



A BROKEN REGIMENT: THE 16TH CONNECTICUT'S CIVIL WAR

BY LESLEY J. GORDON

Louisiana State University Press, Baton Rouge, LA, 2014.
380 pages, \$44.96.

Reviewed by Henry S. Cohn

A Broken Regiment: The 16th Connecticut's Civil War is a significant contribution to Civil War studies. Its author, history professor Lesley J. Gordon of the University of Akron, observes that "regimental histories remain important for the study of the Civil War if only because the infantry regiment was a basic 'building block' of the armies and an essential source of identity for most Civil War soldiers."

Formed in 1862, the 16th Connecticut Volunteers (16th CV) was made up of "some of the oldest and best families" in Hartford County. The enlistees were full of "pure patriotism" and "lofty ideals." "Before becoming soldiers," Gordon writes, "about one-third of those who enlisted were farmers; others worked as druggists, carpenters, clerks, joiners, teachers, students, machinists, shoemakers, blacksmiths, bookbinders, teamsters, gunsmiths, and cigar makers." The regiment was heralded as "the flower of the City" of Hartford.

Unfortunately, the 16th CV turned out to be a "bad luck" regiment. On Sept. 17, 1862, just three weeks after going through a hasty training and leaving Connecticut, the 16th CV participated in a confrontation with Robert E. Lee's Army of Northern Virginia at the battle of Antietam in western Maryland. This battle was the "bloodiest single day of the entire Civil War." The conflict ended in a draw, but Lincoln considered it enough of a victory to issue his preliminary Emancipation Proclamation, taking Secretary of State William Seward's advice to do so only after a military success. The 16th CV fought heroically, but the regiment was left a mere shell. Some of its officers left on furloughs and others returned to Hartford to recruit more soldiers. Some of the enlisted men deserted, making their way to Canada and England.

After the horrific battle at Antietam, the 16th CV was given time to regroup, and it

merely observed the Battle of Fredericksburg from a distance. The men had to endure the winter of 1862 in Virginia without adequate provisions. In the spring of 1863, the 16th CV was in Newport News, Virginia, and in the summer it was in Portsmouth, Virginia. The regiment took part in a failed raid on Richmond, the Confederate capital.

In these Southern cities, the men of the regiment saw African-Americans, some still slaves and others trying to attach themselves to the Union army. The men also saw poor white laborers. Gordon relates that not all of the men of the 16th CV supported emancipation. One soldier sent racist letters home criticizing the fighting ability of the black regiments that he encountered.

On Jan. 24, 1864, the regiment moved to Plymouth, North Carolina. On April 17, 1864, all but the H company of the regiment was captured in a surprise raid by the Confederates. Although some of the officers were immediately paroled to the North, most of the men in the regiment were taken

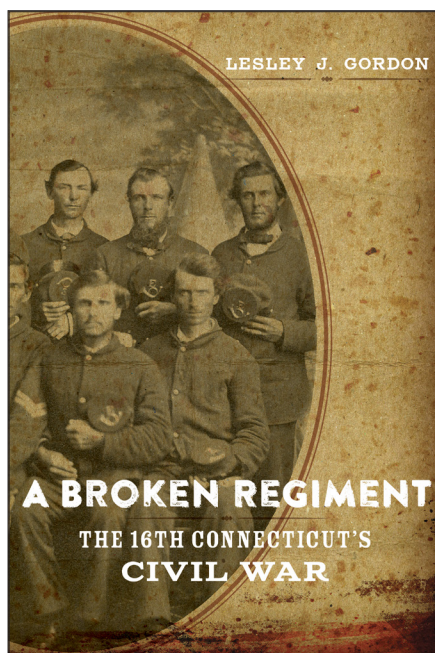
to Andersonville prison camp in Georgia, the worst of the Confederate prison camps. The men had to endure the winter of 1862 in Virginia without adequate provisions. In the spring of 1863, the 16th CV was in Newport News, Virginia, and in the summer it was in Portsmouth, Virginia. The regiment took part in a failed raid on Richmond, the Confederate capital.

When the news of their capture reached Connecticut, prominent persons in Hartford pressed Washington to implement a prisoner exchange, but the national government stalled. Only in December 1864 did the men of the 16th CV leave Andersonville and other work camps where they had been imprisoned. The men not only resented their treatment by the Confederates, but they also grumbled that Lincoln and the Union army had ignored their pleas for release.

After December 1864, some of the men of the 16th CV returned to the battlefield, while others, many physically and mentally disabled, came back to the Hartford area. Of course, they were overjoyed when the war ended the following April, but some of their excitement ended with Lincoln's assassination less than a week after Lee's surrender at Appomattox.

After the war, those who had served in the 16th CV struggled to return to civilian life. They formed a reunion group that met in declining numbers until 1931. Their treasured regimental flag is on display at the Hall of the Flags at the Connecticut State Capitol building. A note posted with the flag states that several men had retained strips of the flag, but had subsequently donated the strips back to form the complete flag again. In 1894, a monument was erected at Antietam in honor of the 16th CV. In 1906, a sculpture of "Andersonville Boy," designed to recognize the 16th CV, was placed at the former prison. One member of the 16th CV, Sgt. Maj. Robert Kellogg, is believed to have been the model for the statue. Kellogg also agreed to testify at the trial of the commandant of the Andersonville prison, Henry Wirz, who was subsequently sentenced to death and hanged.

Gordon excellently traces the main characters of the 16th CV. In addition to Kellogg, these include Frank Cheney of Manchester, the founder of a major silk manufacturing company; Ira Forbes, a journalist who later suffered from mental health problems and died in an asylum; Frank Beach, a strict regimental leader who died in 1873 at age 37 from a "disease contracted in the service"; George Whitney, the regimental historian whose older brother founded Pratt & Whitney, now part of United Technologies; and



to Andersonville prison camp in Georgia, the worst of the Confederate prison camps.

The captured men experienced hell. One man wrote in his diary that Andersonville was "the most offensive place I ever saw." The lack of food and water and the filthy conditions resulted in numerous deaths in

Nathan Mayer, a surgeon whose father was the rabbi at Temple Beth Israel and who “won the affection and loyalty” of the men for his devoted care.

Gordon also mentions those who died in battle and at Andersonville. Among the deceased was Newton Manrose, killed at Antietam at age 37. He was a professor who became a captain, a leader whose death had a great psychological impact on his men. Edward Mix, for a while the regimental commander, died in a fluke boating accident in March 1864. Another, Charles L. Clark, a son of one of the editors of the *Hartford Courant*, was severely wounded.

Gordon’s exceptional study deserves only one criticism. Although Gordon occasionally quotes from the *Hartford Evening Press*, she has few references to the owner of the *Press*, Joseph Roswell Hawley. During the Civil War, Hawley was an officer in Company A, 1st CV, and left the daily operations of his newspaper to Charles Dudley Warner, later a co-author with Mark Twain of *The Gilded Age*. But Hawley controlled the content of the *Press*; received, according to Gordon, communications from Frank Cheney of the 16th CV; became the first governor of Connecticut after the Civil War; and spoke at almost every dedication of war memorials in Connecticut and often in other states as well. For example, according to an Internet site listing Civil War memorials, Hawley appeared as a “dignitary” on Sept. 17, 1877, at the dedication of the Manchester, Connecticut, soldiers monument. The monument was sponsored by men who had served in the 16th CV.

Gordon’s significant effort would have been improved if she had examined whether Hawley had any other wartime connection to the 16th CV, especially because the 1st and the 16th regiments were both in North Carolina during the war, and whether Hawley spoke or wrote about the sacrifices of 16th CV during or after the war. ©

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HANDBOOK ON THE ECONOMICS OF THE MEDIA

EDITED BY ROBERT G. PICARD AND STEVEN S. WILDMAN

Edward Elgar Publishing, Northampton, MA, 2015. 399 pages, \$225.00.

Reviewed by Christopher Faille

By “media” as an industry category, economists generally refer to businesses engaged in the production and dissemination of information, opinions, and entertainment. In *Handbook on the Economics of the Media*, the term is used a little less broadly, focusing on information and opinions rather than entertainment.

Edited by Robert G. Picard and Steven S. Wildman, the book gives several eminent economists an opportunity to look at media, especially in the United States and Europe, and to ask: How *does* this dissemination happen? How is it changing? What are the consequences for law and policy of an economic understanding of those points? These are large questions.

The two editors themselves could hardly be more distinguished. Picard is, among much else, a research fellow at Green Templeton College (University of Oxford) and a fellow of the Royal Society of Arts. Wildman was formerly chief economist of the U.S. Federal Communications Commission.

Vertical Integration

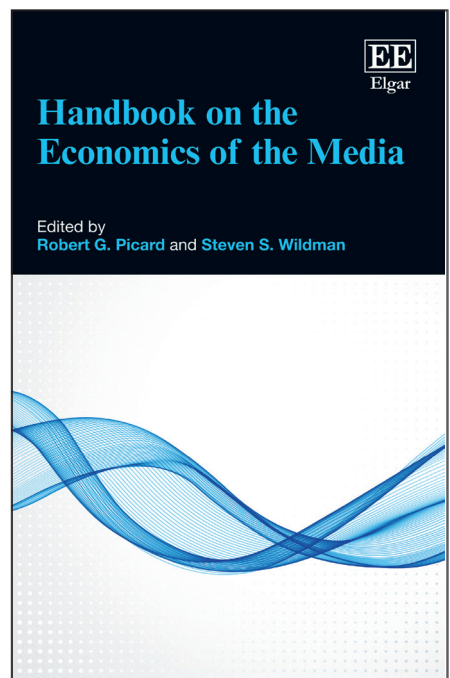
I’ll discuss here just two of the several essays, which are representative of the high quality of the whole collection. In “Vertical Ownership, Technology and Programming Content,” Sung Wok Ji of Southern Illinois University and David Waterman of Indiana University discuss a concept critical to anti-trust law: vertical integration.

The integration of different industrial operations is said to be “vertical” when it involves different points along the same supply chain. Thus, when a widget manufacturer buys a widget retailer on the one hand, or a widget components maker on the other, it is “integrating” that widget supply chain vertically. Usually the raw materials are considered to be the top of this vertical line and the retail establishments the bottom.

Venerable theories contend that vertical integration is a pathway to the more feared “horizontal” integration—toward securing a monopoly or market-share dominance on any one level along that chain. Further,

these anti-integrationist theories have a historically important application in the world of mass media. In a 1948 decision of the U.S. Supreme Court, *U.S. v. Paramount Pictures*, the Court, in an opinion by Justice William O. Douglas, ordained an undoing of the then-extreme vertical integration of the great Hollywood movie studios, including Paramount, Warner Brothers, and RKO. The Court demanded that they divest themselves of their retail establishments, that is, the theater chains.

More recently, there has been much discussion of the vertical integration of television broadcasting, asking, for example, whether it is against the public interest that Disney acquired ABC in 1996. Disney owns a lot of very valuable content, which advertisers are eager to sponsor. Both ABC and its



affiliates are in the business of lining up such sponsors. We might say then that Disney is a widget-parts provider. ABC is a widget maker, and the widget goes out to affiliates as a network feed. The affiliates are the widget retailers. Is the viewing public served better by the vertical integration represented by Disney’s acquisition of ABC?

Broadcast or Cable TV

The essay by Ji and Waterman looks into such questions. It considers the possibility that such integration locks out unaffiliated sources of content. Has ABC become a Disney-only outlet, ignoring other sources of programming and thereby reducing compe-

NATIONAL SECURITY AND DOUBLE GOVERNMENT

BY MICHAEL J. GLENNON

Oxford University Press, New York, NY, 2015.

257 pages, \$29.95.

Reviewed by Louis Fisher

After serving as legal counsel to the Senate Foreign Relations Committee, Michael Glennon taught constitutional law and published a number of exceptional studies, including *Constitutional Diplomacy* (1990), and co-authored the casebook *Foreign Relations and National Security Law* (4th ed. 2011). In his provocative new book, *National Security and Double Government*, he analyzes political developments after World War II that should be of great interest to those who follow constitutional law. Glennon concludes that the government we see and write about today is not the one that prevailed from 1789 to 1950, which was defined by three branches and a Madisonian system of checks and balances. That formal and conventional model has been replaced by a less visible government dominated by executive officials who specialize in the military, intelligence, diplomacy, and law enforcement. Increasingly, over the last seven decades, they have come to formulate and control national policy largely immune from constitutional and electoral restraints.

The theme of “double government” is borrowed from Walter Bagehot’s 1867 book, *The English Constitution*, which spoke of two political systems. The visible one consisted of the monarch and the House of Lords, or what Bagehot referred to as the “dignified” institutions. As Glennon explains, they received that title because they provided a link to the past and excited the public imagination: “Through theatrical show, pomp, and historical symbolism, they exercise an emotional hold on the public mind by evoking the grandeur of ages past.” However, a second government, described by Bagehot as the “efficient” institutions, did the real work. They consisted of the House of Commons, the cabinet, and the prime minister. To avoid a crisis of public confidence, it was important for the dignified institutions to go about their duties and to disguise as best they could the functioning of the efficient institutions.

As Glennon notes, Bagehot probably overstated the naiveté of Britain’s citizenry. Probably few Britons believed that Queen

titution in the market for made-for-TV movie production and related services? In a word: No. “[T]here is scant empirical evidence,” Ji and Waterman write, “that vertical ownership ties between broadcast networks and program producers have significantly foreclosed unaffiliated producers from access to viewers.”

Cable is a somewhat different matter. The business of actually getting signals into homes is monopolized at the local retail level—that of the cable system operators—creating what Ji and Waterman call “a potential bottleneck between the suppliers of programming and consumers.” Do the cable networks have an incentive to affiliate vertically with those systems and then foreclose consumers from accessing unaffiliated programming?

These authors answer “yes.” They review empirical studies to that effect. Nonetheless, when they consider this integration as a public policy matter, Ji and Waterman convey no sense of urgency. In the middle of the first decade of the new millennium, Internet Protocol TV transmission of multichannel television emerged as a market factor in its own right. As of 2012, IPTV accounted for roughly 9.9 percent of the subscribers of multichannel video programming distributors. Ji and Waterman find it “reasonable to speculate” that this will or already is checking the foreclosure effects of verticality in the cable world.

Broadband Internet Access

I will comment on only one other essay in this collection: “The Economics of Broadband,” by Benjamin J. Bates, Nick Geidner, and Yi-Xi Zhu. Recent headlines make this essay topical. After having hung in limbo for more than a year, the proposed acquisition of Times Warner Cable by Comcast Corp. finally received a decisive veto from the U.S. Federal Communications Commission in April 2015. There were many reasons for opposition to this deal, within both the FCC and the Justice Department. But one critical concern was that the combination would have put more than half the U.S. broadband capacity in the hands of the combined corporation, making that corporation a gatekeeper for an ever more important communication medium.

Let’s back up. What exactly *is* broadband? As Bates and his co-authors describe it, “broadband” includes those data networks available through Internet access that

allow high-quality video streams and interactive online gaming. But the threshold of how much bandwidth there must be (how high-speed a connection must be) in order to be “broadband” keeps changing. In the 1990s, broadband meant a connection with 200 to 256 kilobits per second.

One decade’s blazing speed is the next decade’s ho-hum experience. Skipping some intermediary developments: In 2010, the FCC formally defined broadband as meeting or exceeding a threshold of 4 megabits per second. (A megabit is 1,000 kilobits.)

Final Thoughts

In terms of the physical reality underlying the Internet, the growth of broadband, however defined, has had a lot to do with the spread of fiber replacing old-fashioned copper wires or coax. This increases the speed of the flow of data, and, in terms of market realities, the ever-quicker data flow and the demand for high-resolution videos or gaming have joined one another in a feedback loop. As Bates and his co-authors write, “As users experience broadband, they discover new services and content that drive their data usage higher, and as user demand increases, that should drive the supply of content and services higher, which should also drive demand higher, ad infinitum.”

Does this description of the broadband market justify or does it undercut the FCC’s veto of Comcast’s intended acquisition? I’m not sure, but it does tend to make the corporate structure seem epiphenomenal in a realm where technological innovation itself occupies the driver’s seat.

I heartily recommend the entire volume for careful study by lawyers whose practices keep them engaged with any media businesses or their regulators. ©

Christopher C. Faille graduated from Western New England College School of Law in 1982 and became a member of the Connecticut Bar soon thereafter. He is at work on a book that will make the quants of Wall Street intelligible to sociology majors.

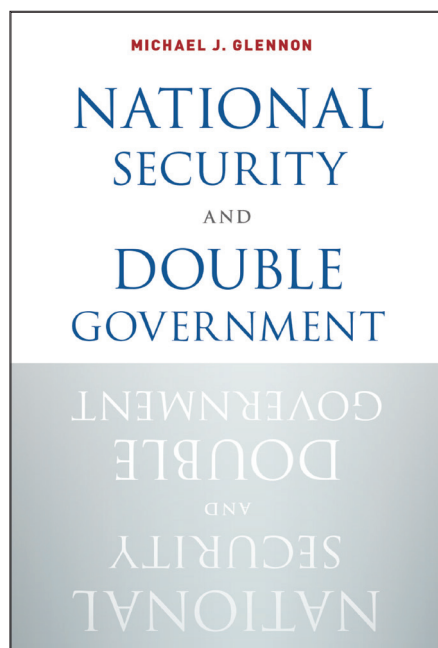
Victoria actually governed. Yet the capacity of dual institutions in Great Britain to evolve side by side prompts Glennon to ask if the double government described by Bagehot helps explain contemporary conditions in America. During his campaign in 2008, Barack Obama promised fundamental breaks with the policies of the George W. Bush administration, such as its dependence on the state secrets privilege to block private litigants who filed lawsuits to challenge warrantless surveillance and the taking of suspected terrorists to other countries for torture and abuse. In fact, there was been a marked continuity from the Bush to the Obama administrations in this area and others. If that is so, do elections matter? Does it make a difference when one administration replaces another?

In Glennon's judgment, the efficient institutions in America make "most of the key decisions concerning national security, removed from public view and from the constitutional restrictions that check America's dignified institutions." The United States has "moved beyond a mere imperial presidency to a bifurcated system—a structure of double government—in which even the President now exercises little substantive control over the overall direction of U.S. national security policy." The result is "greater centralization, less accountability, and an emergent autocracy."

Although Glennon traces double government in America from Harry Truman to the present, he focuses particularly on the marked continuity between the Bush and Obama administrations: "Few who follow world events can doubt that the Obama administration's approach to multiple national security issues has been essentially the same as that of the Bush administration." On Obama's second full day in office, Jan. 22, 2009, he issued an executive order to close the military prison at Guantánamo Bay within one year. It remains open, even if with fewer people held there. Obama engaged the United States in military operations in Libya without congressional approval and argues that he has sufficient statutory and constitutional authority to mount a multiyear war against the Islamic State without receiving additional support from Congress. The number of covert drone strikes is much greater than during the Bush years and targets U.S. citizens as well as foreigners, as with Anwar Al-Awlaqi in Yemen. The Obama administration

declined to prosecute those who committed torture and remains as dependent on the state secrets privilege as was the Bush administration, despite releasing new procedures in September 2009. Broad homeland surveillance by the National Security Agency continued from one administration to the next.

Different explanations can be offered. Glennon begins with the argument that the continuity demonstrates "the substantive correctness of the Bush/Obama policies as a response to perceived security threats." To that extent, the similarity in national security policy "demonstrates the essential rightness of those policies and President Obama's open-mindedness." An alternative



explanation emphasizes domestic politics and personality: "These relate to Obama's personally, suggesting that he was never sincere, or that he has no core beliefs, or that he was well-intentioned but ineffectual, or that he simply sold out."

Glennon describes within the executive branch a "Trumanite network" that has no leader, is not monolithic, and has no formal structure. Strong core beliefs, however, keep this network highly influential. It operates under the "long shadow of the military" and believes in stability and preservation of the status quo. Participants are team players and disinclined to disagree openly. "[O]nce a policy is final, Trumanites rally readily round it, however much they might once have disagreed." Dissent at that stage "shades into disloyalty and risks mar-

ginalization." Executive officials are so busy with crises, meetings, and memos that they have "no time for pondering big pictures" and are "caught up in tactics." Glennon recalls how Robert McNamara explained the failure of Vietnam decision-making: "We faced a blizzard of problems, there were only twenty-four hours a day, and we often did not have time to think straight."

What of traditional checks from the legislative and judicial branches? Glennon says that courts "pose the least danger to the silent transfer of power from the nation's Madisonian institutions to the Trumanite network." Judicial nominees "often come from the ranks of prosecutors, law enforcement, and national security officials, and they have often participated in the same sorts of activities the lawfulness of which they will later be asked to adjudicate." Some justices, including William Rehnquist and Antonin Scalia, headed the Office of Legal Counsel in the Justice Department. Samuel Alito and John Roberts served in the Justice Department. In his opinion for the U.S. Supreme Court in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), Justice George Sutherland wrote of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress." That judicial construct relied on fundamental misconceptions but magnified presidential power in external affairs until partially corrected by the Supreme Court in *Zivotofsky v. Kerry* (2015).

Democratic government and a system of checks and balances require accountability for government officials who abuse power and act illegally. But, as Glennon observes: "One can barely find a case in which anyone claiming to have suffered even the gravest injury as the result of the Bush-Obama counterterrorism policies has been permitted to litigate that claim on the merits—let alone recover damages." Under these conditions, federal courts "cannot seriously be considered a check on America's Trumanite network." As for Congress, Glennon sees a similarity between lawmakers and the Trumanites. Both face "a blistering work load," but members of Congress must cover not only national security but every form of domestic and economic policy. Trumanites draft national security bills that members introduce, they endorse or oppose measures

at hearings and markups, and they lobby members, “collectively and one-on-one.”

Can the president function as an effective check on the Trumanites? Don't we have an “imperial presidency” and a “unitary executive” in full control over administrative officials? In both law and practice, we do not. Yes, the president can give orders to the Trumanites and they would obey, but more likely the Trumanites will formulate the policies that presidents review and agree to. Trumanites end up following their own orders. Glennon does not deny that presidents may exercise independent power. A confident Dwight Eisenhower, having served as commander-in-chief of the military during World II, could say no in 1954 to getting involved in Southeast Asia. His judgment was bolstered by Truman's decision in 1950 to become involved in a costly military stalemate in Korea. Truman certainly had a choice not to send U.S. troops into North Korea at the risk of bringing in the Chinese, but he did so by following recommendations from the military. Lyndon Johnson was not compelled to escalate the war in Vietnam, but he did precisely that.

In chapter 5, Glennon thoughtfully analyzes alternative explanations of the theory of double government. One is the “rational actor” model: U.S. national security policy has not changed because the external threats to the United States have not changed. This school of thought believes that top executive officials carefully analyze various costs and benefits and choose a policy that best advances national interests. There are too many disastrous policies—including Korea, Vietnam, the Bay of Pigs, the Iraq War in 2003, and Libya in 2011—to accept that theory. Other alternative explanations that Glennon analyzes fare no better.

Chapter 6 asks the fundamental question: “Is Reform Possible? Checks, Smoke, and Mirrors.” Much depends on the public, scholars, and the media abandoning the contemporary belief that presidents are endowed with unique talents in pursuing the “national interest” and are surrounded by trusted experts who makes sound judgments based on reliable evidence. Glennon observes: “Justices, senators, and presidents are not masters of the universe after all, the public has discovered. *They are just like us.* ... The government is seen increasingly by elements of the public as hiding what they ought to know, criminal-

izing what they ought to be able to do, and spying upon what ought to be private.” A second essential step is “narrowing the scope of the state secrets privilege.” A third is ridding ourselves of “[t]he fantasy that the Madisonian institutions are in control,” because that fantasy “deflects attention from the underlying malady.” Fourth is recognizing that inspectors general created by Congress in 1978 as safeguards against waste, fraud, abuse, and illegality have declined as a check, in part because many of these positions remain vacant for years in such departments as Defense, State, Interior, and Homeland Security. Fifth is creating an adversarial process in the Foreign Intelligence Surveillance Court. Congress established this court as a judicial check on the executive branch, but “for all practical purposes [it] might as well be within it.” It hears from only from one side: the government's. To provide an adversary process, reformers recommend a special counsel to appear before the court. Standing against these changes is what President Eisenhower warned about in his farewell address: a military-industrial complex that thrives on the production of weapons and the pursuit of endless wars.

This perceptive and well-researched book would have been more accessible to the reader had it not been divided into two parts: 118 pages of text followed by 116 pages of endnotes. Perhaps the publisher thought that footnotes would disrupt the reader, but in fact much of the rich substantive analysis appears in the endnotes. For example, page 23 of the text states that “a spy for the Pentagon stole highly classified NSC documents and passed them to the Joint Chiefs of Staff.” That's a fascinating example of infighting among Trumanites, but one has to go to page 147 to see almost a page of enlightening detail on who did that and why. Many other passages, including Glennon's personal insights as a senior Senate staffer, are relegated to two pages of an endnote on pages 180 and 181. They belong in the text. ©

Louis Fisher is scholar in residence at the Constitutional Project and visiting professor at the William & Mary Law School. From 1970 to 2010, he served at the Library of Congress as a senior specialist in separation of powers with the Congressional Research Service and specialist in constitutional law with the

Law Library. He is the author of more than 20 books, including The Law of the Executive Branch: Presidential Power (Oxford University Press, 2014). For more information, see loufisher.org.

MARISSA MAYER AND THE FIGHT TO SAVE YAHOO!

BY NICHOLAS CARLSON

Hachette Book Group, Inc., New York, NY, 2015.

367 pages, \$30.00.

Reviewed by Christopher Faille

In his latest book, Nicholas Carlson, chief correspondent for *Business Insider*, turns his attention to the converging biographies of his two title characters, Yahoo Inc. and Marissa Mayer. Yahoo is the company best known for the Web portal Yahoo!, an affiliated email service, and related products. Mayer became its chief executive in July 2012. *Marissa Mayer and the Fight to Save Yahoo!* does contain some discussion of the period since then, but its bulk consists of accounts of her life and the company's life in the years before Yahoo's board made that call.

Most of the second of those converging stories is a tale of decline. Yahoo was at its peak as an Internet portal before the turn of the century, when the Internet experience was new to many users and the mere appearance of an ad on a Web page was a moneymaker to a degree difficult to recall 20 years later. Carlson writes, “When Yahoo first started showing banner ads—rectangular graphical advertisements on the margins of its sites—about 5 percent of users who saw them would click on them. By the end of 2000, click-throughs were down to 0.5 percent and falling.”

In those early days, it had been enough for Yahoo to run a Web portal, connect that Web portal to many other branded sites, and sell the ad space. But, as advertisers wised up to the declining value of such real estate, Yahoo needed a new business model.

When Price Doesn't Matter

Around 2006, when Yahoo was no longer the dominant player it once had been but was still formidable, it missed several opportunities. These misses make it look rather bad, as if it had been sitting on its corporate hands. It turned down chances to acquire Facebook, LinkedIn, Twitter, and YouTube.

Carlson is not as cutting about those failures as some have been. He understands

the ease of hindsight. But he does think that the company's top brass failed to understand what he calls "the binary nature of Internet acquisitions." What he means is that, within a very wide range, *price doesn't matter* for such an acquisition. The decision-maker either hits the "buy" button or fails to do so. In Carlson's words, "If buying Facebook [for \$1 billion] was a bad idea, it was bound to be a bad idea at \$850,000 too. If it was a good idea, \$2 billion would end up looking as cheap as \$1 billion." Yet Facebook slipped away because of the difference between an \$850,000 bid and a \$1 billion bid.

But the most dramatic single decision discussed in this book was not about a purchase that Yahoo failed to make, but about a purchase of Yahoo itself that never happened: Microsoft bid for the company in early 2008, met resistance, and backed away.

Microsoft offered to buy Yahoo at \$31 per share. Just prior to that day (Jan. 31, 2008), the stock had been trading at pennies above \$19, so this was a hefty 62 percent premium.

Members of a board of directors of a target company have fiduciary responsibilities

to its shareholders. Yes, the directors themselves are shareholders, of course, but they may have other interests at stake that compete with that one. Some of the directors may be the target company's founders, or have management roles, or be closely affiliated with those who do. In any such case, they may have a motive for preserving the company's independence. This is ego ("Gates and Microsoft CEO Steve Ballmer aren't going to take over OUR company, dammit!"), and it may get in the way of fiduciary responsibility.

Yahoo's brass immediately decided to resist Ballmer's bid. Indeed, on Feb. 1, the day after Microsoft made its intentions known, Yahoo executives, in a conference call, heard their chairman of the board Roy Bostock, declare, "Our attitude is going to be combative." There are good reasons to wonder whether that combative attitude went so far as to cross a line—whether Bostock and others violated their legal obligations.

Carlson describes an airplane ride to Boeing Field, an airport near Seattle serving private jets, at which airport Yahoo executives were going to meet with Ballmer. Who was on

the plane? The two founders of Yahoo, Jerry Yang and David Filo, were there, as was a company lawyer, Mike Gupta. Who was not on board and apparently not involved in any decisions at all? Any independent director (that is, any member of the board who wasn't affiliated with management).

Why is that noteworthy? Because as a matter of best practice, independent directors should be kept in the loop at such moments. They are the people who institutionally can speak for the nonaffiliated shareholders.

In early May, Ballmer walked away from negotiations. The reaction from shareholders, Carlson says, was "pure fury" at what they saw as a "massive screwup." At the end of 2008, Yahoo's market capitalization (that is, its value as measured by the stock price of issued shares) was only \$17.5 billion. Ballmer's Jan. 31 offer had implied a market cap of \$45 billion. The fallout included Yang's departure as CEO.

Rising Through the Ranks

Meanwhile, in a parallel story, Carlson



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tells us about Marissa Mayer's rise through the ranks of another Internet pioneer, Google. She became Google's "user interface" (UI) guru. She took her first step toward this elevated status when she studied the question of whether Google's search-results pages should be in a serif or a sans serif font. She decided that sans serif would be easier on the eye for such a page (because the results list only requires spot reading, not sustained reading through long horizontal lines), and she took her work directly to company founder and CEO Larry Page, who agreed. Google search results have been serif-free ever since.

Soon thereafter, Mayer was running a UI team, leading it "through long sessions reviewing every pixel of design on every page—the width of columns, the margins of pages, the padding between cells."

In the new millennium, as Google grew, it developed a split corporate culture: engineers versus interfacers, so to speak. Mayer had positioned herself to lead the interfacers, but this set her at odds with the engineers, who believed that the hardcore technology that powers the searches was what mattered most to Google's success, and that the UI was a cosmetic concern. People such as Amit Singhal, a coding genius and former research fellow at AT&T Labs, complained that the searches would improve more quickly if Mayer and her interfacers stopped bottlenecking progress.

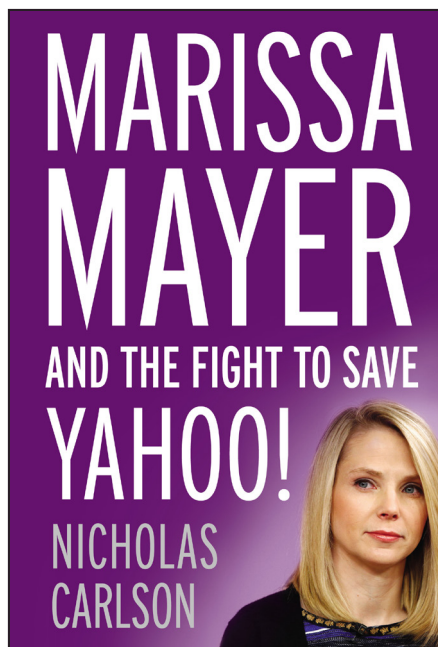
By the end of 2009, an intense battle was underway to control the future of the search engine, and, in October 2010, Larry Page declared that the engineers had won that battle. Page moved Mayer out of search and put her in charge of other projects. Those other projects (including Google Maps) were important and high-visibility themselves, so in a sense this was no worse than a lateral move for Mayer. But search is almost synonymous with Google in the consumer market, where searching has long been known as "googling," and search is understood *within* Google to be by far the company's most lucrative operation. So, in an important sense, Mayer was demoted. With her forward progress within Google halted, Mayer looked elsewhere for a career move.

Gifts from China

Meanwhile, Yahoo, in its own thrashing about, was getting some good news. In 2005, Yahoo had invested \$1 billion in a Chinese Internet-commerce concern known as Alibaba

in return for a 44 percent stake in Alibaba's equity. In the years that followed, Alibaba was wonderfully successful, a corporate surfer successfully riding the wave of growing Chinese Internet use. The key to understanding the importance of this for Yahoo is that Alibaba wasn't a publicly held company. Nobody, in the People's Republic or in New York or anywhere else, could simply call up a broker and say "buy me some shares of Alibaba." As the news of Alibaba's success spread around the world, investors became desirous of finding some way in, though some proxy play. And Yahoo stock became attractive not because of its Web portal, email, or other services but simply because it was a proxy for investing in Alibaba.

In May 2012, Yahoo made another agreement with Alibaba. It contracted to sell back



to Alibaba's managers, for a little more than \$7 billion, half of Yahoo's investment in Alibaba. (Arithmetic suggests that the parties were now valuing the original \$1 billion stake at \$14 billion.)

But there was a downside that came with all this cash. Alibaba announced at this time that it would go public in another two years (and it did so, in September 2014). After that point, the benefit that Yahoo had been receiving from its status as a holding company for Alibaba would lessen. Although Yahoo could still hold on to a sizeable share of the company and benefit from continued growth in the China Internet market, third parties would no longer see Yahoo as a proxy. Anyone who wanted Alibaba could, beginning in the au-

turn of 2014, invest directly in Alibaba.

The May 2012 deal made Yahoo cash-rich, and its continued connection with Alibaba gave it what Carlson calls "air cover." It meant that for the next two years at least, Yahoo executives were going to have a chance to repair Yahoo's sickly core business without lot of cash or stock-price related pressure.

It was in this context that Yahoo's board brought in Mayer in as the new CEO in July 2012. She was supposed to repair her company's bridges in the middle of the war zone of Internet competition, but she could do so secure in the two-years' worth of air cover that the success of Alibaba had bought.

Pessimism

Inspired by the ticking of that clock toward the Alibaba in initial public offering, Mayer and Yahoo bought Tumblr in June 2013. Tumblr is a social-networking platform built around what it calls its dashboard, and it is the corporate host of hundreds of millions of blogs, offering a suite of tools that makes blogging simple. The purchase of Tumblr, for \$1.1 billion, shows that the company has now learned a lesson from the "next big things" that it had failed to buy years earlier—from its nonpurchase of Facebook, LinkedIn, Twitter, and YouTube. Yahoo under Mayer now understands the binary nature of such acquisitions.

But have that and other moves saved Yahoo? Though he offers no definitive answer, Carlson ends on a pessimistic tone. Yahoo's search market share continues to shrink, there is no revenue growth, and Mayer hasn't demonstrated the ability to hire talented executives to whom she can delegate key tasks. Even worse, insofar as Mayer has a broad strategic plan at all, it may have misfired.

She considers that the mobile Internet is more difficult to use than the old desktop-friendly Internet and that Yahoo can regain a defining purpose by making mobile use easier. But, says Carlson, Apple and Google have each gotten ahead of Yahoo in solving that problem for consumers. ©

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