



National Security Law Report

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Conference Surveys Post-Cold War Intelligence Issues, Democratization Goals

Intelligence experts from in and out of government debated a lengthy agenda of intelligence issues in a conference sponsored by the Standing Committee in Washington on April 30 and May 1. The relation of intelligence to policy formulation, arms control, war avoidance and economic competition were among the subjects discussed. The importance of the role of intelligence agencies in totalitarian countries was a pervasive theme of the conference.

Seth Hurwitz, Counsel to the President's Intelligence Oversight Board, keyed the conference by describing the intimidation role of the political police as an essential element of totalitarian rule. He offered the example of East Germany, a nation of 18 million people, with an 85,000-person security police, an estimated 500,000 informers and files on 6 million citizens — one-third of the entire population.

A panel of experts took the theme further in its examination of the democratic control of intelligence agencies in former Warsaw Pact nations. Historian Allen Weinstein, founder and President of the Center for Democracy, led a panel that focused on intelligence oversight in former Warsaw Pact countries. CIA General Counsel Elizabeth Rindskopf stated that helping such nations control their intelligence agencies was one of the most exciting topics for lawyers working in the intelligence community. She described meetings between intelligence and law enforcement services of the United States and Russia that strive to identify areas of joint interest and coop-

eration. Such cooperation comes about because of a realization that security is enhanced by more rather than less knowledge about the intentions of one's neighbors. Former Warsaw nations were, she thought, entitled to foreign intelligence capabilities, but ones that support and do not instead undercut the basic goals and objectives of the democratic structures they serve.

Jefferson Adams, professor of history at Sarah Lawrence College, spoke of the process of "deStasification" and defended the bringing of former Stasi officials to justice. He cited a 1990 poll showing that 80 percent of East Germans opposed a general amnesty for Stasi personnel, and that 88 percent believed there ought to be the right of personal inspection of individual files.

Richard Schifter, former Assistant Secretary of State for Human Rights and Humanitarian Affairs, turned the panel's attention to Russia. He focused on the secret police with intelligence jurisdiction

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Point of View

Kidnapping and the Supreme Court: Understanding the Alvarez Decision

By Robert F. Turner

In *United States v. Alvarez-Machain*,¹ one of its most controversial decisions of recent years, the Supreme Court upheld the right of U.S. courts to try a foreign national who had been kidnapped by U.S. agents abroad and brought to the United States amid protests by his government that the action violated an extradition treaty.

Much of the public commentary on the case has been misdirected. Assertions that the Court held that it was "legal" for the United States to "kidnap" foreign nationals abroad for trial in the United States are simply inaccurate. The Court considered a far narrower

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¹ ___ U.S. ___, 60 U.S. Law Week 4523 (June 16, 1992).

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issue, and its holding was in no sense a departure from the jurisprudence of its predecessors.

Both conventional and customary international law prohibit States from using force within the territory of another State in the absence of consent by the second State or other special circumstances (such as when engaged in legitimate acts of self-defense). But from the earliest days of our history the Supreme Court has allowed the political branches of our government to violate the nation's international political obligations.² To be sure, such acts do not lose their illegal character under international law; but the United States belongs to the *dualist* school of jurisprudence and American courts will give primacy to the U.S. Constitution and to inconsistent statutes of a more recent date when they cannot be reconciled with even the most solemn treaty obligations.

For more than a century the Supreme Court has followed a rule permitting courts to assert *in personam* jurisdiction irrespective of alleged improprieties in the way in which a defendant was brought before a tribunal. Referred to as the *Ker-Frisbie* doctrine, the rule dates back to the Court's 1888 decision in *Ker v. Illinois*,³ affirming the constitutionality of the trial of Frederick Ker despite the fact that he had been seized against his will in Peru and returned to Illinois without the consent of Peruvian authorities.

On the same day the *Ker* decision was handed down in 1888, the Court had held in *United States v. Rauscher* that a fugitive returned to the United States pursuant to an extradition treaty was entitled to the legal protections of the extradition process. At issue before the

² See, e.g., *The Paquete Habana*, 175 U.S. 677 (1900) (holding that American courts must take judicial notice of customary international law "in the absence of any treaty or other public act of their own government in relation to the matter"); and *Whitney v. Robertson*, 124 U.S. 190 (1888) (holding that the "latest in time" rule applies and that Congress by later statute may control an earlier inconsistent treaty for purposes of U.S. municipal law). See also, *Head Money Cases*, 112 U.S. 580 (1884).

³ 119 U.S. 436 (1888).

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over domestic Russian activity. In this area, he said, the new democracies must confront the continuing danger posed by the remnants of the totalitarian state's most potent organ of repression. In Russia, the secret police was founded by Peter the Great in 1702, and in ten years will have been in existence for 300 years. Russia's vulnerability now is that its economic difficulties, social disarray and increase in criminality provide fertile soil for the old order of the KGB to regroup and re-establish a dictatorship. He proposed a strict distinction between purely local law enforcement, which could be entrusted to a police organization, and internal police which should be abolished. He recited that Vadim Bakatin, once Soviet Minister of the Interior, had been in favor of the abolition of the domestic arm of the KGB, but was fired within a few months of expressing this view. Later, after the August coup, Bakatin as head of the KGB sought to reconstitute the organization as a police force on the model of the FBI, but the goal remained beyond reach when Bakatin was again dismissed.

J. Michael Waller of the International Freedom Foundation discussed his program to assist Russian members of Parliament in imposing legislative controls over the security and intelligence services. He pled for more help both from the public and private sector in providing the tools of oversight, but pointed out also that in Russia the oversight committee is itself co-opted by KGB membership. He spoke of the situation as an emergency, with the window of opportunity possibly closing. He listed the ways in which interested journalists, academics and others with information and experience could be of assistance.

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Book Review

By the Editor

The Spy Who Saved the World: How a Soviet Colonel Changed the Course of the Cold War

by Jerrold L. Schecter and Peter A. Deriabin
Charles Scribner's Sons (New York) 1992

Critics of the intelligence business have, from time to time, challenged the usefulness of gathering human intelligence. Soviet Colonel Oleg V. Penkovsky's feeding of sensitive information to CIA and SIS handlers in 1961 and 1962 should be enough to erase such doubts forever.

Expert and highly readable, this book on one of the most celebrated high-level spies of this century is the work of Jerrold Schecter, a journalist who served with distinction on the staff of the National Security Council, and Peter Deriabin, a former KGB counter-intelligence officer who himself defected in 1954 and has worked as a consultant to the CIA. Twenty-five years after the Cuban missile crisis, Schecter and Deriabin asked the CIA for access to historical documents relating to Colonel Penkovsky, and received permission to review 17 cardboard boxes of transcripts and other documents. Notwithstanding the security and bureaucratic hurdles, the book is full of fascinating detail and illuminating insights. No doubt more will be revealed in due time, but surely this is the heart of the matter.

In August of 1960, Penkovsky wrote a letter to the CIA and handed it to a young American tourist:

At the present time I have at my disposal very important materials on many subjects of exceptionally great interest and importance to your government.

I wish to pass these materials to you immediately for study, analysis and subsequent utilization. This must be done as quickly as possible....

* * *

I ask that in working with me you observe all the rules of professional tradecraft and security and not permit any slipups. Protect me.

May the justice of the ideals and goals to which I am devoting myself from this day forward aid us in our future collaboration....

For the next two years Penkovsky provided a steady stream of highly classified documents, including war plans, missile diagrams and thou-

sands of pages of sensitive information. But it was not easy. At the outset, the nagging question: was Penkovsky real, or was he a provocation? After all, the GRU had reason to retaliate for the CIA's use of Lt. Colonel Pyotr Popov, a GRU double agent whose exposure after some five years of spying led to his execution and to profound embarrassment for the Soviet military intelligence establishment.

But the Penkovsky disclosures on the fates of the American U-2 and RB-47 downed while on reconnaissance missions seemed too highly classified to be the chicken feed for establishing a penetration agent within the CIA. The decision was made to approach Penkovsky in Moscow. The initial efforts were halting at best, and months went by with no successful contacts. Finally, the CIA decided to seek British assistance, notwithstanding the widespread concern in Washington that British intelligence had been penetrated by the Soviets. Thereafter, events moved quickly. The first meeting with U.S. and British intelligence agents took place in London in April, 1961, eight months after Penkovsky's initial efforts to make contact.

Part of the book's special fascination is the detailed accounts of the meetings — based on transcripts — held between Penkovsky and representatives of U.S. and British intelligence over the next several years. At early meetings, the intelligence team, led by British intelligence agent Harold Shergold, and the CIA's George Kisevalter, both experienced handlers of agents, took Penkovsky through his life story, and his key obsession with his father's service as a White Russian officer in the Civil War, who had then vanished, leaving the family suspect and vulnerable. The book describes the team's mounting excitement as gradually they realized that here was an intelligence agent with superb access to Soviet military secrets, far beyond their hopes.

The documents that he made available added to the excitement. Some of the initial material showing plans for construction sites for missile-launching installations would later play a critical role during the Cuban missile crisis. There were copies of stolen American weapons manuals that could lead CIA counter-intelligence officers to track down spies within the American military establishment.

Toward the end of the first meeting, Penkovsky spoke about the possibility of Soviet strategic missiles being placed in Cuba — this more than 18 months before the Cuban missile crisis. For the next year and more, Penkovsky gave

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Court in the recent *Alvarez* case was whether the defendant,⁴ "abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts." For the record, there was an extradition treaty with Peru when Ker was abducted. The Ninth Circuit Court of Appeals had held that the *Alvarez* trial was proscribed because his seizure violated an implicit treaty provision barring forceful rendition against the will of the host State.

In critiquing the same reasoning used by the Ninth Circuit in the companion *Verdugo II* case last summer,⁵ I argued: "The Ninth Circuit's error was not in concluding that non-consensual rendition is illegal under international law (it clearly is); the court simply relied upon the wrong legal authority for its holding." Noting that the real violation was more likely of Article 2(4) of the U.N. Charter (and related articles in the O.A.S. Charter and customary international law), I concluded: "While the result — that the United States may be an international lawbreaker — may be the same, the different analytical approaches under international law may produce a far different result on appeal." As the holding in *Alvarez* demonstrates, it did.

The real objections to the kidnapping of Dr. *Alvarez* are of a *policy* nature, and they are indeed powerful. The conceivable circumstances in my view are rare when the option ought to be even arguable,⁶ The dissenters were ready to find a constitutional remedy — barring prosecution — because they found the

⁴ Dr. Humberto Alvarez Machain was a Mexican medical doctor accused of using his skills seven years ago to keep American Drug Enforcement Administration agent Enrique Camarena Salazar alive "so that others could further torture and interrogate him." 60 *U.S. Law Week* 4524.

⁵ Robert F. Turner, "Vergdugo II Reconsidered: The Law and Policy of Rendition," 13 *Intelligence Report* 3 (Summer 1991).

⁶ There is one clear case—kidnapping a major international criminal with secret consent of a protesting government. There may also be rare instances where such action would be a lawful response to state-sponsored terrorism. Other examples are hard to identify.

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the West highly sensitive information on a wide variety of topics. Details as to Soviet nuclear missile strength, Soviet war plans, intentions of the Soviets toward West Berlin, the existence of a Soviet-U.S. missile gap, details of food riots within the Soviet Union — Penkovsky told a graphic story that in detail and sweep provided a series of revelations for Western intelligence because it was so at odds with official Soviet accounts.

On the two major Cold War crises that brought the world closest to nuclear war, Penkovsky had an important influence. In the Berlin crisis, in which a threatening Khrushchev attempted to squeeze what he calculated was a young and inexperienced U.S. president, Penkovsky's information was crucial in helping U.S. policymakers accurately forecast Khrushchev's real intentions and his likely response to Western action. Through the summer of 1961, Penkovsky turned over documents revealing everything from Soviet assessments of Western policy to the details about Soviet missile brigades in Germany. Only the inability of Penkovsky to get his information out quickly prevented President Kennedy from knowing in advance of the Russian plan to build the Berlin Wall. But informed by the Penkovsky disclosures, the U.S. understood the nature of the threat and was able to respond with the steadiness and resolve that withstood the Khrushchev probes.

The book then details the way in which Soviet suspicions began to mount. The strain beginning to tell, Penkovsky nevertheless continued to supply U.S. intelligence authorities with valuable information. During the Cuban Missile crisis in the fall of 1962, the U.S. government was far more knowledgeable about the results of photo-reconnaissance over Cuba as the result of Penkovsky's earlier disclosures concerning SS-4 installations and their operational characteristics. Many top U.S. officials involved in the crisis characterized Penkovsky's contribution as key to its successful resolution.

The authors are likewise able to set out in hour-by-hour narrative the details of Penkovsky's arrest and trial. The reader is given a ring-side seat on the whole riveting Penkovsky story, but enough political and foreign policy background is included to help make sense of this important aspect of the Cold War. Even now, after the Cold War is won and the Soviet Union reduced to a

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underlying policy to be "shocking." But — in keeping with a long line of decisions — the majority recognized that the *political* branches of government are far better able to make such policy choices.

Extradition remains primarily an executive act — an aspect of the conduct of the foreign relations of a country. In the case of extraditions from the United States, Congress has provided that they may only occur pursuant to a treaty and has codified the long-standing practice — originated unilaterally by President Jefferson as a matter of convenience — of using the judiciary to determine whether a requesting country has probable cause to warrant granting extradition; but the President ultimately has complete discretion (normally exercised by the Secretary of State) to make a political decision not to extradite even when the treaty would seem to so require.

The President's special role in implementing political treaties with other States was emphasized by Chief Justice Marshall, in the landmark case of *Marbury v. Madison*:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.⁷

In *Terlinder v. Ames*, the Supreme Court concluded in 1902: "The decisions of the Executive Department in matters of extradition, within its own sphere, and in accordance with the Constitution, are not open to judicial revision"⁸ This includes the right not to

make use of the formal extradition process, and even the right to violate the nation's political commitments to other States.

When the Supreme Court last month in *Alvarez* upheld the well-established *Ker-Frisbie* doctrine, reaffirming that the Constitution did not prohibit the government's conduct, and deferred the policy aspects of the dispute with Mexico to the executive branch,⁹ this was not in any sense an "endorsement" of international lawbreaking. On the contrary, it was an example of the Court fulfilling its proper constitutional role under our system of separation of governmental powers.

The writer is the immediate past chairman of the Standing Committee.

⁷ 5 U.S. (1 Cranch.) 137 (1803) at 165.

⁸ 184 U.S. 270 (1902) at 290.

⁹ "Respondent ... may be correct that [his] abduction was 'shocking', ... and that it may be in violation of general international law principles. Mexico has protested the abduction of respondent through diplomatic notes ... and the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch." 60 U.S. Law Week 4527.

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confederation of struggling republics, the account has an immediacy that serves to leave us with a lesson for the future: a skillful and well-supported intelligence establishment is never just one of several policy options — it is a national security necessity. Schecter and Deriabin teach this lesson with an authority that policymakers in Washington would do well to remember.

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The National Security Agenda

Iraq (Gate)

House Democrats *Gonzalez* and *Brooks* continue to query Bush and Baker over the pre-war policy of providing agricultural grants and intelligence to Saddam Hussein. Brooks and Gonzalez, both from south Texas, are seeking the appointment of an independent counsel to investigate potential criminal wrongdoing.

On May 29, 1992, principal Executive Branch legal advisers were called to testify before the House Banking Committee, chaired by Congressman Gonzalez. *Wendell L. Willkie*, the Commerce Department's general counsel, acknowledged that "unjustified and misleading" changes were made to certain documents concerning exports to Iraq. The alterations, originally uncovered by the Commerce Department Inspector General, involved export license approvals for "commercial vehicles" that were actually vehicles designed for military use.

Independent Counsel Statute

The Independent Counsel statute is up for renewal this year. Short of the statute's being found unconstitutional, which is unlikely in light of the 7-1 decision in *Morrison v. Olson*, some version of it is likely to be enacted. But calls for revision are increasing in the wake of the Weinberger indictment. One solution may be to let the statute lapse until after the election, and then address the issue in the new Congress.

Recent Cases

United States v. Dragoul: The United States Attorney in Atlanta has announced that there will be no trial for *Christopher Dragoul*, the branch manager of the Atlanta branch of the Italian bank BNL, who has decided to plead guilty to unenumerated crimes. The judge in the case, *Marvin Shoob*, has joined the call for an independent counsel to investigate the matter.

United States v. George

Clair E. George, former CIA deputy director for operations, was reindicted on May 21 for inducing others to lie to Congress. The indictment alleges George told *Alan D. Fiers*, a former CIA Central American task force chief, not to disclose certain information to the Senate Foreign Relations Committee and the House Intelligence Committee about resupply operations in El Salvador. Trial began July 13 with Judge Royce Lamberth presiding.

Export Controls Reexamined

The United States has proposed that the Coordinating Committee on Multilateral Export Controls (Cocom) create a special "cooperation council." Secretary Baker, in a letter to Cocom principals, described three purposes for the council: to facilitate the newly independent states' access to technology that Cocom once denied them; to help them establish Cocom-like export control systems; and to provide a forum through which the former Cold War adversaries can jointly address "new strategic threats." These proposals were discussed at the Paris meeting of Cocom at the beginning of June.

Lisbon Protocol

Ukraine, Kazakhstan and Belarus formally agreed with the United States and Russia on May 23 to give up the nuclear weapons within their respective territories by the end of the decade. This will allow the three states of the former Soviet Union to become non-nuclear nations under the terms of the 1968 Nuclear Nonproliferation Treaty. The Lisbon protocol will now be incorporated into the Strategic Arms Reduction Treaty (START), which was signed by President Bush and then-Soviet President Gorbachev in Moscow last July. Senate ratification of START is expected soon.

New Collection Agency Announced

The Pentagon has announced the creation of a new Central Imagery Office. The new agency, a response to congressional criticism of duplicative efforts among the various producer agencies, was agreed to by Secretary Cheney and Director Gates in a compromise designed to avoid the traditional rivalries no longer affordable in an era of shrinking budgets. The new agency's first director will be intelligence veteran *William F. Lackman*.