



National Security Law Report

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Court Finds FBI Investigation Violates 1981 Decree

Judge Ann Williams of the U.S. District Court of the Northern District of Illinois has issued an opinion¹ finding that the FBI's investigation of the Chicago Committee in Solidarity With the People of El Salvador (Chicago CISPES) violated the 1981 consent decree that settled the case *Alliance to End Repression v. City of Chicago*.² Judge Williams, a Reagan appointee, decided that the FBI had improperly investigated political activities, including the lawful exercise of First Amendment rights. She adopted in full a magistrate's finding that the FBI was "guilty of serious intentional non-compliance with the Decree."

The *Alliance* consent decree grows out of two cases filed as class actions in 1974 and 1975 by a group of plaintiffs including churches, political groups, civil liberties organizations and individual political, community and religious activists. The defendants included the city of Chicago, the Chicago Police Department, the Attorney General, the Director of the FBI, the Director of the CIA and the Department of Justice, the FBI and the CIA. The complaint alleged that the defendants had investigated and compiled dossiers on lawful political activities, and had utilized unlawful means (including warrantless wire taps and break-ins), infiltrators and informers, and had disrupted and harassed lawful activities.

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U.S. Defense-Industrial Base Under Budget Siege

A conference co-sponsored by the National Strategy Forum and the Standing Committee on Law and National Security explored issues concerning the state of the U.S. defense-industrial base in a time of relaxation of international tensions and increasingly stringent defense budgets in Chicago on November 15.

Craig King, Navy general counsel, and Ann Petersen, general counsel of the Air Force, presented the views of the Department of Defense on how to insure industry capacity to produce defense goods and services. Craig King reported that the Defense Department and constituent services have undertaken an extensive review of the defense infrastructure in recent months. That review is premised on several propositions: conflicts in the foreseeable future are expected to be regional conflicts, and supply for these conflicts can be handled from reserve stocks. In the event the Soviet Union re-emerges as a global threat, there will be time to reconstitute necessary forces. The Administration's general approach to fostering the defense industry is to allow market forces to function and to avoid picking winners and losers, other than through a competitive award process. Insuring the effectiveness and integrity of the competitive process itself is at the heart of the problem.

A note of caution was sounded by Gordon Adams, executive director of the Defense Budget Project. Adams called the pending changes in defense spending "major and historic." He predicted that research and development expenditures would at least in the near term continue at a relatively high level, but that the overall impact of budget stringency, while absorbable across the full range of U.S. industry, would create considerable hardship in particular industries. Adams called for the establishment of federal policy on the approach companies should utilize through this period of defense downsizing.

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After five years of active litigation in which the issues were sharply contested, the CIA and the FBI entered into settlement agreements. The FBI consent decree governs FBI domestic security investigations within the borders of the United States.

The consent decree embodied certain principles. The FBI's domestic security investigations can focus only on conduct forbidden by criminal law, and cannot proceed solely on the basis of lawful activities protected by the Constitution. Investigations must conform to the standard of minimal intrusiveness, and the FBI agrees not to employ techniques designed to impair lawful and constitutionally protected political conduct.

The FBI also agreed not to conduct warrantless unconsented physical searches in domestic security investigations, or any unlawful physical searches in foreign intelligence and counter-intelligence investigations. Various kinds of physical or photographic surveillance, informant activities and the acquisition and collection of information on U.S. persons in the city of Chicago were required to adhere to applicable federal law and departmental and bureau guidelines.

Chicago CISPES brought suit under the enforcement provisions of the *Alliance* consent decree contending that the FBI was in violation of the decree and seeking an order of compliance. It likewise sought expungement of investigatory records. Following discovery, both sides moved for summary judgment.

Judge Williams' opinion recites that the FBI began the CISPES investigation following an informant's tip that CISPES was involved in international terrorist activity. The national CISPES investigation led to 178 "spin-off" investigations, including 20 investigations in Chicago. Judge Williams states that the FBI has since admitted there were clear deficiencies in its handling of the original informant, and that within a year of the investigation's on-set, the FBI learned that some of the information was unreliable. Director William Sessions has said that the FBI should have known in 1984 that the CISPES investigation should have been discontinued. Nevertheless, the investigation continued for another year until June, 1985.

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Utilizing infiltrators who joined Chicago CISPES, and secretly obtaining copies of deposits, canceled checks, transfer requests and telephone records, the FBI was able to trace the financial affairs and determine the identity of the membership and contacts of the organization. In addition, the FBI conducted photographic surveillance and gathered unpublished telephone and social security numbers of members of the organization.

In June of 1985, the Department of Justice concluded that CISPES was engaged in political activities involving the exercise of First Amendment rights, and not in international terrorism, and as a result instructed the FBI to close the investigation of CISPES. Notwithstanding those instructions, the FBI's Chicago field office continued to collect and record information regarding Chicago CISPES' lawful political activity.

At the instigation of Congress, Director Sessions ordered an in-depth inquiry into the investigation and subsequently testified at a congressional hearing according to Judge Williams, "that the FBI had investigated essentially political activities, and that FBI field offices ignored instructions from Headquarters regarding these investigations." He took internal administrative action to prevent recurrence of the problem.

The court first considers the FBI's motion for summary judgment, concluding that it lacks merit. The doctrine of *res judicata* does not apply, even though an earlier case challenging the national investigation of CISPES had been dismissed on grounds of mootness and lack of standing.³ The court concludes the issues were not the same inasmuch as the Chicago case was an action to

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Foreign Investment in the U.S.: Threat to National Security or Boost to Our Industrial Base?

By Kathleen A. Buck and Evan L. Rosenfeld

In recent years U.S. government leaders have become increasingly concerned about the potential impact of foreign investment in the United States on both the industrial base and the ability of the U.S. to produce weapons and materials needed for national defense purposes. We are uncertain, however, whether it is possible to segregate a "defense-industrial base" from the overall U.S. industrial base. Defense-industrial issues seem intertwined with the more general issues facing U.S. companies that compete in the global market today. Direct foreign investment in the U.S. also raises the question of whether American investors receive reciprocal treatment in other countries.

The recent rise in foreign investment in the U.S. is caused by many factors. Foreign capital is attracted to the U.S. because of the political and economic stability of the country. Additionally, many foreign companies are investing in U.S. companies or establishing U.S. subsidiaries to avoid import quotas and other trade restrictions in the U.S. market.

There have been few restrictions historically in the U.S. on foreign investment. As a result of the sharp increase in the 1980's and the publicity associated with several high-visibility acquisitions, however, Congress became concerned. The result was new legislation to establish a formalized process for the review of foreign investment activities. At least in part, these concerns were based on the premise that the U.S. should retain a vigorous strategic production base and a strong base of expertise in advanced technology.

Thus, in 1988, Congress enacted the Exon-Florio amendment to establish a mechanism for scrutinizing, and potentially prohibiting, foreign acquisitions of U.S. businesses. As originally enacted, this provision authorized the President to prohibit or suspend any acquisition, merger or takeover by a foreign person if the President finds that foreign "control" would "threaten to impair the national security." 50 U.S.C. App. 2170(c).

Companies involved in foreign acquisitions of U.S. firms can remove the looming threat of Presidential disapproval, however, by notifying the President of the acquisition and obtaining what is

in effect a "negative clearance." Currently, this review process is handled by the Committee on Foreign Investment in the United States ("CFIUS"), an interagency group headed by the Secretary of the Treasury. This notice is not required, but once it is submitted, the U.S. government must provide a formal response within 30 days of receipt of the notification indicating whether it intends to investigate the acquisition. Following a decision to investigate, CFIUS then has 45 additional days in which to complete the investigation. Following completion of the investigation, the President has 15 days in which to make a decision.

The law sets forth general factors for making the determination of whether an acquisition, merger or takeover would impair the national security. These considerations include the impact on domestic production needed for national defense, the capability of domestic industries to meet national defense requirements, and the impact of control of domestic industries by foreign citizens.

The review process thus sets out the process whereby the government, including the Defense Department, will examine the nature of the technology that may be transferred to another country, whether the U.S. firm has classified

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An alternative for the future defense-industrial base—increased reliance on public and private arsenals—was suggested by Donald Putnam, Corporate Director of Contracts and Technical Analysis at General Dynamics Corporation. Putnam argued that the advantages of the arsenal system included continuity, relative stability of personnel and predictable levels of production. Disadvantages include anti-competitive effect, occasional production inefficiency and the risk that innovative solutions will be excluded because of the closed technical community.

Consultant Alan Peterson spoke of strategies that defense contractors should consider to adjust to the new realities. Each company must weigh its course of action in an environment of consolidation that will be used to reduce excess capacity and increase efficiency. Peterson called for changes in the tax law to ease decisions to abandon, sell or dispose of production assets. In addition, defense contractor mergers could be facilitated by relaxation of tax and antitrust laws.

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Teaching National and International Security: Curricula for a New Century

What should be the focus of the security studies curriculum in the 1990s? This will be the subject of a faculty seminar to be held July 6-16, 1992 at Bowdoin College in Brunswick, Maine. It is being organized by the Fletcher School of Law and Diplomacy's International Security Studies Program, Columbia University's International Security Policy Program, and the National Strategy Information Center.

Applications are invited from the faculty on all ranks who either already teach in the field or intend to do so. The deadline for applications is February 1, 1992. It is anticipated that approximately 25 applications will be selected. Final notification will be given by mid-March, 1992. Participants will be provided with round-trip travel as well as room and board at the seminar. For further information or application forms, contact: Dr. Roy Godson, National Strategy Information Center, 1730 Rhode Island Avenue, NW, Suite 500, Washington, DC 20036. Phone: (202) 429-0129.

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information or contracts involving access to classified information, the impact on competition, and the impact on ongoing or planned research activities. Foreign investment can, of course, also have a positive impact by providing new capital, advanced technology, or improved manufacturing processes for the U.S. firm.

Because the Exon-Florio provision was originally enacted as Section 721 of the Defense Production Act ("DPA"), it officially expired with most other DPA provisions on October 20, 1990. But it had been subject to continuing congressional analysis and debate ever since its inclusion in the 1988 Omnibus Trade and Competitiveness Act. For example, some members of Congress advocated giving the President express authority to disapprove foreign acquisitions on "economic security" grounds, as well as on national security grounds. Such a provision would have incorporated industrial policy explicitly in the evaluation of transactions

involving foreign investors, thereby purporting to protect not only the national security, but also the basic U.S. corporate and economic infrastructure. The Bush administration, on the other hand, preferred a permanent reauthorization of Exon-Florio without any substantive changes.

On August 17, 1991, Congress ultimately bowed to administration pressures, maintaining Exon-Florio in its original form and enacting a permanent reauthorization provision in the Defense Production Act Extension and Amendments of 1991 (Pub.L. No. 102-99, §8). Congress also made the reauthorization retroactive back to October 20, 1990, the date on

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enforce the 1981 consent decree, which was not at issue in *CISPES I*, nor was there a prior decision on the merits. The petitioners in *CISPES II* were not parties in the earlier case. Likewise, the doctrine of collateral estoppel does not apply, nor was the petitioners' claim rendered moot by the FBI's voluntary cessation of the unlawful activity or the imposition of new FBI guidelines to prevent recurrence.

The court then found that the FBI had utilized certain especially intrusive investigative techniques without adequate justification, and that the FBI's violations of the consent decree were intentional. Consideration of the remedy of expungement of the investigatory records was deferred until the parties had briefed the issues. The court nevertheless reiterated the order that the FBI must henceforth comply with the consent decree. Finally, the court reopened discovery for the limited purpose of exploring the issue of training about compliance with the requirements of the decree. The court declined to rule on the issue of contempt, finding that *CISPES* had not raised the issue in a timely way. The FBI was ordered to pay attorney's fees and costs. Because there is as of yet no final appealable order, no decision on the issue of whether to appeal has been reached by the government.

1. *Alliance to End Repression v. City of Chicago*, Nos. 74-C-3268 and 75-C-3295, slip op. (N.D. Ill. Oct. 2, 1991) ("*CISPES II*").
2. 91 F.R.D. 182 (N.D. Ill. 1981).
3. *Committee in Solidarity with the People of El Salvador v. Sessions*, 738 F. Supp. 544 (D.D.C. 1990) ("*CISPES I*").

Perestroika and Demokratizatsiia at Cross-Purposes in Russia Today

Noted historian Dr. Hugh Ragsdale warned that the West can best understand the present-day Soviet Union by taking into careful account the historical Russian tradition. Dr. Ragsdale, Professor of History at the University of Alabama (Tuscaloosa), spoke before the Standing Committee's breakfast meeting at the University Club in Washington, D.C. on October 17.

Dr. Ragsdale urged his audience to realize that "the specter of ahistoricism" (or the neglect of tradition) haunts *perestroika*:

There is no surer way to mesmerize our intelligence and to spoil our perspective than to draw the materials for reflection on a contemporary problem exclusively from its own present time. This is the provincialism of the present. In this respect, Gorbachev was more guilty than the rest of us.

Professor Ragsdale said that Gorbachev ignored not only the Russian realism of the cynics, but also the tradition of Russian revolution. An examination of four important revolutions in Russia - those of Ivan III, Peter I, Lenin and Stalin - teaches that one legacy of this historical tradition is "that the Soviet people has had the worst of both worlds, unlimited power in the government and unqualified impotence in the people."

Ragsdale argued that Russian egalitarianism has long persisted in various facets of Russian life, just as has authoritarianism. Examples include the peasant commune (the *mir*); the commercial cooperative; the comradesly courts, which settled domestic disputes in urban housing during Stalin's time; and the soviets of 1905 and 1917.

The problem, then, or the misconception, is not that Russians are undemocratic. Rather it is the nature of Russian democracy. We have had the tendency to consider Russian democracy, like democracy everywhere in the fairy tale of the global democrats, as naturally progressive. On the contrary, Russian democracy is conservative, socialistic, egalitarian and cynically fatalistic. Thus the expansion of a democratic dynamic

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In the luncheon address, Colleen Preston, general counsel of the House Armed Services Committee, spoke of the role of Congress in assisting the Department of Defense in this era of budget stringency. She expressed the view that an over-emphasis on competitive process could reduce the efficiency of the defense-industrial base, and cautioned that federal policy must guarantee results, not simply vindicate purity of process.

(A comprehensive summary may be obtained from National Strategy Forum, 312-431-5027.)

Calendar of Events

January 6-7

Conference on *Strengthening Regional Security and the Rule of Law in Latin America and the Caribbean* (co-sponsored with the North-South Center of the University of Miami), Miami, Florida

January 16

Breakfast Meeting, University Club, Washington, D.C.
Speaker: Hon. Michael Galvin
Assistant Secretary of Commerce for Export Administration.

February 20

Breakfast Meeting, University Club, Washington, D.C.

March 19

Breakfast Meeting, University Club, Washington, D.C.

For further information on these events, please contact the Standing Committee office at 703-242-0629.

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from local politics, where it has been strong, into national politics, where it has been weak, must have a retrograde or even paralytic impact on the course of development there.

Professor Ragsdale, speaking of economic reform, said that while the Russians have been led by Gorbachev's propaganda to believe in the superiority of the idea of the market, their belief is in a pure abstraction. When they cope with the reality of the market in the streets, they realize at once they do not like it. A recent Soviet public opinion poll reflected that while a slight majority of those polled preferred the market in concept, only a quarter preferred what the pollsters described as a German or American style of market. The population complains daily about the profiteering of the new cooperative businessmen who in turn complain of being widely labeled as criminals. Significantly, Ragsdale commented, Yeltsin has recently granted the Moscow city government the power to control prices. In addition, the new Soviet declaration of the rights of man, passed by the Congress of People's Deputies on September 5, 1991, reflects distinctly socialist values, for example, the right to work, the right to a sufficient and decent standard of living, the right to an education, the right to proper housing, and the right to free health care.

Professor Ragsdale remarked that "no cultural graft, no Head Start program of Western economics, is likely to lead to a revolution of mentalities and thereby to early Soviet prosperity." The Russians, he observed, are in a damned-if-they-do-and-damned-if-they-don't position: a quick economic advance requires massive statist intervention, and that is precisely the remedy that has afflicted them with their current malaise. Yet to inaugurate the revolution of attitudes required to make them rational, prudent, and provident is to commit cultural treason, Ragsdale warned.

Ragsdale hopes to see the condition described by Soviet specialist George Urban in a Radio Liberty commentary in July 1991: a future Yeltsin reasoning that marketization, a laissez-faire economy and liberal democracy have failed in the Third World and are unlikely to succeed in the Soviet Union, because they presuppose Western traditions, Western education, and the spirit of Western enterprise. Because these Western

values are absent in the Soviet Union, they cannot be built upon. But the Russians can build on their tradition of centralization, a strong respect for authority, a spirit of social justice and even egalitarianism, a hearty sense of national identity, a fine contempt for utilitarianism and a love of spiritual values.

Cultivating these assets, observed Urban, would indeed slow Russian attainment of Western levels of technological efficiency and prosperity, and would prolong the Russians' status as stepchildren of the West, but, the reasoning continues, "we are ready to accept these disadvantages provided we can make some progress towards a better life while remaining true to ourselves."

Ragsdale thought such an approach seems both decent and desirable - if the Russians accept that their tradition is democratic but not liberal. While he said he cannot imagine the Russians finding any time soon the institutional means of articulating a coherent refashioning of their society, at least they - and therefore we - at present enjoy the unique opportunity of an unprecedented atmosphere of international relaxation, which permits the Russians "to look to their domestic interests and forget about being an adequate leviathan super-state determined on military parity."

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which the original provision officially expired under the DPA's sunset provisions.

As a practical matter, many companies have filed an Exon-Florio notification with the Department of the Treasury in order to eliminate the risk of a subsequent challenge to a foreign investment or acquisition. With this relatively new process of notification, the government must deal with the issue of what actually constitutes a "threat" to national security. Proposed regulations issued by the Treasury Department shed some light on the issues being examined by the government, but in this rapidly changing geopolitical environment, the focus is -- and probably should continue to be -- an evolving one.

(Kathleen Buck is a member of the Standing Committee. Evan Rosenfeld is a lawyer in Kirkland & Ellis' Washington office.)