

The Legal Accountability of U.S. Corporations in Foreign

Countries:

The Case of Yahoo! in China

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The United States faces serious challenges as both the world's economic leader and the leading propagator of liberal democracy as foreign policy. Globalization has created remarkable opportunities for companies to engage in operations in foreign countries, especially in the developing world. However, in recent years, several American corporations have been guilty of severe abuses and undemocratic practices that do little to support the United States' foreign policy goals. Recently, two Chinese citizens were arrested as political dissidents based on information provided by Yahoo! to the Chinese government. Subsequently, family members of both men have filed a lawsuit in U.S. courts, and Congress has held several hearings on the matter. These men's cases represent the ongoing struggle between a corporation's right to free enterprise in foreign countries and the American legal system.

This paper will prove that the case against Yahoo!, both in the Congressional hearings and in the civil suit, is valid and Yahoo!'s defense of itself is legally indefensible. Yahoo! has claimed that it had no choice but to comply with China. However, this is not correct. China has never taken action against U.S. interest in cases that are well publicized and politically important to the United States. Also, Yahoo!'s lawyers have claimed that the two men had assumed the risks associated with their online

activities. However, this is false, and the argument wrongly blames the dissidents for their own imprisonment. Finally, Yahoo!'s lawyer's main claim is that U.S. courts do not have jurisdiction over the case. This is also untrue, as precedent has been set that clearly does give U.S. courts jurisdiction in the matter.

Background

In 2003 the Chinese government requested information about an email account belonging to Wang Xiaoning, a pro-democracy dissident and writer. Yahoo!'s management readily complied with this request for information. A week later, the Chinese government arrested Xiaoning based on the information gleaned from Yahoo!. Xiaoning had posted several journal articles and essays on a Yahoo! blog demanding an end to single-party rule in China (Kwan, 2007). Xiaoning was subsequently charged and convicted of "incitement to subvert state power" (Richards, 2007), and sentenced to ten years in prison in 2003. Additionally, in 2003, another political dissident was arrested, Shi Tao, when he revealed on a Yahoo! message board that the Chinese government had issued an Official Order forbidding the acknowledgment of the anniversary of Tiananmen Square. Tao was sentenced to ten years in prison, as well, under the ambiguous charges of "subversion of state power" (Hopkins, 2007).

Yahoo! management is heavily implicated in both of these arrests, since it readily complied with the requests to provide information on both cases. Yahoo! was mentioned several times in the judge's verdicts for both men, and that the information was obtained directly from Yahoo! is heavily noted in the opinions as well (Wingfield, 2007).

Following their convictions, the men have been treated as political prisoners and subjected to various forms of torture and other abuses (Wingfield, 2007).

Public outrage ensued over the incident, which violates one of the very pillars of American democracy, the right to freedom of speech. The United States Congressional Committee on Foreign Affairs has held hearings to address this matter and to discern Yahoo!'s role in the arrests of Tao and Xiaoning (MacDonald, 2007). The direct consequence of these hearings has been the passage of a law banning the placement of servers in any country that censors its population and media. Yahoo! has publicly apologized to the family members of the dissidents present at the hearings, but the apology has been quite empty, as Yahoo!'s attorneys have preempted the apologies with excuses for Yahoo!'s compliance with Chinese demands, which have been enumerated above (MacDonald, 2007).

Apart from the Congressional action, both families enlisted the help of the World Organization for Human Rights USA to file a lawsuit on their behalf in the Northern District Court of California (Hopkins, 2007). The civil lawsuit accuses Yahoo! of aiding and abetting torture, and is filed under the Alien Tort Claims Act and the Torture Prevention Act. The Alien Tort Claims Act gives the United States jurisdiction over alien complaints that it finds to be in violation of commonly accepted laws (Harvard Law Website). Past precedents have been set using the ATCA in U.S. courts, and will be addressed below. The Torture Prevention Act of 1992 says that the United States has jurisdiction over torture that is inflicted in other countries and that violates generally accepted international laws.

The Consequences of Noncompliance

Yahoo! has said that it was compelled by the Chinese government to disclose the information pertaining to the dissidents, or it would not be allowed to operate in China. However, this is not necessarily true. There is no evidence that noncompliance with the Chinese government's demands would result in anything so punitive against an American firm, especially when the American government is so involved in the situation. The Chinese economy is very interrelated to the American economy, and it is unlikely that the Chinese would jeopardize their relationship with such a large American interest in a case that has generated so much attention, because that would jeopardize their trading rights and "most preferred nation" status with the U.S.

China has indicated that it will back down on matters that are highly important to the West, such as China's current stance on Taiwan. It is in U.S. interests for Taiwan to operate independently, and even though China is known to have nation-building aspirations, it has refrained from an all-out invasion of Taiwan. Although other corporations, such as Google, have been penalized by the Chinese government, those situations are fundamentally different. Google was forced by the Chinese government to censor its servers, which violates U.S. principles. However, Yahoo!'s actions directly resulted in the imprisonment and bodily harm of two Chinese citizens. Google's censorship of its web searches did not cause direct harm to anyone in particular, although its actions are not in accordance with American law. Yahoo!'s actions resulted in foreseeable consequences that were far more serious than any harm that Google's censorship of searches could have potentially caused.

The Chinese know that free speech is a fundamental American value, and as a democracy is inherently transparent, the Chinese know that the foreign policy agenda of the U.S. is to promote American ideals and liberal democracy abroad. To do anything to impede that agenda would greatly jeopardize their relationship with the U.S. China has indicated that it is willing to open its borders and show the world that it is at the forefront of the developing countries. China's avid pursuit of the Olympics in Beijing, occurring in 2008, is an excellent example of its desire for Western approval and full integration into world markets. China has a great deal to lose if it damages its relationship with the United States and other Western powers.

Assumption of Risk

The Yahoo! lawyers have also claimed that, "the dissidents had assumed the risk of personal harm when they chose to use Yahoo! China e-mail and engage in activity that they knew violated Chinese law" (Richards, 2007). This is also not true, and virtually irrelevant to whether Yahoo! is held responsible for its actions in China. The internet is generally considered to be in the international domain, which is evidenced by the lack of regulation for online gambling in the United State in those states that prohibit gambling activities. The internet was developed in a liberal democratic country, the United States, and its democratic nature can be evidenced by the emphasis on sharing information and general openness. The internet is considered to be an inherently democratic fixture, and it can be reasonably assumed by a person that it should be treated as such.

It violates this democratic nature of the internet to assume that Xiaoning and Tao would be expected to censor their speech. However, regardless of Chinese law and

whether Xiaoning and Tao had knowingly assumed the risk of their subversive activities, Yahoo! did not have to directly assist the Chinese government by giving it the information that led to the imprisonment and torture of Xiaoning and Tao. We cannot legitimately propagate the U.S. ideal of liberal democracy, if the United States does not hold Yahoo! accountable for actions that violate these American ideals abroad. Whether the dissidents knew or not that they would be held accountable for violating Chinese law is entirely irrelevant to the case. Yahoo!'s actions were still indisputably unjustifiable.

Jurisdiction

Yahoo!'s defense's strongest argument is that U.S. courts do not have jurisdiction over these types of disputes. However, the Alien Tort Claims Act has been used on a variety of similar occasions in which a foreign national has been able to successfully sue a U.S. held company for its actions contributing to the bodily injury, death, or imprisonment of a family member. The ATCA has been used recently in the case *Wiwa v. Royal Dutch Petroleum Company*. The Royal Dutch Petroleum Company owns Shell Oil, a publicly traded U.S. company, and was found responsible for the deaths of several prominent Nigerians in 2000 (Harvard Law Website). Shell wanted to gain drilling rights in the Nigerian homeland of the Ogoni people, and several of the local people were adamantly against allowing access. The government of Nigeria proceeded to torture and execute the defendants, at the behest of several members of Shell's management. In fact, Shell's employees were determined by the Second District Court to be heavily implicated with providing information to the Nigerian government, and Shell also called for the

executions directly (Harvard Law Website). Shell lost the lawsuit, and it was forced to pay a wrongful death penalty to the families involved.

In the case against Shell, the defendants actually helped torture and execute the individuals who were impeding their oil exploration, while Yahoo! simply provided the information that led to Xiaoning and Tao's imprisonments and torture. However, while the case against Shell is far more extreme than what Yahoo! has been charged with, it still shows that claims recently filed under the Alien Tort Claims Act have been granted jurisdiction in United States courts. The extremity of Shell's case shows that cases of a lesser degree are likely to be considered in U.S. courts as well, and many aspects of the cases are similar in nature. Both Shell and Yahoo! are publicly held companies that were complying with governments of the countries in which they operated. They both provided, in varying degrees, information that led to the bodily harm of that country's citizens in pursuit of their own business interests. So regardless of the severity of the Shell case compared to the Yahoo! case, it is obvious that the U.S. court would respond to the precedent of the Shell case, and grant jurisdiction in the Yahoo! case.

Conclusion

Interestingly, on November 14, 2007, because of the increased media attention to the case, and the loss of image sustained by Yahoo!, Yahoo! and its lawyers changed some of their rhetoric. They have settled with the families involved in the lawsuit, and are expected to pay an undisclosed amount of money to the families. This sum would pay for their legal fees and help with "humanitarian efforts" involved in petitioning the Chinese government to release Tao and Xiaoning (Hopkins, 2007). Yahoo!'s willingness to settle

shows that Yahoo! realized that it had little chance to win its case in a court of law. Additionally, Yahoo! realized that the negative public relations that it would receive if the case were to go to trial could irreparably harm its reputation and cause Yahoo! serious economic damage in the long run.

Yahoo!'s defense of itself was a red herring designed to divert attention away from its obvious guilt and responsibility for the imprisonment and torture of Xiaoning and Tao. The U.S. should be active in regulating this sort of behavior of U.S. multinationals, such as Yahoo!, in order to protect U.S. interests, both at home and abroad. The U.S. has a compelling interest as the world's preeminent leader to further the ideal of liberal democracy, and along with it, free speech and other human rights. If U.S. corporations are subverting those goals, the U.S. has a right to allow for litigation against these usurpers of American ideals. Yahoo! not only behaved in a manner that is inconsistent with U.S. ideals, but behaved in a manner that was morally corrupt and utterly indefensible from a legal standpoint. Yahoo!'s example and its experiences in the U.S. court system and with the Congressional hearings set a precedent that the U.S. government should not and will not stand idly by as human rights violations are perpetrated by American corporations.

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