



# National Security Law Report

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## Judge Sporkin Urges Private Sector Action Program for the Former Soviet Union

The March 19 breakfast meeting of the Standing Committee heard Judge Stanley Sporkin focus on the question: "Are we taking full advantage of the opportunities to enhance the national security presented by the dynamic changes taking place in the Commonwealth of Independent States?" The speaker, since 1986 a judge on the U.S. District Court for the District of Columbia, said that the recent changes in the former Soviet Union present the United States with a "defining moment." And yet most Americans are unwilling to accept the challenge and to do something about it, observed Judge Sporkin. Rather, most are content to ignore the challenge and believe that if anything needs to be done, the U.S. government will do it.

Judge Sporkin, who served as General Counsel of the Central Intelligence Agency from 1981-1986 and for 20 years before that with the Securities and Exchange Commission, called on the Standing Committee and the private sector in general to play an active role "in helping our nation finally to secure the peace that is literally within our grasp but which could be forever lost if this nation does not seize the opportunity that is before us."

Conceding the need for America's government leaders to confront severe domestic economic problems, Judge Sporkin noted their failure to summon the necessary support to embark on an all-out effort to make sure the peoples of the former Soviet Union continue with their "wonderful experiment in democ-

racy and Western-style economic systems." Judge Sporkin cited recent calls for such action by Dr. Edward Teller, Dr. Zbigniew Brzezinski, President Richard Nixon and Ambassador Robert Strauss, the U.S. Ambassador to Russia.

Judge Sporkin said it is time for concerned citizens to create a workable blueprint for the CIS states that will bring about the economic and political reforms necessary to sustain simultaneously a democratic political system and a market economy. Many self-proclaimed experts, he noted, have spoken on the general features of such a system but few have articulated practical details. He urged that the private sector address this challenge in a concerted, detailed and long-term manner, regardless of the extent of the monetary commitment made by the U.S. government.

At a minimum, what is called for are the best, most knowledgeable minds to address such questions as: How can we best provide the sorely need-

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## Case Note: *INS v. Doherty* – The Attorney General's Power to Deport

On January 15, the U.S. Supreme Court announced a decision upholding the Attorney General's refusal to reopen administrative immigration proceedings that had resulted in a deportation order for I.R.A. member and convicted murderer Joseph Doherty. (*INS v. Doherty*, 60 U.S.L.W. 4085 (Jan. 15, 1992)). That Supreme Court decision ended a twelve-year drama and forced Doherty's return to the United Kingdom.

While on trial in a British court for his role in the 1980 murder of a British soldier, Doherty escaped from prison. He was found guilty *in absentia* and sentenced to life imprisonment. In 1983 he was apprehended in the United

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## Book Review

By Michael Potter

**SDI and the Alternatives**  
by Col. Simon P. Worden,  
National Defense University Press, 1991

For some, the Strategic Defense Initiative (SDI) may seem a distant science fiction-like fantasy which both blossomed and wilted during the Reagan era. While it is true that much of the hype and misunderstanding relating to the initial SDI announcement has vaporized, the remarkable irony is that the distinguished opposition, including a number of nobel laureates and acclaimed international scientific figures, were trounced by a group of savvy space warriors.

In a move that must have painfully jolted the hardline peace movement, Russian President Boris Yeltsin recently offered his country as a partner in the SDI project. Despite the focus of his attention on a vigorous reelection campaign, President Bush took time out in his State of the Union address to reaffirm this country's commitment to pursuing an SDI defense. The riveting images of the Patriots slamming into SCUD missiles during the Gulf War has, no doubt, generated additional support for the President's commitment.

So what happened in such a short period of time that has radically rearranged the entire debate, not just on SDI, but on our national security in a broader context? The answer you may think is simply the result of the end of the Cold War.

Col. Worden, a member of the U.S. arms control delegation that negotiated about space weapons, a former spokesman for the SDI office, until recently a member of the Vice President's space council and currently responsible for SDI technology development, argues that SDI actually became an important factor in ending the Cold War:

The Cold War is generally regarded to be over, with monolithic communism assigned to the dustbin of history. In the years ahead numerous scholars undoubtedly will address the cause of its collapse and try to explain the sudden-

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States and the INS began deportation proceedings. After initially requesting political asylum and the withholding of deportation, Doherty withdrew his request for asylum and withholding, conceded his deportability, and designated Ireland as the country to which he wished to be deported, because there he would be subject to imprisonment for only ten years and could avoid the British authorities. (U.S. courts had ruled that he qualified under the political offenses exception to the U.K.-U.S. extradition treaty and thus was not extraditable to the U.K. under that treaty.)

While his designation of Ireland was being considered by then-Attorney General Meese, Doherty sought to reopen the earlier administrative proceedings so that he might apply for asylum and withholding. Doherty made that request because an Irish statute had subsequently been enacted that would permit his extradition to the U.K. from Ireland. Thereafter, in 1988, Meese rejected Doherty's designation of Ireland and ordered him deported to the U.K. instead, reasoning that because, under the relevant statute, he had committed a "serious nonpolitical crime" in the U.K., it would harm U.S. interests to deport Doherty to any country other than the U.K. Later Attorney General Thornburgh denied Doherty's motion to reopen the earlier proceedings.

The Second Circuit U.S. Court of Appeals

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Robert F. Turner  
*Chairman, Standing Committee on Law and National Security*

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## Judge Sporkin

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ed legal assistance? How can each of the independent states rebuild their infrastructure while at the same time creating privately owned manufacturing and consumer distribution centers? How can a system of privately owned and operated farms be devised? How can America's under-utilized production facilities be used to help construct in the CIS the plants and equipment that will be needed for economic revival? Since the independent states cannot at present pay for U.S. assistance, what ways can be used to take CIS debt instruments, which would be repaid at such times as new facilities begin their successful operation?

While we in this nation are faced with severe economic problems, we are blessed as never before with a prospect for peace that would have been beyond our wildest dreams a few years ago. What we must do now, underscored Judge Sporkin, is to make sure there is no slippage in the desire and wishes of the CIS peoples to obtain their political and economic reform. We must not, he warned, squander this opportunity and some years down the road be faced with a new evil empire.

Judge Sporkin also criticized those who want to cut back on U.S. intelligence coverage of the states that formerly made up the Soviet Union. It would be foolhardy to assume that the business of intelligence has grown easier, or that the need for timely and accurate intelligence has diminished. Quite the opposite is true. Lack of stability and predictability increases the need for foreign intelligence. Sporkin cited the continued existence of nuclear weapons in the CIS, their acquisition by less stable or responsible states, and the possibility of the proliferation of Soviet chemical and biological weapons.

What will ultimately replace the Soviet Union remains to be seen. But the possibility of 1930's-style fascism cannot be dismissed, particularly given that many of the conditions of Weimar Germany appear to exist in parts of the old Soviet empire. We should not minimize the importance of the events we are now witnessing in the Commonwealth of Independent States, Judge Sporkin urged, because they are likely to be as far-reaching as those events in Russia in 1914 and 1918, and perhaps those in Germany in the 1930's.

In his final "call to action," Judge Sporkin encouraged all who have views on these problems to make their views known as forcefully as possible.

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affirmed Meese's denial of Doherty's designation but reversed Thornburgh's refusal to reopen. The Court of Appeals ruled that the enactment of the Irish statute, in conjunction with the denial of Doherty's designation, qualified as new evidence that required a reopening of the earlier proceedings.

The Supreme Court reversed in a fractured decision. In a five-to-three opinion by Justice Rehnquist, the Court held that the Attorney General has wide discretion to determine whether an alien has put forward the requisite new material evidence to justify a reopening, whether the relief sought is asylum or withholding of deportation. The Court noted that reopening is provided for not by statute, but only by a regulation, which is phrased negatively to prevent reopening unless justified by new material evidence not available at the time of the earlier proceeding. The Court further held that Thornburgh did not abuse that discretion in denying reopening either on the basis that Doherty failed to adduce new material evidence or that he failed satisfactorily to explain his previous withdrawal of the asylum and withholding claims.

Rehnquist continued more specifically, here speaking for a mere plurality of four Justices, to rule that neither the enactment of the Irish statute nor the refusal of Doherty's designation qualified as facts that were not foreseeable when Doherty withdrew his earlier request for asylum and withholding of deportation. Finally, Rehnquist specifically endorsed Thornburgh's conclusion that Doherty waived his claims for relief by earlier withdrawing them for purely tactical reasons; he was joined in this endorsement only by Justice Kennedy, while the three dissenters expressly disagreed.

Justice Scalia, joined by Justices Souter and Stevens, wrote a rather detailed dissent from all three parts of Rehnquist's opinion. Scalia concurred that the Attorney General has wide discretion to deny reopening, but only when the relief sought is asylum, not withholding of deportation. Because of the lack of a majority endorsement for the more detailed parts of Rehnquist's opinion, however, this opinion will not be the Court's final words on this subject.

## Book Review

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ness of that collapse. Needless to say, this author would attribute much of the pressure behind these changes to the Strategic Defense Initiative.

If this passage, which appears in the Epilogue, is taken out of its larger context we might then wonder whether Col. Worden could be guilty either of simplification or revisionism. But the thorough and lucid analysis that precedes it largely dispels such concerns.

Col. Worden argues that "By the late 1960s, US space successes showed that the trend in space was not moving in favor of the Soviets." The Soviets were not only terrified of a U.S. capability of knocking out satellites and missiles, but expected that SDI could also have the capability of destroying planes and airfields. Worden writes: "Space capabilities could give the U.S. a potent hand in the next few poker games with the Soviets. Space is the winning card, not just a bargaining chip." In essence, SDI radically transformed the "game" of nuclear strategy and arms control from a predictable chess game that the Russians traditionally played so well, to a wild poker game in which the Americans traditionally excelled.

In addition, SDI threatened to drive the level of the technology of the arms race and the costs of competing and defending against that technology through the ceiling, and literally, into outer space. By threatening to do this, the U.S. exposed the fundamental contradictions of the Soviet system. While some of the world's greatest scientific thinkers live in Russia, they have been unable to apply their conceptual talent to concrete applications. Where applications were built, it was always done at the expense of others. Traditionally in a centrally planned economy there was a choice between standard guns or standard butter. In a decentralized economy, citizens can have both quality guns and quality butter. However, SDI clearly illuminated for Kremlin policy-makers the unavoidable fact that the Soviet's collapsing economy could provide neither butter nor space-based lasers.

While the end of the Cold War was a partial consequence of SDI, the initiative itself, Worden argues, was a consequence of the

inherent contradictions of nuclear strategy. Worden provides a comprehensive analysis of these contradictions, and the related underpinnings of U.S. nuclear policy. The main issue, Col. Worden argues, is that nuclear policy and arms control thinking have been disconnected from a holistic strategy. A complete strategy must also include moral content and satisfy the fundamental laws of logic. This portion of the book should be required reading for critics of SDI, who, if they are to be credible, must not only be able to address the technical integrity of SDI, but also the fundamental and underlying issues of strategy.

Where both supporters, including Worden, and critics of SDI failed in their early debates, is precisely on Western strategy and conceptions of arms control. The Western approach, in my opinion, has been overly focused on the technical aspects (the numbers and characteristics of weapons) rather than the political aspects of deterrence, including such things as alliance management and the impact that arms management can have on the strength or weaknesses of political and economic systems. Without a coherent understanding of strategy and arms control, there has been a massive gap in the West among theory, rhetoric and practice. Had this void been narrowed earlier, we may have had a greater understanding of, and better anticipated, the strategic events that we confront today.

It is expected that any book published on fast-moving events involving the former Soviet Union and space technology would be obsolete even before it could be published. But *SDI and the Alternatives* provides the reader with a mixture of issues, analysis and observations that will prove both timely and timeless.

There is an explosion of innovation as SDI technology is being integrated into civilian and commercial space projects, as well as into larger discussions involving U.S. competitiveness. SDI technologies have an immediate role in national security in the larger sense, which includes the capability of monitoring and managing our global environment. *SDI and the Alternatives* provides both a history and a road map for managing war and peace in the space age.

*Michael Potter writes frequently on international technology and space issues.*

## Book Review

By Lawrence R. Houston

### **Espionage and Secrecy: The Official Secrets Acts 1911-1989 of the United Kingdom**

by Dr. Rosamund M. Thomas

New York: Routledge, Chapman and Hall, 1991

The legal problems arising out of espionage and efforts to control it in Britain were well covered by Prof. David Williams in his 1965 book, *Not in the Public Interest*; but, as Dr. Thomas says, much has since gone on in the courts and Parliament. Dr. Thomas is the Director of the Centre for Business and Public Sector Ethics at Cambridge University. She has been writing on this legal subject since 1977, so she is well qualified to bring us up to date.

*Espionage and Secrecy* rehearses the legislative history of the Official Secrets Acts from their beginnings in 1911 through 1990 and covers all but the most current espionage and secrecy trials. Her book is therefore an excellent source for American students of the subject, although the convolutions of proposed and enacted British legislation are somewhat less interesting to Americans; some of the court cases, such as those involving the Peter Wright problem, are rather specialized in British and Commonwealth law. However, that which is pertinent to us is pretty easily identified, particularly in the evidentiary field.

This is not an easy book, as almost every paragraph has meat in it, but the main subjects are clearly set out. For instance, the role of the British Attorney General is far different from the American practice. In Britain, in criminal cases, the Attorney General is Crown Counsel and not responsible to the Government in which he is a Minister, but in civil cases his role adjusts to a relationship with the Government. Also emphasized by Dr. Thomas is the impact of the British judiciary, particularly on criminal cases, which is considerably stronger than in this country. All in all, this is an excellent study well worth the time it takes to digest.

*Espionage and Secrecy* has been awarded the prize by the National Intelligence Study Center in Washington for the best book in 1991 by a foreign author, writing on the subject of intelligence.

*Mr. Houston saw service on the legal staff of OSS and CIG, and became the CIA's first General Counsel, 1947-1973. At his retirement, by direction of President Nixon Mr. Houston became the 15th recipient of the President's National Security Medal for his outstanding work as the "Father of Intelligence Law".*

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## Standing Committee To Consider Wide-Ranging Agenda

On May 8 and 9, the members of the Standing Committee will meet to evaluate the past year, consider programs and resolutions for the ABA's annual meeting in August, and begin planning programs and projects for the coming year. In addition, the Standing Committee will consider a revised mission statement, as well as a possible long-range strategic plan. Time on the agenda will also be devoted to detailed planning of the second annual National Security Law Conference, now scheduled for the fall in Washington, D.C. The conference may include a panel on the President's Annual National Security Strategy Report, as well as another annual feature, the Developments in the Law panel that provided the occasion for several spirited exchanges at the inaugural conference.

Reports of the Standing Committee's several task forces will be received. The Intelligence Task Force, for instance, is beginning a detailed examination of the legal aspects of the dissemination of economic intelligence to the American business community, a program some have suggested will be an important aspect of making the United States more competitive in the decade ahead.

### Standing Committee on Law and National Security

*Chairman:* Robert F. Turner. *Members:* David R. Brink, Kathleen A. Buck, Mary Doyle, Michael S. Greco, Lucinda A. Low, Richard Schifter, John H. Shenefield, John M. Shepherd, Delbert L. Spurlock, Jr., Diane P. Wood

*Advisory Committee Chairman:* Richard E. Friedman

# **The National Security Agenda . . . .**

## **National Security Community Reorganization**

*Sen. David Boren*, chairman of the SSCI, and *Rep. Dave McCurdy*, chairman of the HPSCI, have introduced companion bills (S. 2198 and H. R. 4165 respectively) on reorganization of the Community. The Select Committees have heard testimony from such dignitaries as Schlesinger, Inman, Carlucci, Colby, Turner and McMahon. Both bills are strongly opposed by Secretary of Defense Cheney. Passage of these bills is not expected this session. • *Robert M. Gates* (Director of Central Intelligence) appeared before the first-ever joint session of HPSCI/SSCI on April 1 and discussed in open and closed session his plans for the Intelligence Community: they include abolition of Intelligence Community Staff and the establishment of a DCI Community Management Staff, run by the new Executive Director for Intelligence Community Affairs *Richard Haver* (currently the Assistant Secretary of Defense for Intelligence Policy). Haver will assume his duties June 1, 1992, and he and his staff will be centrally located at Langley. Gates also plans new emphasis upon human intelligence and upon a better analytical product, greater integration of the collection disciplines, and strengthening support to the military (with a new Associate Deputy Director for Operations for Military Affairs (*Major General Roland Lajoie*, U.S. Army, has already assumed this post) and a new Office of Military Affairs).

## **Other Legislation**

An overhaul of the *Export Administration Act* is underway, with many export controls liberalized. The legislation is awaiting conference, with no veto expected. New trade will stress sophisticated technology transfer, commercial imports of non-military items involving the private sector, and even exchange of thermonuclear materials (Plutonium 238). COCOM controls to be relaxed.

## **Treaty Matters**

The *Open Skies Treaty*, allowing a limited number of unfettered reconnaissance aircraft flights over the former Soviet Union, Europe and North America, was signed on March 24 by the 24 nations participating in the CSCE. For the United States and Russia, the two largest military powers involved, the treaty will mean that each nation will accept 42 overflights per year by surveillance aircraft collecting an array of photographic and electronic data for the other. The treaty does not affect the ability to collect satellite intelligence.

## **Recent Cases**

The D.C. Circuit recently upheld the sentence given to *Jonathan Pollard*, rejecting his contention that the government coerced him to plead guilty by linking his plea agreement to that of his wife, a co-conspirator in the espionage case (2-to-1 decision with Judge Silberman writing the opinion). • After eight months of trial, *General Noriega* was convicted on eight counts and acquitted on two counts (including the "Krill" count). Sentencing set for July. • Three Iran-Contra counts dropped for former CIA Deputy Director for Operations *Clair George*. Prosecutors will seek reinstatement of two counts. • On April 1, the Supreme Court heard oral argument in the *Alvarez-Machain* case to consider the legality and constitutionality of extraterritorial fugitive apprehension.

## **Items of Interest**

*Admiral William Studeman*, formerly Director of the National Security Agency, confirmed as Deputy Director of Central Intelligence on April 7, promoted to full admiral upon confirmation. • Nomination of *Rear Admiral John M. McConnell*, presently Director for Current Intelligence, Joint Staff and Command Support, J-2, for Director of National Security Agency is on track, with hearings before Senate Armed Services and SSCI set for the end of April.