999.

dynasty, this tradition was written into the official code: “Each village should build a shenming [making reasons clearly] pavilion. In this pavilion, the wise and intellectual people listened to the disputes of the local individuals. They then intervened to devise a peaceful solution for most of the cases. According to Chinese tradition, people would rather solve their personal disputes by either going to the chief of their family clan or the head of the village rather than sue the officer. Some local communities even mandated this type of procedure. If one party had already sent its complaint to the local community, it still needed to accept the decision made by those who intervened. The following story portrays the philosophical perspective behind mediation in the Chinese culture:

“A widow living in Huang Chun sued the local county officer stating that her dead husband’s cousin had seized her land. When her six relatives knew that the members of their family clan had fallen into dispute, they could not be at ease as bystanders, so they voluntarily intervened between the parties. They found out from the deed that the land in dispute had been mortgaged to the cousin by the widow’s dead husband, and she was too poor to redeem it. After they had convinced the widow of this, they persuaded the cousin to take into account the feelings of relatives and help the widow and the orphan as much as possible. At last, the mortgagee offered the voluntary conveyance of the land to the widow out of respect for the feeling of the family clan and of consanguinity. Witnessed by the relatives, the two parties resumed good relations, transferred the land deed and made a written agreement stating: From today the two

parties keep each property, never to argue, and should both maintain the harmony of the family clan.”¹⁷

East meets West

Understanding this story and perspective is essential to the mediation between JB Dream Team v. Government. The cultural differences between the mediator Sun Tzu and the parties in this dispute greatly influenced the mediation itself. By choosing a mediator centered on eastern culture, he or she would pay more attention to maintaining harmony as an essential by-product of the mediation. This would also apply after the mediation concludes. A special power of mediation is that “it is a consensual process that seeks self-determined resolutions.”¹⁸ The use of mediation in this dispute placed the substantive outcome of the dispute within the control and determination of the parties themselves.

An eastern-educated mediator, however, may not be familiar with certain phrases and priorities of the western participants. This could create more conflicts within an already heated and disputed issue. This analysis must be taken into account in preparing and conducting any mediation with different cultures between the parties and/or the mediator.

Conclusion

Through this mediation, the Unionization of Secret Agents v. Government, both parties agreed on using a “private treaty” as the settlement to this dispute. Should an

¹⁷ Pei, Cao. “The Origins of Mediation in Traditional China.” *Dispute Resolution Journal*. May 1999.

¹⁸ Folberg, J. & Taylor, A. *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation*. (1984).

agent wish to “retire,” or should his or her undercover status be exposed to the public, it has been agreed upon by and between the aforementioned parties that the agent shall not be terminated, eliminated, or neutralized. This agreement will apply so long as there are not any willful or wanton acts of bad faith on the part of the agent. It was also evident that conflicting cultural and philosophical issues played an important role in this mediation. Sun Tzu was familiar with the concern about saving face and was thus able to suggest a creative solution.

Whether one prefers martinis shaken and not stirred like James Bond, preventing nuclear catastrophes like Jack Bauer, or clashing against one’s former CIA supervisors like Jason Bourne, the use of mediation proved to be an effective means for settling this dispute.