



National Security Law Report

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Breakfast Remarks:

Cuban General Says Castro "Crazy" and "in his last hour"

General Rafael del Pino, hero of the revolution during the 1961 Bay of Pigs battle and the highest ranking Cuban official to defect to the United States, spoke to a packed audience at the Standing Committee's October 15th breakfast.

Addressing the sources of Castro's traditional power in the Caribbean nation, the General observed that—unlike Communists in Eastern Europe who could look across the border and see a dramatically higher lifestyle in the West—Castro's \$5 billion annual subsidy from the Soviet Union provided social welfare and economic benefits superior both to those available to the average Cuban under the Batista regime and those observable in neighboring Haiti and many other Latin American states. Thus, one reason for Castro's more than three decades in power is "he is still offering his people some advantages."

Another major explanation of Castro's political longevity, according to General del Pino, is the brutality and the "perfection" of his "political police." He characterized Castro's "Committee for the Defense of the Revolution" as being "a nightmare" exerting greater control "in every block [and] factory" than the organs established by Hitler, Mussolini, and "even Stalin."

Nevertheless, General del Pino characterized Castro as being "in his last hour." The loss of Soviet aid has left Cuba's economy in shambles, he said, with popular discontent growing rapidly. The Cuban press is seeking to restore confidence with articles about an imminent lifting of the American trade embargo, but General del Pino argued that Castro's situation "is terminal."

General del Pino suggested that a positive U.S. approach might be to lift the embargo on trade "to any private property or any private enterprise in Cuba," which might lead the Cuban people "to realize that the only obstacle to their freedom and well being is Castro."

In response to a question from the audience about the effect of the execution of General Arnulfo Ochoa in 1989, General del Pino responded that "General Ochoa was the most prestigious general in the Cuban armed forces" and the only leader likely to successfully challenge Castro's power at the time. The execution weakened Castro's hold on the military, as General del Pino explained in a first-hand

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Maryland Court Adopts Restrictive View of State-Secrets Doctrine

by Jackson H. Sharman III

The United States District Court for the District of Maryland (Nickerson, J.) has adopted a magistrate's recommendations and granted a motion for a protective order filed by the Central Intelligence Agency based on the state-secrets privilege. *Robert J. Maxwell v. The First National Bank of Maryland*, No. WN-88-2702, 1992 U.S. Dist. LEXIS 15174 (D.Md. April 29, 1992). The protective order precluded all discovery relating to allegations of a relationship between the CIA and defendant Associated Traders Corporation (ATC) or defendant First National Bank of Maryland (FNB). Magistrate Judge's Report and Recommendations, 1991 U.S. Dist., LEXIS 20709 (Oct. 9, 1991) (Magistrate Judge Blake).

Mr. Maxwell was an employee of FNB who worked as an international banking executive and handled letters of credit for ATC. According to the complaint, Maxwell's superiors informed him that ATC was a CIA corporation. Maxwell subsequently suspected that ATC was engaging in arms transactions in violation of federal law. The complaint further alleges that when he questioned ATCs transac-

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Point of View

Post-Referendum Canada

by Dwight N. Mason

In a national referendum on October 26, Canadians rejected a package of constitutional amendments intended to strengthen national unity and probably set Canada on a path to increased internal fragmentation and the eventual succession of Quebec.

The original impetus for the effort to amend the constitution was the federal government's desire to resolve the issue of Quebec's relationship with the rest of Canada. The negotiations to do so, however, stimulated Western Canadians and the native peoples to focus on their own grievances and to insist that they be addressed as well.

The proposed agreement provided for recognition in the constitution of the distinct nature of Quebec's society, the transfer of some powers from the central government to Quebec (and all the other provinces) and a guarantee that Quebec would always have 25% of the seats in the House of Commons. The agreement sought to address Western concerns by providing for a new but weak senate in which the provinces would be equally represented, and it sought to address the concerns of the native peoples by recognizing their inherent right to self-government and by creating an ill-defined third order of government for them with powers approximating those of provincial governments. Although unanimously approved by negotiators, the agreement was not entirely satisfactory to any of the parties.

Much will be written on why Canadians voted against the amendments. But this much is clear now: the views of Quebecers on the nature of Canada and how the country should be organized are fundamentally incompatible with those of most other Canadians, and this difference is increasingly seen as a zero sum game by both sides. Each attempt at resolution seems to sharpen it. (This is why independence for Quebec is a good probability in the future). Quebecers insist that their province must receive different political treatment than the others because the basic form of Canada is and must remain an equal partnership between the two founding nations—the French and the English. Conversely, the general view in the other provinces is that while Quebec is clearly a distinct society culturally, it is not appropriate to treat it differently from other provinces politically. Quebecers concluded that the agreement provided insufficient symbolic and practical recognition of their position while most other

Canadians reached the opposite conclusion, and both voted no.

The referendum also gave Canadians a chance to send a message to their political leadership at all levels about their bitter discontent with the Prime Minister, his government, the national parties and many provincial governments about the state of the economy and its management. As one Canadian columnist put it: "The constitution came to be seen as the fiddle that the elites played while Canada burned." Thus this vote should be seen as a repudiation of most Canadian political leaders and the national political parties.

An immediate consequence of this repudiation is likely to be changes in political leaders and governments across Canada as federal and several provincial elections take place over the next two years—in fact the referendum may accelerate that schedule at the federal level if the separatist Bloc Quebecois and the Western-based Reform Party can erode the Mulroney Government's small majority of ten seats in the House of Commons by arguing that the Government has lost its claim to legitimacy. A number of Conservatives from Quebec and the West may be susceptible to such an approach after they study the referendum results in their electoral districts.

Another result is likely to be increasing political decentralization and fragmentation of central governmental authority in Canada. This will probably take several forms: a decline in the strength of the national political parties and an increase in the power of regional parties such as the Bloc Quebecois and the Reform Party in the West; these changing party relationships will be reflected in the next parliament by the presence of five rather than three

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Cuban General . . .

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account: "I used to be in many meetings with Castro and I was sitting there and maybe I was applauding and I was thinking to myself: 'This man is crazy. Where is he going to take us?' I think that is the same way many generals are thinking . . ."

General del Pino announced the forthcoming publication of his book, *Dispatches from Castro's Headquarters*, and said it includes many accounts illustrating Castro's "madness." For example, shortly after the American intervention in Grenada (October 1983), Castro ordered his military to prepare for an American invasion. One aspect of Castro's plan, according to General del Pino, was to launch a conventional weapons attack on the Turkey Point nuclear power plant south of Miami to produce a nuclear leak that would destroy all of the "killer worms"—Castro's term for Cuban exiles in the Miami area.

In response to other questions, the General said Castro's secret personal wealth exceeded even that of former dictator Batista, and that Radio Marti "is the main source that the Cuban people listen to today." In discussing his own decision to defect, he explained that he had been sent to the Soviet Union to coordinate the training of Cuban pilots, and while there he was sent on a brief trip by train to Amsterdam. "What I saw, as soon as I left the Moscow train [station], we [went through] villages and it was like being in a time machine—going back to the old West. All that was missing was Gary Cooper and the cowboys. . . . In all of those villages, [there was] mud in the streets, old ladies were pumping water Is this the "paradise" they were offering after seventy years to my country?" Unlike most Cubans, General del Pino had been allowed to travel and had seen the accomplishments of capitalism. Seeing no future in Communism, he fled to the United States.

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tions, officials from the bank and the CIA threatened him, causing his work conditions to become so intolerable that he was forced to resign from the bank. Maxwell later allegedly suffered a nervous breakdown.

The state-secrets issue arose when Mr. Maxwell asked the court to compel his former bank supervisors to answer deposition questions concerning the CIA's connection with the bank and the nature of various shipments by ATC. The United States intervened and filed a motion for a protective order barring disclosure of the information on the ground that such information was protected by the state-secrets doctrine.

The court analyzed the government's state-secrets claim under the three-part test articulated in *United States v. Reynolds*, 345 U.S. 1 (1953). In *Reynolds*, the Supreme Court stated that "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* at 7-8 (footnotes omitted).

Following this procedure, the United States submitted an affidavit by former CIA Director William Webster. The Webster affidavit stated that Judge Webster had personally reviewed the matter and that the confirmation or denial of CIA activities would compromise national security. The Webster affidavit explained that the confirmation of relationships with the CIA could jeopardize sources, cause the loss of intelligence, and create a chilling effect on the Agency's ability to recruit new sources. In addition, the affidavit noted, a denial of the alleged relationship would allow foreign intelligence entities to concentrate their efforts in different areas, and any denial of a relationship would prevent the CIA from declining to confirm or deny such a relationship in the future because a refusal to respond would be viewed as a confirmation.

In opposition to the government's motion, Maxwell argued that the government could not assert the state-secrets privilege to prevent discovery between private parties that have no connection with the government (i.e., between Maxwell and the bank). The court disagreed, noting that "[t]he state secret that must be protected . . . is the existence of a relationship between the CIA and ATC or FNB. The CIA cannot be forced to establish publicly that FNB officials have worked for the CIA and entered into security agreements as a predicate to asserting the state-secrets privilege to keep that very information from being disclosed."

Maxwell next argued that the government could not assert the privilege because the information he sought had been disclosed to persons without security clearances. Maxwell alleged that he possesses copies of various bank documents concerning the ATC accounts and that the purported relationship between CIA, ATC and FNB had been the subject of published articles. The court rejected these contentions, citing *Reynolds* for the proposition that the "state-secrets privilege belongs to the government. It can be neither claimed nor waived by a private party." Thus, accidental disclosure cannot be viewed as the government's affirmative waiver of the privilege. The court reasoned that if there is some accidental disclosure to unauthorized persons—such as private-sector employees without se-

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curity clearances who may have no notion that an apparently private entity is actually a CIA proprietary—the government is entitled to minimize the damage to national security by refusing to confirm or deny the existence of the information. The court found the issue similar to those presented in Freedom of Information Act (FOIA) cases in which an item must be officially acknowledged before disclosure can be required on the grounds that the information previously has been made public. Citing *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990), the court concluded that published articles that speculate on a relationship between the CIA and a purported proprietary cannot constitute public disclosure that would bar assertion of the privilege. Indeed, because the assertion of the state-secrets privilege “may well involve information more sensitive than that sought under a FOIA request[,] the state-secrets privilege . . . must have a standard for waiver based on public disclosure that is at least as stringent as the one under FOIA.”

Significantly, the court found that the assertion of the state-secrets privilege in this case may, upon further motion, “cause this Court to evaluate whether the case may proceed at all.” Although the plaintiff sought to establish the alleged relationship through circumstantial evidence, the court found that such an approach might not be feasible under the state-secrets doctrine: if Maxwell were allowed to allege that bank officials told him that CIA was involved in ATC, the bank officials and officials of the supposed proprietary would be required to respond, and thus their response would go to the heart of the state secret that must be protected. The court’s conclusion on this point was reinforced by its *in camera* review of two classified appendixes.

Maxwell demonstrated the seriousness with which federal courts treat the government’s assertion of the state-secrets privilege, so long as the government is careful to follow the three-part test set out in *Reynolds*. The government’s adherence to the *Reynolds* procedure, coupled with its willingness to provide the court with substantial classified information for *in camera* review, led to the successful invocation of the privilege. The case suggests that private plaintiffs in cases raising national security concerns may be given limited room for discovery, even where the party against whom discovery is sought is a private entity (such as the bank) or an apparently private but allegedly public entity (such as a CIA proprietary). Finally, readers should note the court’s holding concerning the respective standards for waiver under FOIA and the state-secrets

doctrine. Under *Fitzgibbon* and other cases, the public-disclosure standard for FOIA cases is already quite demanding for the requester: (1) the information requested must be as specific as the information previously released; (2) the information requested must match the information previously disclosed; and (3) the information requested must already have been made public through an official and documented disclosure. Not surprisingly, the government often satisfies these requirements. After *Maxwell*, plaintiffs may have an even more stringent standard to satisfy in order to succeed with waiver-by-disclosure claims in cases where the government properly invokes the state-secrets privilege.

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parties; more delegation of central government powers to the provinces (intended to address some of Quebec’s concerns); and finally eventual independence for Quebec. The next Quebec provincial election (which must come within two years) will be fought on the issue of separation, and the campaign has in effect already begun.

Such developments will have important consequences for the U.S. because events in Canada affect the U.S. directly. Canada is our largest bilateral trading partner, the largest recipient of U.S. direct investment and the purchaser of 20% of our exports. We are partners in the Free Trade Agreement and in the proposed North American Free Trade Agreement. Cooperation with Canada is essential to the air defense of North America, to the management of North American environmental matters (air quality and levels of the Great Lakes, for example), the operation of air, rail and water transportation systems (the St. Lawrence Seaway, is one example), not to mention hundreds of other agreements incident to the fact that we are contiguous states.

Managing this vast relationship with post-referendum Canada will be a demanding task. For example, we will have to deal directly and extensively with provincial governments far more than is now the case. They will not speak with one voice. This requirement is likely to complicate trade and environmental relations.

We have consistently taken the position that how Canadians handle their affairs is their business. That must remain our position. We have also made it clear that we have a preference for a strong and united Canada. It is time to recognize that that latter policy is becoming less tenable because of Canadian decisions.

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Russia Selling Declassified Spy Satellite Photos—Central Trading Systems of Arlington, Texas, is now importing and offering for sale high resolution photographs of Washington, D.C., taken by modern Russian spy satellites. The photos are said to have a resolution of slightly less than two meters. (*New York Times*, 4 Oct. 1992)

France Agrees to Trial of Terrorists in Libya—The Egyptian newspaper Al-Ahram reported that U.N. Secretary General Boutros Boutros-Ghali used his good offices to persuade France to agree to the trial in Libya of four Libyans accused of the terrorist bombing of UTA Flight 772 over Niger in 1989. (*Washington Times*, 4 October 1992)

Russians Admit Violating Chemical and Biological Treaty—Anatoly Kuntsevich, chairman of the Russian presidential committee on chemical and biological weapons, admitted in late September that the Soviet Union and Russia had conducted an active germ warfare development program until early 1992, despite having ratified a treaty banning such weapons in 1975. (*Rossiyskye Vesti*, reported by AP)

Pentagon to Limit "Pool" to U.S. Media—The Pentagon proposed in late September that press "pools" for coverage of future hostilities will be limited to U.S. owned and operated media with large Washington bureaus and military affairs reporters. Such pools have been used a dozen times since 1985, and in the future are to be drawn from 43 news organizations now eligible for inclusion. (*Washington Post*, 25 September 1992) In a related story, retired General Norman Schwarzkopf expressed concern to Barbara Walters on ABC's *20/20* that having reporters providing live coverage from enemy territory was a cause of serious concern, noting that more than 2,000 reporters covered the Gulf War as compared to fewer than 100 during most periods of the Vietnam war. (*USA Today*, 24 September 1992)

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We will want and need good relations with Canadians no matter what their internal political arrangements are. We will also want and need good relations with Quebec if it should become independent (we do as much business with Quebec as we do with France). We should start to think now about how to structure our relationship with Canada and perhaps Quebec in these new circumstances. Such a planning effort is also appropriate because with the

end of the cold war the nexus of U.S.-Canadian relations will be primarily trade and environmental matters—matters which involve the provinces and about which they will have more influence in the future.

Mr. Mason is a member of the Atlantic Council's Working Group on Canada. He served at the U.S. Embassy in Canada from 1980 to 1983 as Political Counselor and from 1986 to 1990 as Deputy Chief of Mission, and is now in private law practice.

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Senate Consents to START Ratification—On the first of October the Senate gave its consent to the ratification of the START Treaty by a vote of 93-6. Kazakhstan approved the treaty unanimously, and the other three former Soviet republics possessing nuclear weapons are expected to do so in the near future. The only serious challenge is likely to occur in the Ukraine. Ratification will take place once all parties have given their consent.

Iranian Arms Buildup—Numerous sources have expressed growing concern about an ongoing military buildup in Iran. The Russians are reportedly selling Iran SU-24 bombers and spare parts for Iraqi aircraft added to the Iranian air force after being flown to safety during Operation Desert Storm by Iraqi pilots; and at least two 3,000-ton Kilo-class diesel submarines at a reported cost of \$600 million. Although the submarines will add a new dimension to the regional arms balance, by far the most alarming reports involve an Iranian program to acquire or develop nuclear weapons. Last month Russia agreed to sell two 440-megawatt nuclear power reactors to Iran, and China is already building a reactor at Qazvin. On 8 October the prestigious International Institute for Strategic Studies reported Iran was apparently trying to develop nuclear weapons, perhaps in cooperation with China. (China is also providing nuclear assistance to Libya.) Kazakhstani and Iranian sources strongly denied reports from the People's Mujahedeen, the leading Iranian opposition group, that Iran had purchased four nuclear warheads from the former Soviet republic. (Various News Sources)

Russia and PRC Said to Restore Intelligence Cooperation—Unnamed U.S. government officials reportedly confirmed this month that a secret agreement was reached in September restoring ties between Russian and Chinese intelligence services which were broken off in 1959. Yuri Kobaladze, a spokesman for the Russian Intelligence Service (SRV), was quoted as saying that post-Cold War Russian intelligence operations are no longer ideologically based: "We don't have constant enemies. We have national interests." Some observers speculated that the SRV agreement with the Military Intelligence Department of the Chinese People's Liberation Army might involve high-technology collection operations against U.S. and other Western defense industries. (*Washington Times*, 21 October 1992)

EPA to Police Nuclear Weapons Programs—In late September Congress overwhelmingly passed legislation ending the immunity from federal, state, and local hazardous waste laws for the Pentagon and the Department of Energy. Under the new law, the Environmental Protection Agency will have authority to levy stiff fines against federal agencies that violate environmental laws. (*Washington Post*, 24 September 1992)

Saddam Reportedly Executes 30 in Alleged Coup Plot—Sources back from Iraq report that 30 Iraqi military officers were shot in September in an effort to head off a possible coup attempt. One of the victims was reportedly a hero of Iraq's war against Iran. (*Los Angeles Times*, 4 October 1992)

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