# THE CASE OF COLONEL ABEL

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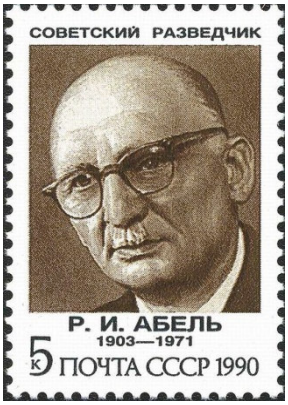


***Multum in parvo*[1]**

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In June 2010, journalists for the Associated Press reported the arrest of ten Russian spies, all suspected of being "deep-cover" illegal agents in the United States.[2] Seeking to convey the magnitude of this event, the journalists wrote in the first paragraphs of their article that this "blockbuster series of arrests" might even be as significant as the FBI's "famous capture of Soviet Col. Rudolf Abel in 1957 in New York."[3] The reference was probably lost on most Americans, but Colonel Abel's story of American justice at a time of acute anxiety about the nation's security is one that continues to resonate today. The honor, and error, that is contained in that story offer lessons worth remembering as the American and Russian systems of justice struggle with a new common enemy, international terrorists.

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* Assistant Professor of Law, Southern Methodist University. This article resulted from an invitation to address an international conference on criminal law held at the A.I. Herzen Russian State Pedagogical University in St. Petersburg, October 6-8, 2010. Presentations based on this article will also be made at the University of Wisconsin on October 14, and the University of Helsinki on October 29, 2010. I thank Vin Arthey, Jeff Bellin, Bill Bridge, Fred Moss, Anthony Palermo, Harry Shukman, and the students in my seminar at SMU, particularly Nicole Hay.

[1] This is the "hollow nickel" and encrypted message found in it that was submitted as evidence against Rudolf Ivanovich Abel, a.k.a. Mark, Andrew Kayotis, Emil Goldfus, Martin Collins, Vilyam Genrikhovich Fisher, and, his name at birth, William August Fisher. Available at: http://www.fbi.gov/libref/historic/famcases/abel/abel.htm. The Soviet postage stamp picture of Abel is available at: http://en.wikipedia.org/wiki/File:1990_CPA_6265.jpg.

[2] Pete Yost & Tom Hays, *10 alleged Russian secret agents arrested in US*, ASSOCIATED PRESS, June 28, 2010.

[3] *Id.*

Early in the morning of June 21, 1957, almost exactly fifty-three years before these recent arrests, Special Agents Edward Gamber and Paul Blasco of the FBI pushed their way into Room 839 at the Hotel Latham in Manhattan.[4] The FBI agents sat a sleepy and half-naked Abel on his bed, identified themselves as charged with investigating matters of internal security, and questioned him for twenty minutes, insinuating knowledge of his espionage activities by addressing him as "Colonel."[5] The FBI agents told Abel that "if he did not 'cooperate,' he would be arrested before he left the room."[6] When Abel refused, the FBI signaled to agents of the Immigration and Naturalization Service (the INS, then under the authority of the Department of Justice), who were waiting outside. Under the close observation of the FBI agents, the INS agents arrested Abel, searched him and the contents of his room, and seized several items as evidence of Abel's alienage.[7] Immediately after Abel had "checked out" of the hotel with an INS escort, the FBI agents obtained permission from the hotel manager to search Room 839 themselves. There they found a cipher pad, a hollowed-out pencil, and microfilm, all of which became evidence used to convict him at his criminal trial.[8]

Although Abel had been under surveillance for more than a month, neither the FBI nor INS sought a warrant signed by a federal judge or a United States Commissioner to arrest Abel or to search his room.[9] The immigration agents possessed only an administrative order signed by another Justice Department official, the INS District Director in New York, granting them authority to detain Abel on a suspected immigration violation.[10] The decision to circumvent the standard warrant procedure was quite deliberate. "We were well aware of what he was when we

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[4] Direct Examination of FBI Special Agent Paul J. Blasco, Hearing on Defendant's Motion to Suppress (as reproduced in the Transcript of Record, Abel v. United States, No. 2 (October Term 1959) at 175 (hereafter "Transcript")). "Pushed" is the verb Special Agent Blasco chose to describe their entry.

[5] *Id.* at 179-83. Abel was also directly informed that the FBI had "received information concerning your involvement in espionage." *Id.* at 184.

[6] United States v. Abel, 258 F.2d 485, 492 (2d Cir. 1958); Mildred Murphy, *F.B.I. Sifts Abel's Possessions For Possible Clues to Espionage; Cryptic Notes, Films, Scribbled Names and Commonplace Objects Found in Suspect's Rooms Studied Here*, N.Y. TIMES, Aug. 9, 1957, at 8.

[7] Abel v. United States, 362 U.S. 217, 223-24 (1960). Abel did not consent to any search, nor was his consent sought. *Id.* at 223.

[8] 362 U.S. at 225. Abel tossed these three items into a wastebasket prior to leaving his hotel room under arrest. The cipher pad was hidden in a piece of wood wrapped with sandpaper. The microfilm was hidden in the pencil. Brief for the United States, Abel v. United States, No. 2 (Jan. 2, 1959), at 22.

[9] 258 F.2d at 490. At the time, a United States Commissioner performed several roles now tasked to a United States Magistrate Judge, including issuing search and arrest warrants. See Charles A. Lindquist, *The Origin and Development of the United States Commissioner System*, 14 AMER. J. L. HISTORY 1, 2 (Jan. 1970).

[10] 258 F.2d at 491. Section 242(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1252(a), granted the INS this administrative arrest power. 362 U.S. at 232.

picked him up," the Commissioner of Immigration, Lt. Gen. Joseph M. Swing, told reporters. "Our idea at the time was to hold him as long as we could. … [W]e were holding him in the hope that sufficient evidence could be gathered to indict him."[11] The Commissioner said that his officers would not have arrested Abel had the FBI not requested that they do so.[12]

The INS gave Abel a written order to appear at INS offices in Manhattan to show cause why he should not be deported.[13] Perhaps because he was "the most professional spy we have yet encountered" (as his prosecutor later informed a rapt press corps), Abel remained in there for only a few hours.[14] Instead, later that day, he was secretly bustled onto a special plane waiting for him in Newark and flown thirteen hours to a federal detention center in McAllen, Texas.[15] He was held there for almost seven weeks. During this time the FBI (not the INS) questioned him in lengthy interrogation sessions and without a lawyer. The FBI hoped to turn him into a double agent or at least obtain intelligence about Soviet espionage.[16] But Colonel Abel met threats and blandishments alike with stony silence. The FBI finally gave up, he was processed through deportation proceedings, found deportable, but not deported. Instead, Abel was returned to New York to face capital charges of military and atomic espionage.[17] Only with the announcement of his indictment on August 7th, did his forced disappearance come to an end.[18]

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[11] Richard C. Wald, *Spy Hunters Had Eye on Abel a Year*, N.Y. HER. TRIB., Aug. 12, 1957, at 1 (as reproduced in the Transcript at 75-78).

[12] *Id.*

[13] Order to Show Cause and Notice of Hearing, reproduced in Transcript, *supra* note 4, at 34-37. The order compelled Abel to appear at 70 Columbus Avenue in Manhattan on July 1, 1957, and informed him that he had the right to appear with counsel, to present evidence and witnesses, and to cross-examine government witnesses. *Id.* at 35-36.

[14] *The Rise and Ruin of a Successful Spy*, LIFE MAGAZINE, Aug. 19, 1957, at 22. The quotation is from Assistant U.S. Attorney William F. Tompkins.

[15] Brief for Petitioner, Abel v. United States, No. 2 (Nov. 26, 1958), at 7. Frank Gibney, *Intimate Portrait of a Russian Master Spy*, LIFE MAGAZINE, Nov. 11, 1957, at 126.

[16] Why Abel was lawyerless is disputed. Compare Transcript at 30-32 (affidavit of Rudolph I. Abel, stating that his request for a lawyer was refused) and at 60-62 (affidavit of Dep't of Justice Special Attorney Kevin T. Maroney, stating that Abel was made aware of his right to a lawyer but declined to exercise it).

In any event, today his silence would not be considered sufficient to evoke his Fifth Amendment right to have an attorney present during a custodial interrogation. In *Burghuis v. Thompkins*, No. 08-1470, slip op. at 10 & 14 (June 1, 2010), the Supreme Court required that the right be invoked "unambiguously." The Court held that Thompkins had not invoked his right by sitting "largely silent" through two hours and forty-five minutes of interrogation before giving an inculpatory response and that he had knowingly and freely waived this right when this silence was finally overcome and he chose to respond to his interrogators' questions.

[17] Russell Porter, *Spy Suspect Fights Use of Seized Tools*, N.Y. TIMES, Sept. 15, 1957, at 1.

[18] Brief for Petitioner, Abel v. United States, No. 2 (Nov. 25, 1958), at 8. *Espionage: Artist in Brooklyn*, TIME MAGAZINE, Aug. 19, 1957.

Abel had been held by federal agents in solitary confinement and in total secrecy for 48 days, two thousand miles from the place of his initial arrest, and without having appeared before any judicial officer for any reason.[19] The resonance between Abel's treatment and the seizure and extra-judicial detention of suspected terrorists in the years after September 11, 2001, is striking.[20]

Who was this Colonel Abel, whose case would be argued twice before the United States Supreme Court? Who was his American lawyer, James Donovan? Why did he take this case, how did he argue it, and what resonance does the matter have for Russian and American criminal law and criminal procedure? The latter question hints at a theme found in the press reports of Abel's trial (as in the arguments of the lawyers themselves): that Abel would receive a fairer trial in the United States than any captured American spy could expect to receive in the Soviet Union. More interesting today, perhaps, might be what lessons can be learned from the case of Colonel Abel as Russia and the United States both struggle to balance national security and justice in their pursuit of suspected terrorists. Ideologically driven, international terrorists are today's nearest analogue to Communist agents in the atmosphere of hyper-fear that was still so palpable in the shadow of the McCarthy era.

These are big questions with many facets. In this brief article, I will explore just three topics: the appointment of counsel; the defense's investigation and cross-examination of witnesses for the prosecution; and the defense motion to suppress the evidence obtained through the tandem conduct of the FBI and the INS that midsummer's morning. It was this motion that brought Abel's case to the attention of the highest court in the land.

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[19] Brief for Petitioner, Abel v. United States, No. 2 (Nov. 25, 1958), at 7-8.

[20] For example, American citizen Jose Padilla was detained on a judicially authorized material witness warrant for thirty-three days in 2002 (ostensibly to provide evidence for the ongoing grand jury investigation into the September 11 attacks, but in reality on suspicion that he was plotting a new terrorist attack) before the warrant was vacated at the government's request and Padilla was transferred to military custody, where he was held as an enemy combatant for almost four years (the first six months of that time without any judicial decision regarding the lawfulness of his detention). *Padilla ex rel. Newman v. Bush*, 233 F.Supp.2d 564, 571 (S.D.N.Y. 2002); *Hanft v. Padilla*, 546 U.S. 1084 (2006). Padilla's detention differed significantly from Abel's in that it was announced almost immediately by the Attorney General, ironically enough, at a press conference in Moscow. *U.S. Arrests Man Allegedly Planning Attack*, Online NewsHour, June 10, 2002, http://www.pbs.org/newshour/updates/dirtybomb_06-10-02.html. Both the Russian Constitution and Code of Criminal Procedure categorically prohibit detention for more than forty-eight hours without a judicial order. Статья 22(2), Конституции Российской Федерации [Art. 22(2), Constitution of the Russian Federation, hereafter "Статья ___ Конст. РФ"]; Статья 94, Уголовно-процессуальный Кодекс Российской Федерации [Art. 94, Criminal Procedure Code of the Russian Federation, hereafter "Статья ___ УПК РФ"]. Of course, the distance in Russia between the law on the books and the law in practice, particularly in regard to matters of terrorism, has been noted by many respected sources.

## WHO WAS COLONEL ABEL?

But first, who was Colonel Abel? Even the most basic details of the life of a master Soviet spy are shrouded in obscurity. Rudolf Ivanovich Abel was born in 1903 as William August Fisher in what was then the outskirts of the city of Newcastle upon Tyne in northern England.[21] He was the son of Heinrich Fischer, a well-educated metalworker born in Russia of German ancestry who would later flee Tsarist Russia to found the Newcastle branch of the Russian Social Democratic Workers' Party and assist in the publication and distribution of *Iskra* while Vladimir Lenin was quartered in London.[22] As a teenager, Abel moved from England to Moscow, where his father took a short turn on the Comintern's UK desk before Lenin's death made the life of an old Bolshevik a precarious one.[23] Abel married and the couple was blessed with a daughter.

Abel's British citizenship meant a legitimate Western European passport, his Newcastle upbringing gave him native English fluency, and his wife and child in Moscow were excellent insurance against defection; this plus his worker's credentials and internationalist upbringing were (to quote Humphrey Bogart quoting Shakespeare) the stuff that dreams are made of – that is, if the dreamer recruited for the Soviet clandestine services.[24] After surviving the Stalinist purge and with a distinguished record in World War II (no mean feat, either one), Abel became an "illegal" KGB agent – i.e. one formally unassociated with the Soviet Embassy or other official mission – active in Oslo and London before he ran all Soviet espionage in North America for nine years.[25]

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[21] VIN ARTHEY, LIKE FATHER LIKE SON: A DYNASTY OF SPIES xxxi, 21 (2004). Because Abel is the name by which Fisher was known during his trial, I use it here for consistency with most primary sources. His real identity was unknown until 1972, when an American journalist found both "Abel" and "Fisher" carved in his tombstone in a Moscow cemetery. JOHN COSTELLO AND OLEG TSAREV, DEADLY ILLUSIONS 372 (1993). (It should be noted that some have questioned the integrity of this book due to the active role of the Russian foreign intelligence service – then known as the SVR – in selecting its author and allowing him selective access to its records. CHRISTOPHER ANDREW AND VASILI MITROKHIN, THE MITROKHIN ARCHIVE: THE KGB IN EUROPE AND THE WEST 26-27 (1999). To his credit, Costello makes clear this collaboration, Costello & Tsarev, at vii, but does so while effusively thanking Vladimir Kryuchkov, the KGB's last chairman and a plotter in the coup against Gorbachev.) The "real" Rudolf Ivanovich Abel was actually a very close friend of Fisher and a fellow KGB officer. ARTHEY, at 114-16. Unbeknownst to Fisher, Abel had died shortly after Fisher left Moscow for what would be his last assignment. *Id.* at 226. The name had been used as the agreed means to signal Moscow that Fisher had been arrested, but its use in this way after the death of his friend apparently haunted Fisher. *Id.;* ANDREW & MITROKHIN, at 225.

[22] ARTHEY, *supra* note 21, at 3, 11, 21-23.

[23] *Id.* at xxxi, 66-68.

[24] Sam Spade in THE MALTESE FALCON (1941); WILLIAM SHAKESPEARE, THE TEMPEST, Act 4, scene 1, 156–58.

[25] JAMES B. DONOVAN, STRANGERS ON A BRIDGE: THE CASE OF COLONEL ABEL 4 (New York: Atheneum, 1964); ARTHEY, *supra* note 21, at 87-116, 163. He was apparently also active in France and Turkey. *Id.* at 124; PAVEL

That all came crashing down with his arrest in Manhattan, secret interrogation in Texas, and trial in federal court in Brooklyn, the United States District Court for the Eastern District of New York. The trial required ten days, the prosecution called twenty-seven witnesses, and over one hundred exhibits were admitted into evidence.[26] The prosecution's case revolved around the testimony of Reino Hayhanen, Abel's incompetent subordinate, who had secretly defected to the United States.[27] Due to a surprising lapse by a spy as accomplished as Abel, Hayhanen had learned the location of Abel's workplace in Brooklyn.[28] It was also probably due to Hayhanen's own incompetence that a local newsboy acquired a hollowed-out nickel containing an encrypted message to Hayhanen.[29] It was Hayhanen's initial refusal to testify against his former superior officer that led the FBI to enlist the assistance of the INS in Abel's arrest.[30] Abel was caught virtually surrounded by the tools of his trade, providing ample evidence to support espionage charges. Under the immigration statutes at that time, no judicial approval was necessary for federal executive agents to detain Abel and search his effects. But it was this pretextual use of administrative powers under the immigration laws – a sham in fact intended to pressure Abel to become a double agent or, failing that, to gather evidence to lay the basis for a criminal prosecution – that attracted the interest of the Supreme Court, not Abel's notoriety.[31]

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SUDOPLATOV AND ANATOLI SUDOPLATOV, SPECIAL TASKS: THE MEMOIRS OF AN UNWANTED WITNESS – A SOVIET SPYMASTER 241-45 (1994). Evidence at his trial established links of various strengths to Morris and Lona Cohen (a.k.a. Peter and Helen Kroger, arrested in Britain along with Gordon Lonsdale) and Helen Sobell (wife of Morton Sobell, a co-defendant in the Rosenberg case). ROBERT J. LAMPHERE & TOM SCHACTMAN, THE FBI-KGB WAR: A SPECIAL AGENT'S STORY 274-78 (1986). Subsequent information suggests connections with American scientist Ted Hall, Soviet spy (and later defector) Alexander Orlov, and the Rosenbergs. ANDREW & MITROKHIN, *supra* note 21, at 193-5 (Cohens & Hall); JOSEPH ALBRIGHT & MARCIA KUNSTEL, BOMBSHELL: THE SECRET STORY OF AMERICA'S UNKNOWN ATOMIC SPY CONSPIRACY, 196-97, 221-22, 244-53 (1997) (Cohens & Hall); EDWARD VAN DER RHOER, THE SHADOW NETWORK: ESPIONAGE AS AN INSTRUMENT OF SOVIET POLICY 160-61 (1983) (Rosenbergs). Notwithstanding these links, others have judged his career to have been a "pedestrian reality" that "achieved nothing of real significance." ANDREW & MITROKHIN, at 229.

[26] DONOVAN, *supra* note 25, at 245-46.

[27] *Espionage: Pudgy Finger Points*, TIME MAGAZINE, Oct. 28, 1957.

[28] DONOVAN, *supra* note 25, at 146; ARTHEY, *supra* note 13, at 208-10.

[29] DONOVAN, *supra* note 25, at 185-86; LAMPHERE & SCHACTMAN, *supra* note 25, at 274. The newsboy found the nickel in 1953 and gave it to the local police, who sent it to the FBI. Robert Lamphere, the FBI specialist who examined the nickel and the cipher it contained, wrote a memo that (unsuccessfully) urged an immediate redeployment of manpower to search for an illegal Soviet agent in New York. LAMPHERE & SCHACTMAN, at 270-272.

[30] Brief for the United States, Abel v. United States, No. 2 (Jan. 2, 1959), at 6.

[31] 362 U.S. at 219 ("Of course, the nature of the case, the fact that it was a prosecution for espionage, has no bearing whatever upon the legal considerations relevant to the admissibility of evidence.").

The jury deliberated for 3½ hours before convicting Abel on October 25, 1957, on all three counts of the indictment for conspiring to obtain and transmit national defense information to the Soviet Union as an unregistered foreign agent.[32] Abel was spared execution (conspiracy to transmit atomic secrets, count one of the indictment, was a capital offense) largely because of his lawyer's foresight and skill in articulating the national interest in preserving Abel's life for an exchange of agents at some future date; instead, he was sentenced to thirty years in prison. On February 10, 1962, a cold morning almost four and a half years later, Abel was exchanged for the captured American U-2 pilot Francis Gary Powers at the midpoint of the Glienicke Bridge that connects Potsdam with what was then Soviet-controlled East Berlin.[33]

## APPOINTMENT OF COUNSEL

At Abel's side from his initial plea, through his trial, conviction, incarceration, and finally his exchange on a wintry German bridge, was James Britt Donovan. Donovan was forty-one years old when he first met Abel, a Harvard-educated New York City lawyer, former Nuremburg prosecutor, and general counsel to what was known as the O.S.S. during World War II.[34] This exceptional lawyer recorded his work in this case in a book entitled Strangers on a Bridge, which is essentially a detailed lawyer's diary supplemented with the transcripts and reporting of the trial and appeal. The CIA evidently considered the publication of Donovan's book, two years after the prisoner exchange on the Glienicke Bridge, to be significant enough an event that a secret report was written about it and added to Abel's file.[35] Portions of this report remain redacted more than twenty-nine years later.

Donovan's decision to accept Abel as a client was not one to be taken lightly. First of all, the work would most likely be done *pro bono*, i.e. without compensation. As it turns out, the trial judge approved a fee up to $10,000 out of money seized when Abel was arrested, but Donovan

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[32] Edith Evans Asbury, *Abel Guilty as Soviet Spy; Could Get Death Sentence*, N.Y. TIMES, Oct. 26, 1957, at 1. Frank Gibney, *Intimate Portrait of a Russian Master Spy*, LIFE MAGAZINE, Nov. 11, 1957, at 129.
[33] DONOVAN, *supra* note 25, at 3-4; ARTHEY, *supra* note 21, at xvi, passim.
[34] Mildred Murphy, *Abel, Spy Suspect, Accepts Donovan; Russian Has Long Talk With Former O.S.S. Counsel Who Will Defend Him*, N.Y. TIMES, Aug. 22, 1957, at 3.
[35] STRANGERS ON THE BRIDGE [sic], five-page document dated June 17, 1965, CIA FOIA Reading Room, available at: http://www.foia.cia.gov/browse_docs_full.asp.

indicated that he would donate it to charity (a politic move).[36] Second, the case would likely take a considerable amount of time. As it turns out, the obligation lasted almost four-and-a-half years.[37] Lastly, the notoriety of such an unpopular client in McCarthy-era America could destroy a lawyer's reputation and sink his legal practice. Donovan returned home from his first meeting with his client to find on his desk a drawing made by his eight-year-old daughter depicting "a black-haired, slant-eyed convict in stripes with a ball and chain," with the caption, in a child's hand, "Russian Spy in Jail: Jim Donovan is working for him."[38]

Why, then, did Donovan accept the appointment? He was not a CIA agent assigned to Abel to ensure his conviction (although Donovan made it clear to Abel that he distinguished sharply between "my duty to him as defense attorney and my duty as an American citizen.").[39] That is the first important fact about this story. Although it might seem almost offensive to an American lawyer's ears to suggest the idea of a government stooge for a lawyer, it is worth noting. James Donovan was in private practice, a distinguished member of the New York Bar. Donovan had been nominated by a committee of lawyers from the Brooklyn Bar Association after Abel requested the judge to assign counsel with the advice of the Bar.[40] Perhaps partly due to his own wartime work as counsel for the OSS, Donovan was convinced of his client's guilt.[41] But Donovan accepted the appointment, and zealously represented Abel's interests until the day they parted on the Glienicke Bridge.

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[36] DONOVAN, *supra* note 25, at 14; *Dr. James B. Donovan, 53, Dies; Lawyer Arranged Spy Exchange*, N.Y. TIMES, Jan. 20, 1970, at 43.

[37] DONOVAN, *supra* note 25, at 3, 16. Abel agreed to Donovan's appointment on August 21, 1957. The prisoner exchange on the Glienicke Bridge occurred on February 10, 1962. The interim period amounts to 1634 days.

[38] DONOVAN, *supra* note 25, at 15.

[39] DONOVAN, *supra* note 25, at 31.

[40] Assignment of James B. Donovan as Counsel, United States of America v. Rudolph Ivanovich Abel, Order of United States District Judge Matthew T. Abruzzo, Aug. 20, 1957 (as reproduced in the Transcript at 20). According to Anthony Palermo, who was sent from the Justice Department's internal security division to be a special attorney in this case, Abel's request for Judge Abruzzo to appoint counsel recommended by the Bar Association (rather than merely appointed at the judge's individual discretion) was rather unusual. Telephone Interview with Anthony Palermo, August 2, 2010 (notes on file with the author). Perhaps for this reason, Judge Abruzzo was rather irked by the request, although he complied with it. DONOVAN, *supra* note 25, at 393.

[41] DONOVAN, *supra* note 25, at 18 ("There was no question in my mind that Abel was exactly what the government claimed, and that he had decided it would be futile to argue otherwise.").

Donovan was following in the honorable tradition of American lawyers who, once appointed, zealously defend the interests of their clients no matter how infamous or unpopular.[42] One need only think of then Colonel Kenneth C. Royall, who, in defiance of an order by President Roosevelt, sought judicial review for Nazi saboteurs whom he was assigned to represent before a military commission.[43] More recently, one recalls Lieutenant Commander Charles Swift's defense of Salim Hamdan, a detainee at Guantánamo Bay, Cuba. Both lawyers, like Donovan, defended the constitutional rights of their infamous clients, and thus the interests of justice, right up to the Supreme Court.[44]

In both the United States and the Russian Federation, the right to assistance of counsel is constitutionally protected.[45] How that protection is given practical realization for the most unpopular or impoverished among us is the proper measure of its strength for us all. American lawyers are encouraged, but not required, to provide legal services *pro bono.* The right of indigent defendants to free legal counsel came relatively late in American history;[46] debate about

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[42] Three judges of the United States Court of Appeals for the Second Circuit ended their opinion affirming Abel's conviction by thanking Donovan and his assistants, who "represented the appellant with rare ability and in the highest tradition of their profession. We are truly grateful to them for the services which they have rendered." United States v. Abel, 258 F.2d 485, 502 (1958). According to Donovan, Chief Justice Earl Warren congratulated him on behalf of the entire Supreme Court following oral argument. DONOVAN, *supra* note 25, at 306.

I am proud to note that among those leaders of the bar who wrote to congratulate Donovan on his appointment and offer encouragement was Col. Robert Storey, a fellow Nuremberg prosecutor and former ABA president, who was then serving as Dean of the Law School at Southern Methodist University. DONOVAN, *supra* note 25, at 27.

Other famous names surround the Abel case. On the defense team was Thomas M. Debevoise, of the well-established New York legal family and future Dean of Vermont Law School. DONOVAN, *supra* note 25, at 56; Dennis Hevesi, *Eli Whitney Debevoise Dies at 90; Co-Founder of a Top Law Firm,* N.Y. TIMES, July 1, 1990; *Law School Dedicates $6.5 Million Renovation To Tom Debevoise,* THE HERALD OF RANDOLPH, May 26, 2005, http://www.rherald.com/news/2005-05-26/Front_page/f07.html. For the prosecution, there was Cornelius W. Wickersham, Jr. DONOVAN, *supra* note 25, at 68.

[43] LOUIS FISHER, MILITARY TRIBUNALS: THE *QUIRIN* PRECEDENT, CRS Report for Congress RL31340 (Mar. 26, 2002).

[44] Royall's case was ultimately decided as the ignonimous *Ex parte Quirin*, 317 U.S. 1 (1942). Swift's case became *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Roughly two weeks after the Supreme Court decided the case, Swift was informed that he had been denied a promotion and, under the Navy's "up-or-out" system, was therefore forced to resign his commission. Carol Rosenberg, *Guantánamo defense lawyer forced out of Navy*, SEATTLE TIMES, Oct. 8, 2006, at http://seattletimes.nwsource.com/html/nationworld/2003294468_lawyer08.html.

[45] VI Amendment, U.S. Const.; Статья 48 Конст. РФ. The Russian Constitution uses both the words адвокат (*advocat* – lawyer who is a member of the bar, following the continental distinction between types of lawyers) and защитник (*zashchitnik*, or "defender" – a non-advocate lawyer or perhaps even a non-lawyer). There is thus an ambiguity that the courts and the legislature have generally resolved in favor of advocates. WILLIAM BURNHAM, PETER B. MAGGS, AND GENNADY M. DANILENKO, LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION 157, 163 (4th ed. 2009); Статья 49 УПК РФ.

[46] *Johnson v. Zerbst*, 304 U.S. 458 (1938) (federal cases); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (state cases).

the point at which the right attaches continued at least through the mid-1980s.[47] Today, state and federal systems provide for public defenders who are paid salaries by the state that, although relatively low, are adequate to afford a living.[48] In Russia, members of the bar (*i.e.* advocates) are *required* to provide *pro bono* legal services to indigent members of society, not only in criminal cases, but also in certain civil matters.[49] The right to counsel attaches in Russia at various prosecutorial decision points but also (to guard against the tactical manipulation of formal decision-making), "from the point in time when any other coercive procedural actions or other procedural actions are taken that infringe on the rights and freedoms of a suspect."[50]

In addition to the system of salaried public defenders that exists in the United States, a federal statute also provides for the appointment of private counsel who are typically paid $60 per hour in federal court and $40 per hour "for time reasonably expended out of court."[51] In Russia, the sums are far lower, on average $15-20 per day, and payable only for time spent in court.[52] When one considers the importance of pretrial investigation and legal research, the disparity in fees is compounded by these limits on compensable lawyerly activities.

In America, the tradition Donovan followed preceded the adoption of our Constitution – recall the defense by John Adams of British soldiers on trial for the Boston Massacre. Since that time, Americans have tended to focus on the advocates, perhaps naively assuming that a court's neutrality is to be expected. In Russia, the Soviet past remains fresh, underscoring the need for private counsel independent of state control. But here an important difference occurs. In Russia,

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[47] *United States v. Gouveia,* 467 U.S. 180 (1984) (detention by government officials does not render individual an "accused" entitled to counsel). It is now recognized that the Sixth Amendment right to counsel attaches only at the point at which adversarial judicial proceedings may be said to begin. The Fifth Amendment right against self-incrimination, however, has been interpreted to extend a right to the assistance of appointed counsel at stages prior to the beginning of federal and state proceedings, e.g. during custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436 (1966).

[48] For example, the oldest (and perhaps most prestigious) such organization is the Legal Aid Society of New York City, founded in 1876 and funded by the State of New York. http://www.legal-aid.org/en/home.aspx.

[49] Статья 26, Федеральный закон от 31 мая 2002 г. N 63-ФЗ «Об адвокатской деятельности и адвокатуре в Российской Федерации» [Article 26, Federal law No. 63-FZ, "On the activity of advocates and the advokatura," May 31, 2002]. It should be noted that Russia follows the civil law tradition in distinguishing between members of the bar (advocates) and practicing lawyers who have not joined the bar. It should also be noted that some regional bars have permitted advocates to pay into a fund in lieu of representing indigent clients; the fund then pays the lawyers who provide these legal services.

[50] Статья 49(3)(5) УПК РФ.

[51] Criminal Justice Act, 18 U.S.C. §3006A(d)(1). Although these fees are capped, 18 U.S.C. §3006A (d)(2), the ceilings may be waived by judicial order for extended or complex litigation. 18 U.S.C. §3006A(d)(3).

[52] BURNHAM, ET AL., *supra* note 45, at 164.

one thinks as much of the need for independent judges as one does of zealous lawyers. I have in mind, for example, Anatolii Koni. Koni chaired the trial court in the case of Vera Zasulich, who was widely acknowledged to have shot General Trepov, the military governor of St. Petersburg, in 1878.[53] Koni was repeatedly pressed by Count Konstantin Palen, the Minister of Justice, to ensure that her jury returned a guilty verdict. Koni responded to this pressure by saying, "[a]ll I can assure in this case is the observance of complete impartiality and all the guarantees of correct justice."[54] Palen found the idea repulsive: "Indeed, justice, impartiality! ... but in this accursed affair the government has a right to expect special services from the court and from you .... [T]here are cases which must be viewed ... politically."[55]

Although these words were uttered more than 130 years ago, the principle, the pressure, and the individual courage required of lawyers and judges remains the same today. In the recent past, a senior official at the United States Department of Defense crudely attacked the lawyers working *pro bono* to represent detainees at Guantánamo Bay.[56] In Russia, lawyers for controversial defendants have suffered far worse retaliation; judges, too, have not escaped controversy and

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[53] *See, generally,* the first issue of volume 37 of the journal *Russian History/Histoire Russe* (2010), which Professor Richard Pipes has devoted to an examination of the case.

[54] WILLIAM G. WAGNER, MARRIAGE, PROPERTY, AND LAW IN LATE IMPERIAL RUSSIA 8 (1994). If the entreaties of the Minister of Justice was not pressure enough, Koni and his two assistant judges conducted the trial while the Russian Minister of War (D.A. Miliutin), Chancellor (Prince Gorchakov), and several Russian senators sat behind them in seats reserved for dignitaries. Dostoevsky observed from the packed public gallery. Richard Pipes, *The Trial of Vera Z.*, 37 RUSSIAN HISTORY/HISTOIRE RUSSE 52 (2010).

[55] *Id.* at 8-9. As Koni later recalled a "talk" to which he was summed by Palen prior to the trial, the Minister asked: "Can you, Alexander Fedorovich, guarantee that Zasulich will be convicted?" As Richard Pipes quotes from Koni's memoirs, the conversation continued:

> "No, I cannot!" [Koni] replied. "How so?," Palen shouted, as if stung. "You cannot guarantee?! You are not convinced?" "If I were myself to judge on the merits, even then, not having heard the inquest, not knowing all the circumstances of the case, I would not venture to express my opinion in advance, an opinion which later, at the bar, is not the decisive factor. In this instance, the judgment is rendered by a jury, whose verdict is based on many considerations, unforeseeable in advance. How can I guarantee their verdict?… However, I presume that common sense of the jury will suggest to them a decision that is just and dispassionate. The fact is obvious and it is unlikely the jury will venture to deny it. But I cannot guarantee a conviction!…". "You cannot? You cannot?", Palen [replied] agitatedly. "In that case, I will report to His Majesty that the chairman cannot guarantee a conviction. I must report this to His Majesty!" he repeated, with a vague and pointless threat."

Pipes, *supra* note 54, at 47 (quoting А.Ф. Кони, Воспоминания II, 72).

[56] Neil A. Lewis, *Official Attacks Top Law Firms Over Detainees*, N.Y. TIMES, Jan. 13, 2007, at A1 (reporting comments by Charles D. Stimson, the deputy assistant secretary of defense for detainee affairs, "I think, quite honestly, when corporate C.E.O.'s see that those firms are representing the very terrorists who hit their bottom line back in 2001, those C.E.O.'s are going to make those law firms choose between representing terrorists or representing reputable firms, and I think that is going to have major play in the next few weeks. And we want to watch that play out.") Stimson was excoriated by the private bar and members of the Bush Administration, ultimately forcing his apology and resignation. *Official Quits After Remark on Lawyers*, N.Y. TIMES, Feb. 3, 2007.

retaliation for independence and opposition to rampant corruption.[57] It is apparent that it is a lesson that must repeatedly be relearned in both countries that the quality of the justice system can only be measured by its treatment of prisoners least palatable to the state.

## DEFENSE INVESTIGATION AND CROSS-EXAMINATION

Appointed by the court and accepted by his client, Donovan immediately started work. Donovan tried to persuade the U.S. Attorney to adopt for Abel's case the European requirements of broad pretrial disclosure that Donovan had followed as a young prosecutor at Nuremburg. The U.S. Attorney refused to agree to anything more than the Federal Rules of Criminal Procedure required of him, believing "that so general a pretrial disclosure would be an unfortunate precedent for criminal prosecutions" in the United States.[58]

As it turns out, however, a small revolution in criminal procedure had occurred just months before Donovan was appointed to defend Abel. In June 1957, the Supreme Court handed down its opinion in *Jencks v. United States*.[59] Clinton Jencks, a union leader, had been convicted of lying to the National Labor Relations Board about his membership in the Communist Party.[60] Jencks sought the production of numerous reports made by two paid FBI informants who testified against him.[61] Justice Brennan, writing for the Court, overturned the conviction obtained without permitting the defense to inspect these reports, noting that "[e]very experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory."[62] If the state wished to invoke a privilege against production – say for national security reasons – the price of that decision was

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[57] *E.g.* Attorney Karinna Moskalenko (on whom I am proud to note the degree of doctor of laws *honoris causa* was conferred by Southern Methodist University on May 15, 2010), or former judge Olga Kudeshkina, *Kudeshkina v. Russia,* App. No. 29492/05 (Eur. Ct. H.R. 2009).

[58] DONOVAN, *supra* note 25, at 26.

[59] 353 U.S. 657 (1957). Mildred Murphy, *Abel, Spy Suspect, Accepts Donovan; Russian Has Long Talk With Former O.S.S. Counsel Who Will Defend Him*, N.Y. TIMES, Aug. 22, 1957, at 3. Donovan, and the press, were aware of its implications for the Abel case from the start. Mildred Murphy, *Ex-Navy Officer to Defend Abel*, N.Y. TIMES, Aug. 21, 1957, at 10.

[60] Jencks, 353 U.S. at 658-59. Section 9(h) of the National Labor Relations Act (the Taft-Hartley Act), Pub. L. 80-101, June 23, 1947, 61 Stat. 138, 146, required each officer of any labor organization seeking the benefits of the Act to swear an affidavit that "he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

[61] Jencks, 353 U.S. at 659.

[62] *Id.,* at 667.

"letting the defendant go free [since] it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."[63]

These words are worth noting today, when fear of terrorists has replaced fear of Communists. The state feels the same pressure to imprison (whether upon criminal conviction or military detention) without fully disclosing its grounds for doing so. Justice Brennan quoted Justice Sutherland's famous phrase that "the interest of the United States in a criminal prosecution is not that it shall win a case, but that justice shall be done."[64] Nevertheless, it would be another six years before the Supreme Court held that the defendant's right to due process of law also required the prosecution to turn over other potentially exculpatory evidence in its possession.[65] Fifteen years would pass before justice was seen to require the state to reveal material that could impeach the testimony or character of its own witnesses at trial.[66] As noted below, recent cases concerning detainees in the so-called war on terror demonstrate that these principles remain contested in the context of deciding petitions for writs of habeas corpus.

The *Jencks* opinion led Congress to pass the Jencks Act, which entered into force just two weeks before the date originally set for Abel's trial.[67] It was front page news when Donovan invoked the Act at the conclusion of the direct examination of the prosecution's star witness, Abel's former subordinate and now Soviet defector, Reino Hayhanen. Hayhanen had been on the witness stand for 2½ days, producing 325 pages of testimony; Donovan wanted to compare his story in court with the "basic raw material of what the man said" to the FBI before the trial began.[68] The court denied Donovan's motion to review notes describing more than 75 FBI interviews on the grounds that the reports were "interpretative," not "substantially verbatim," as required by the statute for release to the defense.[69] But even the modest release that the court did grant Donovan proved the value of such information: one prior statement, written and signed by

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[63] *Id.,* at 671.
[64] *Id.,* at 668 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).
[65] Brady v. Maryland, 373 U.S. 83 (1963).
[66] Giglio v. United States, 405 U. S. 150 (1972).
[67] See Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595, 18 U.S.C. §3500.
[68] Michael Clark, *F.B.I. Files Asked by Abel's Lawyer*, N.Y. Times, Oct. 17, 1957, at 1. DONOVAN, *supra* note 25, at 166-67.
[69] Michael Clark, *Abel Trial Lists G.I. As Soviet Spy*, N.Y. TIMES, Oct. 18, 1957, at 1. DONOVAN, *supra* note 25, at 166, 181.

Hayhanen, directly contradicted his testimony that he had engaged in espionage at Abel's direction. Donovan could then ask the classic question of cross-examination: was Hayhanen lying then or lying now?[70]

The government's second witness was Master Sergeant Roy Rhodes, whom prosecutors presented as a loyal family man blackmailed into providing information to Soviet agents while posted to the U.S. Embassy in Moscow. The prosecution tied him to Abel through Hayhanen as someone the duo sought to contact and pursue after Rhodes returned home to the U.S. The Government had agreed to Donovan's requests under the Jencks Act for statements made by Rhodes in the course of his debriefing by U.S. counterintelligence officers. The tapes of these sessions revealed a very different picture of Rhodes, which validated Justice Brennan's observations in the Jencks case but also presented a serious problem for the defense. Rhodes, it turned out, was far from the hapless dupe he had been made out to be. Rather, he appeared to have operated a small business while in Moscow selling secrets for a considerable amount of money, alcohol, and other forms of compensation. But in Donovan's judgment, impeaching him with his own prior statements to federal agents "could rock the American diplomatic representation in Moscow and other foreign capitals," and reveal secret intelligence information damaging to national security. Providence could not have found a better case or counsel in which to present this issue for decision:

> [T]he prosecution had elected to put Rhodes on the stand. Now I was expected to cross-examine him. The prosecution, I said, had placed me in an outrageous predicament. As court-assigned counsel I was bound to do everything I could for my client; but I was also a United States citizen, still held a commission as a commander in Naval Intelligence, and had worked for three years in the OSS during World War II to help establish a permanent central intelligence system in this country. The last thing I wanted to see happen, I added, would be to have our intelligence apparatus compelled to bring before the jury the contradictory statements of Rhodes. I argued that for this reason, as well as the others I had

[70] DONOVAN, *supra* note 25, at 179. Donovan asked this question with subtlety, closing his cross-examination by slowly reading aloud from Hayhanen's statement, pointing out to the jury that it was in the witness's own handwriting. *Id.*

> voiced the day before, the entire testimony of Rhodes should be stricken from the court record.[71]

What to do? According to Anthony Palermo, then a member of the prosecution team specially appointed for this case from the Justice Department's Internal Security Division in Washington, such was the confidence that the lawyers for each side had in one another's integrity and professionalism that a sort of "gentleman's understanding" emerged between them about how to balance the lawyer's responsibility to his client with what Donovan apparently considered his duty as an American citizen.[72] Donovan, however, eked out only a statement from the judge to the jury that Rhodes had made conflicting statements and therefore, although the matter could not be fully revealed because of national security, the fact of that conflict should serve to discredit his testimony about his activities in Moscow. "Such," concluded the judge, "is the purpose of cross-examination."[73] This point was driven home by Donovan's subsequent questioning of Rhodes, which ended with Donovan reminding the dishonored sergeant, with evident disgust, that even Benedict Arnold had not betrayed his country for money.[74]

Today, questions about how to use sensitive national security information are raised more frequently. The issue is now resolved not by gentlemen's agreements but by federal statute, the

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[71] DONOVAN, *supra* note 25, at 197-98. Donovan's "outrageous predicament" illustrates another tradition in Anglo-American law as honorable and as lasting as the one concerning the appointment of counsel, *supra* text accompanying note 42. That is the obligation of zealous defense of the interests of one's client. As Lord Brougham famously characterized this responsibility in Queen Caroline's Case in 1820:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.

David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2068 (2010).

[72] Telephone Interview with Anthony Palermo, August 2, 2010 (notes on file with the author).

[73] DONOVAN, *supra* note 25, at 199.

[74] DONOVAN, *supra* note 25, at 206. I asked Anthony Palermo whether this ruling was fair to Donovan, since he could have engaged in a far more prolonged cross-examination of Rhodes, albeit at the expense of revealing information potentially embarrassing or damaging to American intelligence. Mr. Palermo, who has maintained a distinguished career in public service and private practice after his role in the Abel case, felt that Donovan had done a "good job with a bad hand" in the case. Prolonging Rhodes' time on the stand, he noted, risked antagonizing the jury. Donovan "did not have to go to the bottom of the pit," to establish that Rhodes was an unsavory character. Telephone Interview with Anthony Palermo, August 2, 2010 (notes on file with the author). Any speculation as to whether Donovan was forced to pull his punches by his perception of the conflict between his roles as counsel and citizen should be balanced with these tactical considerations.

Classified Information Procedures Act.[75] In Russia, notwithstanding the special rules enacted for national security cases (see below), the Constitutional Court reacted sharply to attempts to limit counsel in cases concerning state secrets to those granted security clearances by the state. Invoking both the Russian Constitution and the International Covenant on Civil and Political Rights, the Court held that such an attempt violated the right of a suspect or accused to the free choice of counsel.[76]

The direct testimony of Hayhanen and Rhodes was pockmarked with Donovan's voiced objections: to the leading form of questions asked by the prosecution, the relevance of the issues raised in the direct examination, and the competence of the witness to answer them. These illustrate a crucial difference between the oral focus of an American criminal trial and the largely written focus, then and now, of a Russian one (as I will discuss shortly). It also illustrates the great trust placed in juries by the American system, since as often as not, the judge answered the objection by noting that "[i]t is for the jury to say whether or not they consider it of any weight as a matter of evidence."[77] Donovan's closing argument explicitly made the comparison between the two systems of justice, but with the natural bias of an American lawyer for his own system. Addressing the jury, he explained:

> We believe that our trial-by-jury system is the best system ever devised for arriving at the truth. Why is your function so important? You might say to yourselves, 'His Honor, the judge, knows all the law applicable to the case; he has been trained for many years to evaluate evidence. Why, then, shouldn't cases such as this simply be left to the lawyers and the judges?' The answer is that from the time of Aristotle many centuries ago, ordinary citizens are not content to leave these questions to the lawyers and judges, with their legalisms and their legal niceties.[78]

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[75] 18 U.S.C. App. III, §§ 1-16.

[76] Постановление Конституционного Суда РФ от 27 марта 1996 г. N 8-П, «По делу о проверке конституционности статей 1 и 21 Закона Российской Федерации от 21 июля 1993 года "О государственной тайне" в связи с жалобами граждан В.М.Гурджиянца, В.Н.Синцова, В.Н.Бугрова и А.К.Никитина» and Определение Конституционного Суда РФ от 10 ноября 2002 г. N 314-О, «По жалобе гражданина Романова Юрия Петровича на нарушение его конституционных прав статьями 21 и 21.1 Закона Российской Федерации "О государственной тайне"» (extending the rule to civil cases).

[77] DONOVAN, *supra* note 25, at 212. It should be noted that even an overruled objection, when made in the presence of the jury (as Donovan's objections almost always were), serves notice to the finders of fact that the evidence is not incontestably admitted for their evaluation.

[78] DONOVAN, *supra* note 25, at 224.

Of course, Donovan himself knew from his experience in Europe that a great many republics place no such faith in the layman and do indeed prefer the experience and training of professional finders of fact as well as finders of law. But this trust in the jury, even when serious matters of national security are presented, as in Abel's case, is worth noting today with the new fear of terrorism and the urge to Schmittian exceptionalism.[79] In the United States, many call for special courts to try suspected terrorists while others prefer military commissions or would simply opt not to try such individuals at all in order to extract intelligence without the limitations placed on government conduct by the constitutional guarantees that apply to criminal trials.[80] In Russia, where the jury slowly began its return in 1993,[81] pressure from the security services led in 2008 to the exemption of national security cases from the ordinary right of a defendant to trial by jury.[82] The respected Russian lawyer Genri Reznik compared this retrenchment to the similar set of restrictions on the jury that the Tsarist Duma enacted after Vera Zasulich's jury (instructed on the law by an impartial Anatolii Koni) reached the "wrong" verdict in 1878.[83]

If Hayhanen and Rhodes were the star witnesses, the most sensational piece of physical evidence was the mysterious hollow nickel mentioned earlier. Hayhanen had given a similarly doctored Finnish coin to officials at the American Embassy in Paris in order to establish his bona fides as a defector.[84] Counsel argued vigorously about the admission of these coins into evidence, one side claiming that the coins could be nothing but a spy's container, the other insisting that they

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[79] I refer to the dangerous views of the Nazi legal theoretician, Carl Schmitt. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab trans., MIT Press 1985) (1922) ("Sovereign is he who decides on the exception.")

[80] What limits may remain by virtue of the Due Process Clause is another matter further complicated by jurisdictional questions of extraterritoriality and interpretive questions concerning the nature of the Constitution's restrictions on state action.

[81] See Статьи 47(2) and 123(4) Конст. РФ; *see also* Jeffrey Kahn, *The Search for the Rule of Law in Russia,* 37 GEO. J. INT'L L. 353, 395 (2006).

[82] See Статья 2, Федеральный закон от 30 декабря 2008 г. N 321-ФЗ «О внесении изменений в отдельные законодательные акты Российской Федерации по вопросам противодействия терроризму». This provision was recently upheld by the Constitutional Court of the Russian Federation, see Постановление Конституционного Суда РФ от 19 апреля 2010 г. N 8-П «По делу о проверке конституционности пунктов 2 и 3 части второй статьи 30 и части второй статьи 325 Уголовно-процессуального кодекса Российской Федерации в связи с жалобами граждан Р.Р. Зайнагутдинова, Р.В. Кудаева, Ф.Р. Файзулина, А.Д. Хасанова, А.И. Шаваева и запросом Свердловского областного суда».

[83] Виктор Хамраев, *Дума меняет суть присяжных*, КОММЕРСАНТЪ, № 220 (4037) от 03.12.2008 [Viktor Khamraev, *Duma Changes the Jury*, KOMMERSANT", Dec. 12, 2008], http://www.kommersant.ru/doc.aspx?DocsID=1088181.

[84] DONOVAN, *supra* note 25, at 159.

were common novelty items available in any magic store.[85] Of course, the arguments of counsel do not constitute evidence, as the judge reminded them. But this argument (again, in front of the jury) was important to both counsel, who wanted to implant their theories in the minds of the jurors.

These sharp exchanges highlight elements of the Anglo-American adversarial trial that may be contrasted with Russian trials, which have been so strongly influenced by the continental European inquisitorial system.[86] Evidence – whether in the form of statements or physical evidence – is only admissible in an American courtroom through the testimony of live witnesses.[87] That is not the case in Russia, where (whether *de jure* or *de facto*) the old saying still retains some truth, *Quod non est in actis, non est in mundo* – "What is not in the file is not in the world."[88]

The Russian Criminal Procedure Code strongly suggests (if it does not require) that the criminal investigator collect all evidence, whether inculpatory or exculpatory, and lodge it in the case file.[89] In a break with the inquisitorial tradition, the state's investigator is no longer explicitly tasked with conducting a "complete and objective investigation."[90] He is now described as situated on the "prosecution's side" of the case.[91] Nevertheless, some materials gathered by the investigator (such as forensic reports and the reports of experts) are considered to be "pre-

[85] DONOVAN, *supra* note 25, at 161-62.
[86] Jeffrey Kahn, *Adversarial Principles and the Case File in Russian Criminal Procedure*, in RUSSIA AND THE COUNCIL OF EUROPE: TEN YEARS AFTER 107-33 (K. Malfliet & S. Parmentier eds., Palgrave Macmillan, 2010).
[87] Amend. VI, U.S. Const. As Justice Scalia noted in *Crawford v. Washington*, 541 U.S. 36, 43 (2004), "[t]he common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers." In fact, "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50. It should be noted, of course, that previously recorded testimony is admissible so long as the defense has had an adequate, prior opportunity to cross-examine a now unavailable witness.
[88] Bernhard Grossfeld and Josef Hoeltzenbein, *Language, Poetry, and Law: Order Patents*, 10 LAW AND BUSINESS REVIEW OF THE AMERICAS 669, 670 (2004).
[89] Статьи 87 и 152(4) УПК РФ.
[90] William Burnham & Jeffrey Kahn, *Russia's Criminal Procedure Code Five Years Out*, 33 REV. OF CENTRAL & E. EUR. LAW 1, 26 (2008). Cf. Статья 20, Уголовно-процессуальный кодекс РСФСР, Ведомости Верховного Совета РСФСР (1960), № 40, ст. 593. Although, as Professor Burnham observes, the idea of assigning to the investigator the task of conducting a complete and objective investigation "sneaks back in" through the requirement of Article 152(4) of the new Code, which requires that the investigation "be conducted where the accused or the majority of witnesses is located, in order to secure its completeness, objectivity and compliance with the procedural time limits." BURNHAM, MAGGS & DANILENKO, *supra* note 45, at 490 n.18.
[91] Статья 5(47) УПК РФ.

admitted" evidence by virtue of its inclusion in the case file and verification by the investigator.[92] In other words, notwithstanding the Code's requirements of "directness" and "orality,"[93] the people identified in these reports will not be required to appear at trial to subject their findings to the cross-examination of defense counsel. Even the testimony of witnesses can be read from the case file instead of heard from live persons in exceptional circumstances. And some courts have become quite adept at finding such exceptions.[94] The protocol – a non-verbatim summary of witness testimony given outside of court to the state's investigator, usually without defense counsel present – would never be admissible in an American courtroom for anything other than impeachment purposes. But it is a core feature of the Russian case file, which fits oddly (if it does at all) with the newly readopted jury system and the re-tasked roles of the investigator, prosecutor, and defense counsel in what the Russian Constitution and the Criminal Procedure Code describe as an adversarial system.[95]

An innovation that derives from the same break with tradition that now identifies the investigator as a partisan, not a neutral fact-finder, is that defense counsel may now gather evidence and interview witnesses on his or her own. Such an exercise was previously considered akin to obstruction of justice.[96] Still, a number of impediments render the system heavily dependent on the case file and less than purely adversarial. First, there is no provision for the defense that corresponds to the one that establishes the investigator's power to render some material

[92] Burnham & Kahn, *supra* note 87, at 28-31 (analyzing how articles 74, 79, 87, 240, and 281 of the Code combine to permit the use of protocols, reports, and witness statements from the case file, rather than live testimony). For example, a ballistics report by a specialist is "admissible as evidence" under Article 74. Once it is verified by the investigator, *pace* Article 87, the Code at Article 240 only requires that the report be "subjected to first-hand examination" by being "read aloud" in order to be admitted as evidence at trial. Similarly, the testimony given by a witness is defined to be evidence admissible at trial by Article 74, but that testimony is defined by Article 79 to include "information communicated by a witness during questioning conducted in the course of pre-trial proceedings" by the criminal investigator outside of the presence of either the judge or defense counsel. The protocol summarizing that testimony may be admitted as evidence in lieu of the witness's live testimony if the witness fails to appear in court for a variety of reasons including refusal to testify and "other exceptional circumstances" left to the court's discretion.

[93] Статья 240 и Глава 6 («Участники уголовного судопроизводства со стороны обвинения»), УПК РФ.

[94] See Burnham & Kahn, *supra* note 87, at 31; see also КАРИННА МОСКАЛЕНКО И ЛЕОНИД НИКИТИНСКИЙ (РЕД.), БАСМАННОЕ ПРАВОСУДИЕ: УРОКИ САМООБОРОНЫ. ПОСОБИЕ ДЛЯ АДВОКАТОВ (ПРОЧТИ И ПЕРЕДАЙ ДРУГОМУ) (Публичная репутация, Москва: 2004).

[95] Статья 123(3) Конст. РФ; статья 15 УПК РФ.

[96] *See* BURNHAM, ET AL., *supra* note 45, at 526.

automatically admissible evidence by virtue of its inclusion in the case file.[97] Since the defense's materials are produced only at trial (either as live testimony or as admitted evidence), the case file retains a certain permanence and aura of authenticity by virtue of its official status and bound physicality. Thus, although the Russian Criminal Procedure Code has had the general effect of moving Russian trial practice more towards the adversarial end of the spectrum, it is the retention of this case file – an official record of investigation conducted by a state official during a pre-trial investigation closed to the public (and frequently to the defense counsel as well) – that remains the primary distinguishing feature between the two systems.[98] Were Abel's case conducted in a Russian courtroom today, much of his lawyer's work would be very different. Considerably more time would be spent in attempts to influence the composition of the case file, *i.e.* to influence the development of the *prosecution's* case in addition to the defense's own investigation. And great caution must be exercised by a defense counsel in deciding whether to use her new powers to make motions to compel investigative actions that might result in favorable evidence being included in the case file. After all, such actions (although requested by the defense) are undertaken by the government's (i.e. the prosecutor's) criminal investigator.[99]

Generally speaking, this approach is not followed in courts in the United States.[100] The Confrontation Clause of the Sixth Amendment to the Constitution and American rules of evidence and procedure are all premised on the view that live, oral testimony, subject to cross-examination should be the foundation of a trial, not a case file.[101] However, in the context of habeas petitions from detainees at Guantánamo Bay, this conventional understanding has been

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[97] This work may be further complicated by the secret nature of the preliminary investigation. Only the prosecution side is may grant permission to make public disclosures. Unauthorized disclosure is a crime punishable by up to three months imprisonment. Статья 161 УПК РФ.

[98] Kahn, *Adversarial Principles and the Case File in Russian Criminal Procedure*, *supra* note 83.

[99] Статьи 53 & 159 УПК РФ. See Burnham & Kahn, *supra* note 87 at 53 ("This operates as a mandatory and immediate disclosure to the prosecution of any such defense discovery. This prospect will make the defense reticent to use any such procedures unless they are absolutely sure that the material will be helpful. This is another example of the inequality of the parties at trial. Unlike the defense, the investigator need not disclose the 'raw' materials it obtains but can pick and choose among them and decide which to include in the case file for the defense's later viewing. By contrast, any materials the defense requests will immediately be turned over to the prosecution.")

[100] *See* Melendez-Diaz v. Massachusetts, 129 S.Ct. 2927 (2009), finding that affidavits by forensic specialists about the methodology and results of drug tests were testimonial and therefore subject to the Confrontation Clause of the Sixth Amendment to the Constitution.

[101] It is true that some documentary evidence is deemed by statute to be self-authenticating. See Fed. R. Evid. 901(b)(10) & 902. Of course, the regular requirements of relevance and admissibility would still apply, and evidence deemed testimonial in nature would additionally be subject to the requirements of the Confrontation Clause. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE §§ 8.84 & 8.86 (4th ed. 2009).

thrown into doubt.[102] (A petition for a writ of habeas corpus is decided through a civil action, to which the Confrontation Clause by its own terms does not apply, although the underlying detention in question typically arises in the criminal context or, recently, the context of the "war on terror".) The Supreme Court indicated in *Hamdi v. Rumsfeld*, that the exigencies of the overseas military context could result in relaxed evidentiary standards for some documentary and physical evidence used to establish the status of detainees. As the *Hamdi* plurality put it:

> [T]he exigencies of the circumstances may demand that, aside from these core elements [of notice and fair opportunity to respond to the Government's allegations], enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.[103]

Exactly what that meant in practice was left to the district courts to sort out. Sometimes, the result has sounded more in the inquisitorial tradition of criminal justice than in the adversarial one. "When the government in these proceedings asks for a presumption of *authenticity* on these grounds, it effectively is asking the judge to reverse the usual practice of requiring the proponent of potentially-inauthentic evidence to carry the burden of proving its authenticity."[104] Some courts have been persuaded to give such a presumption to records on which the Government relies to prove up its detention, notwithstanding chain-of-custody and other problems that ordinarily are grounds for placing the *burden* of authentication (with live witnesses) on the Government. So far, no court has gone so far as to grant the Government a presumption of *accuracy* regarding such evidence.[105] And attempts by judges to generate rules concerning the

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[102] An excellent recent summary of these cases is provided by Chisun Lee, *Judges reject evidence in Gitmo cases*, NAT'L L.J. 1, 24 (Aug. 16, 2010) (noting that the United States has lost 37 of 53 habeas cases decided to date). Lee reports that the Obama administration "has already said that at least 48 of the remaining 176 prisoners at Guantánamo will be held indefinitely because they're too dangerous to release but can't be prosecuted successfully in military or civilian court," in part because of "coercion-tainted evidence". *Id.*

[103] Hamdi v. Rumsfeld, 542 U.S. 507, 533-34 (2004). In *Boumediene v. Bush*, 128 S.Ct. 2229, 2277 (2008), the Supreme Court also indicated that detainees "may invoke the fundamental procedural protections of habeas corpus," although these procedural protections "need not resemble [those] in a criminal trial," merely "effective" and "meaningful," *id.* at 2269. The contours of these terms the Court did not attempt to define with any precision.

[104] See BENJAMIN WITTES, ROBERT CHESNEY, AND RABEA BENHALIM, THE EMERGING LAW OF DETENTION: THE GUANTANAMO HABEAS CASES AS LAWMAKING 33 (Brookings Institute, 2010).

[105] *Id.* at 34.

use of hearsay, to determine burdens assigned and presumptions accorded to each side, to establish standards of proof, and to resolve many other procedural and evidentiary issues have little in common save their complexity and variety.[106]

Whatever one's view on the necessity of such judicial creativity in this context, the erosion of the American preference (if not principle) of adversarial confrontation through live witness testimony is clear. In some contexts (e.g. the capture of combatants on a traditional battlefield), such a departure is neither provocative nor ahistorical; in other contexts (e.g. detention of individuals in circumstances that make their status uncertain), the issue remains a serious one. It is an open question whether these evidentiary concessions will leak into the American criminal justice system if the Government wishes to prosecute suspected terrorists and their agents with evidence submitted in the form of classified intelligence reports citing unidentified sources, anonymous foreign experts, and summaries of out-of-court statements by unavailable witnesses.[107] It is worth recalling Justice Jackson's healthy suspicion of exceptional emergency powers, since emergency powers "tend to kindle emergencies."[108]

Like the United States, Russia also feels itself compelled by the threat of terrorism to exempt certain crimes from normal criminal procedures.[109] It is worth recalling just how similar were the fears in Abel's time. Less than a fortnight before his trial began, the Soviet Union launched Sputnik-1.[110] The federal prosecutor closed the government's case by describing Abel's offense

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[106] *Id.* at 35-50. As the authors of this exhaustive and thorough report demonstrate, the judges themselves initially differed about whether the use of hearsay was best resolved by a preliminary determination of the admissibility of this evidence or by a merits-stage assessment of its reliability. In *Al Bihani v. Obama*, 590 F.3d 866, 879-80 (D.C. Cir. 2010), the Court of Appeals for the District of Columbia Circuit held that the proper approach was a reliability assessment because the concerns of an adversarial criminal trial are not present ("The habeas judge is not asked, as he would be in a trial, to administrate a complicated clash of adversarial viewpoints to synthesize a process-dependent form of Hegelian legal truth."). Nevertheless, these judges have struggled with how to accomplish this assessment. And, as Wittes, Chesney, and Benhalim note, while admissibility decisions are reviewed *de novo*, a more deferential standard of review would apply to an appeal of the fact-finder's assessment of reliability. WITTES, CHESNEY, & BENHALIM, *supra* note 101, at 39.

[107] At least one federal court has permitted the testimony of an anonymous Israeli intelligence official as an expert witness (a status with special advantages under the Federal Rules of Evidence) in a criminal prosecution. See *United States v. Holy Land Foundation for Relief and Development, et al.*, No. 3:04-CR-240-G, 2007 WL 2059722 at *7-8 (N.D. Tex. 2007).

[108] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650-51 (1952) (Jackson, J., concurring).

[109] *See supra* note 79.

[110] DONOVAN, *supra* note 25, at 120.

as "directed at our very existence and through us at the free world and civilization itself, particularly in light of the times."[111] The very same words could be uttered today.

## DONOVAN'S MOTION TO EXCLUDE EVIDENCE

The most interesting legal issue in the case, and the one that led to its argument – twice – before the Supreme Court, was Donovan's motion to suppress the physical evidence gathered from Abel's room in the Hotel Latham. Donovan argued that the search violated the Fourth Amendment to the Constitution.[112] Donovan's description of his legal theory resonates today:

> A decision on the highest policy level had to be made by the Department of Justice, with respect to the man in Room 839:
>
> (1) Should the Department, as a law enforcement agency, obtain a warrant for his arrest on espionage or other criminal charges, and also a search warrant? If so, the man could be seized and his room searched but he would have to be publicly brought before the nearest available U.S. Commissioner or Federal Judge without unnecessary delay, be entitled to counsel at once, and then be remanded to a federal prison.
>
> (2) On the other hand, would it be more in the national interest for the Department, exercising its counter-espionage functions, to seize the man and his effects in a clandestine manner, conceal his capture from his co-conspirators as long as possible, and meanwhile seek to induce him to come over to our side?[113]

Notwithstanding, or perhaps because of, his own experience in World War II and as general counsel to the OSS, Donovan was convinced that the state could lawfully conduct the

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[111] DONOVAN, *supra* note 25, at 238.

[112] U.S. Const., Amend. IV ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). If Room 839 of the Hotel Latham would constitute a "dwelling" under Russian law, then the warrantless arrest, search, and seizure of evidence on Abel's person and in his room, was unlawful under the current Russian Code of Criminal Procedure. See Статьи 29(2)(4-6) and 164(2), УПК РФ (requiring that nonconsensual inspections of a dwelling, search and seizures conducted in a dwelling and searches of persons (other than those incident to a lawful arrest) may be "conducted only pursuant to a judicial warrant."). Although Art. 165(3) does provide for warrantless searches in exceptional circumstances, when a search "must be conducted without delay," that article requires submission of the matter to a judge within twenty-four hours of the search. The fruits of the search may then be declared inadmissible if the investigative action is determined to be illegal. If Room 839 were held to constitute something other than a "dwelling" (e.g. an office or storage room), then only the order of an investigator would be required to search the room. Article 182.

[113] Brief for Petitioner, Abel v. United States, No. 2 (Nov. 26, 1958), at 14-15 (internal quotations omitted).

warrantless arrest of Abel, hoping to turn him into a double agent for counterintelligence purposes, or it could prosecute him for the capital crime of espionage. But it could not do both:

> We have not criticized their calculated gamble to grab Abel and his effects, keep his seizure secret as long as possible, and try to persuade him to aid the United States. We stated in the courts below that from a counter-espionage, viewpoint, the decision seems prospectively sound. But we maintain that the Department of Justice, having elected to gamble that Abel would 'cooperate' and then having lost, cannot subsequently seek to reverse its steps, prosecute Abel on evidence inadmissible in federal court, and pay lip service to due process of law.[114]

The choice having been made not to comply with constitutional criminal procedure, the evidence obtained through this detention and failed attempt to "turn" Abel could not be used in a criminal trial: it was fruit from a poisonous tree.[115] The ostensible basis for the arrest was an administrative detention order signed by the INS district director, not a warrant issued by a judge, and the INS agents waited patiently while FBI agents began to question Abel on what they called "a matter involving the internal security of the United States."[116] The search of Abel's room was "unreasonable" in the language of the Fourth Amendment, because it was not a good faith effort to discover evidence of his alienage, permitted during a legitimate administrative arrest on immigration charges for which no judicial warrant was required.[117] Abel's immigration

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[114] *Id.* at 12-13 (internal quotations and citations omitted).

[115] The Abel Court would cite *Weeks v. United States*, 232 U.S. 383, 398 (1914), for this proposition, but it would be three more years after upholding Abel's conviction before the Court would first adopt this metaphor. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

[116] Interview by Vin Arthey with Ed Gamber, one of the FBI agent who participated in the arrest. ARTHEY, *supra*, note 21, at xxxi, 204-05. In retirement, FBI special agent Gamber, recalled that "[w]e got no co-operation from him whatsoever. He said nothing. He just sat there and looked at the floor. He didn't say a word." *Id.* at 205. This is mostly confirmed by the testimony of his partner, FBI Special Agent Paul Blasco. Direct Examination of FBI Special Agent Paul J. Blasco, Hearing on Defendant's Motion to Suppress, Transcript, *supra* note 4, at 180-81 (testifying that Abel either sat silently or gave very terse answers). Whether by instinct or training, Abel's conduct at the time of his arrest illustrated the constitutional right to remain silent. The FBI gave Abel no such warning on the morning of his arrest because, according to Agent Blasco's testimony, "we were conducting an interview to solicit his cooperation." Direct Examination of FBI Special Agent Paul J. Blasco, Hearing on Defendant's Motion to Suppress (as reproduced in the Transcript of Record, Abel v. United States, No. 2 (October Term 1959) at 185-87).

[117] An argument based on the subjective "good faith" of the government official would get little traction today. The Supreme Court made clear in *Whren v. U.S.*, 517 U.S. 806, 813 (1996), that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." The Whren Court dismissed arguments to the contrary that were based partly on dicta from Abel's case, describing the Abel Court's treatment of pretext as "plainly inconsistent" with later opinions. *Id.* at 816.

status was a pretext to roust him from his bed and search for evidence to confirm the FBI's suspicion that he was a spy, all the while circumventing the warrant requirement of the Fourth Amendment. According to the defense, the INS was a willing instrument of the FBI from start to finish.[118]

The Government opposed Donovan's motion on the grounds that Abel's arrest on an INS administrative warrant was perfectly legal and not governed by the same constitutional rules as an arrest on a criminal warrant. The arrest being lawful, a search of Abel and his surroundings for weapons or evidence that could have been seized under a criminal warrant was also permissible.[119] Likewise, there was nothing improper in the collaboration of the INS and the FBI. The initial arrest was made in good faith: Hayhanen's refusal to testify left the FBI with insufficient evidence to secure a criminal warrant.[120] Apprehension of Abel – believed to be a top Soviet agent – was therefore only possible on grounds of an immigration violation.[121] When Hayhanen had a change of heart and agreed to testify, and (thanks to the search of Abel's room) more evidence of espionage became available, the Government "expeditiously" presented the case to a Grand Jury, which returned the three-count indictment in the case.[122] In other words,

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It may seem odd to the modern scholar of constitutional criminal procedure that Donovan did not argue that the search of Abel's room was presumptively invalid because of its broad sweep. *Chimel v. California*, 395 U.S. 752, 763 (1969) ("There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs-or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The 'adherence to judicial processes' mandated by the Fourth Amendment requires no less.") (footnote omitted). The answer is that *Chimel*, as its date implies, was not the law in 1957. The law was stated in *U.S. v. Rabinowitz*, 339 U.S. 56 (1950), which upheld a similar search based on the officer's expectation of finding evidence of the underlying offense.
Interestingly, Justice Frankfurter wrote a strong dissent to *Rabinowitz*, which case he distinguished in his majority opinion in Abel's case. *See* Abel, 362 U.S. at 236-37.

[118] Brief for Petitioner, Abel v. United States, No. 2 (Nov. 25, 1958), at 4-6, 21-22.

[119] Brief for the United States, Abel v. United States, No. 2 (Jan. 2, 1959), at 29-34. It should be noted that different justifications were offered for the seizure of different items: the false birth certificates and other items using an alias that were found in Abel's room were seized as evidence of the immigration violation; the coded message that Abel tried to hide up his sleeve was seized as evidence of another crime that Abel had been seeking to conceal on his person (which itself was subject to search incident to his arrest); and the cipher book, hollowed-out pencil, and microfilm, the government argued, had been abandoned by Abel when he threw them away. *Id.* at 55-60. Although interesting, these lines of argument are not especially peculiar to Abel's case, and will not be pursued here.

[120] *Id.* at 6.

[121] *Id.*

[122] *Id.* at 46-47. *See also* Transcript, *supra* note 4, at 58 (Affidavit of Kevin T. Maroney, Special Attorney, Department of Justice). As suggested, *supra* text accompanying note 19, "expeditiously" is a relative term. Abel was held in extrajudicial, secret detention for almost seven weeks before he was publicly indicted for a crime.

what else was the Justice Department to do, hamstrung by a recalcitrant witness but charged with responsibility for counter-espionage?

It is interesting to note how the two sides seemed to be arguing past each other. The Government's arguments were marked by the formality of their legal reasoning: the arrest was valid because the proper government channels for accomplishing it had been carefully followed and the seizure of each item was justified by a different rule or judicial opinion. Abel's lawyers, on the other hand, focused on the abuse of formalities to accomplish an ulterior purpose. As Donovan summarized this divergence between the parties' reasoning, he asserted that the Government's case rested:

> on a false premise which may be mumbled, "an arrest is an arrest is an arrest." The truth is that what the Government termed "an arrest *sui generis*" in its District Court briefs is not an arrest at all, either civil or criminal. It is a detention process, whereby a person is taken into custody for the sole and expressed purpose of deportation from the United States. Yet the Government's basic reasoning, and the applicability of the case authority cited in its brief, rest upon the misleading assertion that there was a "valid arrest" in the case at bar.
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> Thus, too, the Government weaves back and forth in an elaborate defense of its process for deportation (the legality of which we have never disputed) and then leap-frogs to the unwarranted conclusion that process appropriate for deportation is also appropriate to obtain evidence of a capital crime – even when the arresting officers admittedly were convinced that such a capital crime had been committed but had decided to avoid regular criminal procedures at that time.[123]

These arguments bring to mind the controversy concerning the use of the immigration laws and "material witness" warrants to apprehend and interrogate individuals shortly after the terrorist attacks of September 11, 2001. The arguments of the Government had the same tone: these detentions were formally lawful, not to mention urgently necessary in the aftermath of the attack. The arguments of lawyers defending detainees were similar to Donovan's plea: processes made for one purpose are abused when they are employed for such different objectives. Under Russian law, prudential reasons for using alternative procedures are irrelevant to the admissibility of

[123] Reply Brief for Petitioner, Abel v. United States, No. 2 (Jan. 15, 1959), at 2 (internal citation omitted).

evidence at trial. Information obtained through so-called "tactical investigative operations" – i.e. stings, surveillance, undercover agents, and other activities that may ultimately result in criminal investigation and prosecution, but which may be undertaken in the absence of an open case based on any "threat to state, military, economic or ecological security" of the state[124] – is inadmissible unless they satisfy the evidentiary requirements of the Criminal Procedure Code.[125]

Donovan's suppression motion was denied, again making headlines.[126] First, although admitting the matter was one of first impression, the court held that no warrant was required for the search of Abel's hotel room following his detention on an immigration violation, which was not a criminal offense.[127] Second, the court saw no reason why the INS and the FBI, different branches of the Justice Department, could not work in tandem, the former seizing Abel on the immigration violation and the latter investigating his suspected espionage. The court observed, neatly ducking the issue of procedure in favor of result, "[t]he Department of Justice owes its first allegiance to the United States, and it is not perceived that an alien unlawfully in this country has suffered any deprivation of Constitutional rights" in the factual circumstances of Abel's arrest.[128] At the hearing on the motion, Judge Byers expressed his view that he should not tell the FBI how to do its job.[129]

After Abel's conviction, Donovan appealed on precisely this point. The Court of Appeals for the Second Circuit upheld the lower court's ruling on Donovan's pre-trial suppression motion. The Second Circuit considered deportation to be similar enough to a criminal arrest to extend the general rule permitting search of the premises where an arrest is made, even a warrantless one.[130] The court was willing to allow the INS and FBI to work in tandem when it suited their purposes, because it saw a clear line dividing the different agents. Thus, the good faith of the INS in

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[124] Статья 7(2)(2), Федеральный закон от 12 августа 1995 г. N 144-ФЗ «Об оперативно-розыскной деятельности».
[125] Статья 89, УПК РФ. See also Burnham & Kahn, *supra* note 87, at 47.
[126] *Abel Loses Move to Bar Evidence*, N.Y. TIMES, Oct. 12, 1957, at 5.
[127] United States v. Abel, 155 F.Supp. 8, 10-11 (E.D.N.Y. 1957).
[128] United States v. Abel, 155 F.Supp. 8, 11 (E.D.N.Y. 1957).
[129] Transcript, *supra* note 4, at 131 (Excerpt from district court oral argument on motion to suppress: "I think it is the job of the F.B.I. to bring to light information concerning violations of the law and I don't think it is part of the Court's duty to tell them how they should function.").
[130] United States v. Abel, 258 F.2d 485, 492-94 (2d Cir. 1958).

pursuing its lawful objective was not tainted by the ulterior motives of the FBI.[131] In any event, the appellate court did not appear interested in parsing this line with a trial record that "fairly shrieks the guilt" of Colonel Abel of the KGB.[132]

Donovan appealed again and the Supreme Court granted his petition for a writ of certiorari on October 13, 1958.[133] The Court limited its grant to two issues: (1) Was the administrative warrant issued by the INS constitutionally adequate to search and seize evidence in Abel's rooms after he was detained for deportation proceedings but not arrested for having committed a crime; and (2) Was the Constitution violated when such evidence, unrelated to the immigration interests of the INS, was later used to convict Abel of espionage? These questions were briefed and argued, but the Court found itself unable to decide the case. Therefore, the Court ordered reargument, refining the issue to its technical foundations:

> 1. Whether under laws and Constitution of the United States (a) the administrative warrant of the New York Acting District Director of the Immigration and Naturalization Service was validly issued, (b) such administrative warrant constituted a valid basis for arresting petitioner or taking him into custody, and (c) such warrant furnished a valid basis for the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham.
> 2. Whether, independently of such administrative warrant, petitioner's arrest, and the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham, were valid under the laws and Constitution of the United States.
> 3. Whether on the record before us the issues involved in Questions '1(a),' '1(b),' and '2' are properly before the Court.[134]

Justice Frankfurter put this detailed description of the issue more plainly in his opinion for the Court: "We are asked to find that the Government resorted to a subterfuge, that the Immigration and Naturalization Service warrant here was a pretense and sham, was not what it purported to be."[135] Unusually, the lawyers were each granted one and one-half hours for oral argument

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[131] *Id.* at 494.
[132] *Id.* at 502 (quoting Lutwak v. United States, 344 U.S. 604, 619 (1953)).
[133] Abel v. United States, 358 U.S. 813 (1958).
[134] Abel v. United States, 359 U.S. 940 (1959).
[135] Abel v. United States, 362 U.S. 217, 225 (1960).

(instead of the usual 30 minutes), signaling the difficulty the Court appeared to have with this case.[136]

The opinion this argument produced was a narrow one, with only five of the nine justices voting to uphold Abel's conviction. Justice Felix Frankfurter wrote the majority opinion, which was joined by Justices Clark, Harlan, Whittaker and Stewart. In principle, Justice Frankfurter found it an easy matter to note the importance of preventing abuse of the government's administrative powers as a tool to circumvent constitutional and statutory safeguards in a federal criminal investigation.[137] Perhaps in order to cobble together his slim majority, Justice Frankfurter used issue 3 to uphold the conviction on the narrowest possible grounds: the Supreme Court would not second guess the lower courts' judgment that no bad faith was evident here.[138] Frankfurter noted how Judge Byers had held a pretrial hearing at which the arguments for suppression of the evidence on these grounds were fully aired and testimony on the matter heard before issuing a finding of no evidence of the bad faith.[139] The Court of Appeals had affirmed this ruling after its own review. The Court held that the lower courts could reasonably conclude that the FBI's use of the INS's administrative powers to enter Abel's room, apply pressure, and extract evidence had all been part of a "bona fide preliminary step in a deportation proceeding."[140] The formal distinctions between the decision-making authority of two components of the Justice Department had all been carefully preserved, thus making the practical effect of collaboration acceptable to Justice Frankfurter: "The test is whether the decision to proceed administratively toward deportation was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime."[141]

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[136] Abel v. United States, 359 U.S. 940 (1959).

[137] Abel v. United States, 362 U.S. 217, 226 (1960). The Court of Appeals for the Eighth Circuit speculated in dicta that the Court's disapproval of such a method of law enforcement may no longer be good law. United States v. Clarke, 110 F.3d 612, 614 (8th Cir. 1997) ("We wonder, in the first place, about the continued validity of *Abel* in light of *Whren.*"). In *Whren*, police used a traffic stop for failing to signal before turning as a pretext to search the defendants' car for drugs, their true purpose for stopping the vehicle. Since probable cause existed to believe that defendants had violated a part of the traffic code (a state of existence that is almost always true for every car on the road if observed long enough), the Court unanimously held that the subjective intentions of the police "play no role in ordinary, probable-cause Fourth Amendment analysis." Whren v. United States, 517 U.S. 806, 813 (1996).

[138] Similarly, whether the administrative warrants failed to satisfy the Fourth Amendment's warrant requirement, was dismissed by the Court for not having been preserved on appeal. Abel v. United States, 362 U.S. 217, 230-34 (1960).

[139] Abel v. United States, 362 U.S. 217, 226 (1960).

[140] *Id.* at 230.

[141] *Id.*

Finding the arrest valid, the Court upheld the search made incident to it. Although not judicially reviewed prior to its use by INS agents, the administrative warrant required approval by an independent officer of the Justice Department. This was protection enough, Justice Frankfurter concluded, especially considering that warrantless arrests based upon probable cause of crime were made without any such review at all.[142] The search being lawful, there was no basis for excluding the evidence found by it from use at trial. Even the cipher pad and hollowed-out pencil, quickly thrown away by Abel before being escorted from his hotel room and found after the FBI returned after Abel had "checked out," were held validly obtained: what could be unlawful about Government use of abandoned property?[143]

The fact that both the FBI and the INS were components of the same agency mattered a lot to Justice Frankfurter, who drew a distinction between their legitimate cooperation and an instance where one agency was acting "not within its lawful authority but as the cat's paw of another, unrelated branch of the Government."[144] At the time, this line served to distinguish cases in

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[142] *Id.* at 236-37.

[143] *Id.* at 240-41.

[144] *Id.* at 230. Justice Frankfurter approvingly cited "the story told in" Colyer v. Skeffington, 265 F. 17 (D.Mass. 1920), rev'd by Skeffington v. Katzeff, 277 F. 129 (1st Cir. 1922), "[f]or a contrast to the proper cooperation between two branches of a single Department of Justice as revealed in this case". Abel v. United States, 362 U.S. 217, 229 (1960). Why cite a district court case forty years old, especially only for "the story" told in it, not the holding? The answer has two parts. First, the case was of particular interest to Justice Frankfurter because it had benefited from amicus briefs submitted by two trusted lawyers: the young Professor Felix Frankfurter himself, alongside his colleague at Harvard, Zechariah Chafee. Colyer and others had been arrested by immigration officials, then under the jurisdiction of the Department of Labor. Though nominally responsible, these officials had abdicated their decision-making authority to agents of the Justice Department's Bureau of Investigation (the precursor to the FBI) to effect the warrantless arrest of aliens affiliated with the Communist Party. *Id.* at 30. The court described in vivid detail how "[i]n cases of doubt, aliens, already frightened by the terroristic methods of their arrest and detention, were, in the absence of counsel, easily led into some kind of admission as to their ownership or knowledge of communistic or so-called seditious literature." *Id.* at 47.

But the holding in Colyer did not support Frankfurter's distinction in the Abel case. Judge Anderson had rejected petitioner's argument that the Labor Department's deportation hearings were void because, in essence, controlled by the Department of Justice. *Id.* at 51. Justice Frankfurter now advanced in dicta in the Abel case the holding his side advanced, but lost, in Colyer's case. (The district court ultimately granted habeas following a lengthy examination of socialist and communist doctrine, finding as a matter of law that this manifesto did not advocate the overthrow of the United States Government, a statutory prerequisite to deportation, and that in many cases the petitioners were denied due process of law in the conduct of their arrests and deportation hearings. *Id.* at 58-71. The first part of this holding was reversed by the Court of Appeals. Skeffington v. Katzeff, 277 F. 129, 133 (1st Cir. 1922).) Forty years later, Frankfurter had the last word.

To be completely fair to Justice Frankfurter, Donovan may have goaded him into citing Colyer v. Skeffington. His opening brief was the only one to cite the case, recalling his work as an advocate for aliens subject to deportation during the excesses of the Palmer Raids to the Justice now sitting in a case alleging excesses following the McCarthy era. Brief for Petitioner, Abel v. United States, No. 2 (Nov. 25, 1958).

which an administrative agency empowered to engage in warrantless arrests and searches was abused by collaboration with a separate agency with a separate mandate. The health inspector, for example, could not demand entry on grounds of a suspected public nuisance, only to signal a waiting police officer to the illicit activities found during his pretextual search.

But perhaps this was a distinction without a difference. Was it so unimaginable that different components of a single federal agency as large and powerful as the Department of Justice might be tempted to combine and magnify its array of separate powers just as two separate agencies might? Wasn't this all the more likely when agents were under pressure to protect the country from the threat of anarchists, or Communists, or terrorists? None other than FBI Director J. Edgar Hoover had publicly boasted after Abel's conviction that the FBI had first concluded that Abel was a spy and then directed the INS to use its powers to snatch him, a point Donovan emphasized in one of his Supreme Court briefs.[145] By testing the FBI agents for "bad faith," Justice Douglas noted in dissent, the Court had knocked down a straw man: "The issue is not whether these F.B.I. agents acted in bad faith. Of course they did not. The question is how far zeal may be permitted to carry officials bent on law enforcement."[146] Justice Douglas mockingly noted the real reason why, though Abel had been kept under surveillance for a month, no time could be found to obtain a warrant from a judge or commissioner:

> If the F.B.I. agents had gone to a magistrate, any search warrant issued would by terms of the Fourth Amendment have to 'particularly' describe 'the place to be searched' and the 'things to be seized.' How much more convenient it is for the police to find a way around those specific requirements of the Fourth Amendment! What a hindrance it is to work laboriously through constitutional procedures! How much easier to go to another official in the same department! The administrative officer can give a warrant good for unlimited search. No more showing of probable cause to a

[145] Supplemental Brief for Petitioner, Abel v. United States, No. 2 (Sept. 2, 1959), at 4 (citing J. EDGAR HOOVER, MASTERS OF DECEIT, THE STORY OF COMMUNISM IN AMERICA AND HOW TO FIGHT IT 298-99 (1958)). Donovan used Hoover's words to support a statement by the Director of the INS that "Abel would not have been arrested by immigration officials on June 21 if American counter-intelligence had not requested it," but which the appellate court had dismissed as hearsay. *Id.* at 3.

[146] Abel v. United States, 362 U.S. at 245. Justice Brennan, in his dissent, made a more practical critique of the focus on good faith: "If the search here were of the sort the Fourth Amendment contemplated, there would be no need for the elaborate, if somewhat pointless, inquiry the Court makes into the 'good faith' of the arrest. Once it is established that a simple executive arrest of one as a deportable alien gives the arresting offices the power to search his premises, what precise state of mind on the part of the officers will make the arrest a 'subterfuge' for the start of criminal proceedings, and render the search unreasonable?" *Id.* at 253.

> magistrate! No more limitations on what may be searched and when![147]

Justice Brennan, in his dissent, noted that the failure to secure a warrant from an independent magistrate *before* the arrest consequently meant no obligation to present Abel to an independent magistrate after his arrest, to publicly "justify what had been done."[148] There was no one, that is, to ask why Abel needed to be transported halfway across the country, kept in solitary confinement, and interrogated daily for weeks without the assistance of counsel. As Justice Brennan put it, "As far as the world knew, he had vanished."[149] Wasn't that reason enough to remain faithful to the Fourth Amendment's requirement that a warrant be obtained before an arrest? Justice Frankfurter did not cite to his own opinion for the Court in *McNabb v. United States*, in which he expressed a different view of the role of federal law officers. This reference had to be supplied by Justice Brennan in his dissent.[150] Nor did he cite to his opinion for the Court in *Mallory v. United States*, issued the year of Abel's arrest, reversing a rape conviction because the police delayed his presentation before a magistrate until their daylong interrogation had succeeded in eliciting a confession.[151]

Beginning in the 1970s, investigations by United States Senate committees, most notably the one led by Senator Frank Church (the Select Committee to Study Governmental Operations with respect to Intelligence Activities), disclosed how the FBI and the CIA had abused their powers both separately and in collaboration with each other. At the FBI, the result was what became known as the "Wall" between the Bureau's counterintelligence and law enforcement functions.

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[147] *Id.* at 246.
[148] *Id.* at 251.
[149] *Id.* at 252.
[150] Abel v. United States, 362 U.S. at 250. See McNabb v. United States, 318 U.S. 332, 343-44 (1943) ("A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. … Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. … It aims to avoid all the evil implications of secret interrogation of persons accused of crime. It reflects not a sentimental but a sturdy view of law enforcement.") By comparison, Abel was held significantly longer, and without counsel, than all of the detained members of the McNabb family combined.
[151] See Mallory v. United States, 354 U.S. 449, 456 (1957) ("Presumably, whomever the police arrest they must arrest on 'probable cause.' It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'")

An agent involved with an investigation on one side of this barrier could not communicate with an agent on the other side. Abel's case could not have proceeded in the same way under this regime; indeed, it is doubtful whether Abel would ever have seen the inside of a courtroom. But in 1960, the Supreme Court effectively had decided that no "Chinese Wall" was needed between these two aspects of the Justice Department's mandate: Abel's incommunicado, secret detention in McAllen could hardly have been said to advance an immigration purpose.

The danger Douglas perceived was that the list of administrative officers allowed to conduct warrantless searches would grow to swallow the rule set by the Fourth Amendment. The countervailing variable he neglected to include in this equation was the political process. Citizens who found administrative searches too frequent or intrusive could limit or strip entirely such powers from government agencies through the political process. The growth of the American administrative state is a history of that debate.

Of course, aliens cannot vote. Many have noted the sorry pattern in American law that begins with restrictions on the rights of foreigners only to end with the expansion of those restrictions to American citizens.[152] The Palmer raids, described so vividly in the *Colyer* case cited by Justice Frankfurter, resulted in mass warrantless arrests of suspected alien communists in which it was understood that citizens would occasionally be swept up in the dragnet, acceptable collateral victims.[153] Curtailment of the rights of those accused was deemed necessary "to protect the Government's interests" during a struggle against a perceived imminent danger.[154]

The dissenters in the Abel case forecast that the effect of this opinion would be no different and, indeed, it wasn't. In fact, every generation perceives imminent dangers and, with unconscious repetition, employs the same language of justification to commit the same infringements of the rights of some, usually aliens, in defense of others, usually citizens. But the exceptional inevitably becomes the status quo. Slowly but surely, the abuses (as they soon come to be seen once the crisis has passed) are extended to citizens. The danger lurks, as Justice Brandeis

[152] DAVID COLE, ENEMY ALIENS passim (2003).
[153] Colyer v. Skeffington, 265 F. 17, 37, 40-45 (D.Mass. 1920).
[154] *Id.* at 46.

observed, "in insidious encroachment by men of zeal, well-meaning but without understanding."[155]

## CONCLUSION

Between Abel's case and today, the United States experienced the dramatic reforms to constitutional criminal procedure introduced by the Supreme Court under the leadership of Chief Justice Earl Warren. On the other hand, the temptation to return to old ways remains present. After September 11th, Attorney General John Ashcroft authorized the use of material witness warrants and arrest on immigration violations to pursue the investigation of the attacks. Not a single conviction resulted from the 762 persons seized, detained, and sometimes unlawfully and brutally treated as a result of these immigration-related arrests.[156] Ironically, the INS had more "success" with Abel's administrative arrest and criminal conviction.

The core evidentiary issue that rose to the Supreme Court, which Donovan described as one that "would trouble any student of constitutional law," remains with us today.[157] The presidential commission tasked with the investigation of the terrorist attacks of September 11, 2001, focused much of its attention on the so-called "wall" separating the FBI's law enforcement and counterintelligence responsibilities.[158] The wall had been built because of the very sort of misuse of power that Donovan described in his motion. After 9/11, the wall was deemed too high and too impermeable, and blamed for the intelligence failures that left the United States vulnerable to attack. Today, experienced and gifted legal minds argue that the wall should be weakened, if not torn down completely.[159] But this ends-justifies-the-means thinking was known to Donovan, too, who concluded his brief with a warning that resonates today:

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[155] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).
[156] EDWARD ALDEN, THE CLOSING OF THE AMERICAN BORDER 98 (2008); Office of the Inspector General, U.S. Dep't of Justice, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES' ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK (December 2003), available at: http://www.justice.gov/oig/special/0312/final.pdf.
[157] DONOVAN, *supra* note 25, at 117.
[158] FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004).
[159] STEWART A. BAKER, SKATING ON STILTS: WHY WE AREN'T STOPPING TOMORROW'S TERRORISM (Palo Alto, CA: Hoover Institution, 2010).

> Abel is an alien charged with the capital offense of Soviet espionage. It may seem anomalous that our Constitutional guarantees protect such a man. The unthinking may view America's conscientious adherence to the principles of a free society as an altruism so scrupulous that self-destruction must result. Yet our principles are engraved in the history and the law of the land. If the free world is not faithful to its own moral code, there remains no society for which others may hunger.[160]

Justice Frankfurter's slim majority upheld the conviction by deferring to the lower courts' evaluations of good faith. This may well be the same deferential standard of review used to evaluate the reliability determinations of trial courts assessing hearsay and other exceptional pieces of evidence submitted by the Government in the habeas cases of detainees held at Guantánamo Bay.[161]

Lest there be any doubt that the issues we confront today should not seem new or unfamiliar to us, ask yourself how familiar this summary description by Donovan sounds today: "The simple fact was that the Colonel and all his belongings were made to disappear from the face of the earth while FBI agents, in a counterintelligence function, carried out their plan."[162] And ask whether the prosecutor's closing argument resonates in your mind as much with the threat of terrorism today as it clearly resonated for a jury deciding Abel's fate in the shadow of the threat of communism fifty years ago: Colonel Abel's actions were "directed at our very institutions and through us at the free world and civilization itself."[163] Our time is well spent learning from our history.

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[160] DONOVAN, *supra* note 25, at 66.
[161] See *supra* text accompanying note 104.
[162] *Id.* at 111.
[163] Edith Evans Asbury, *Abel Jury Hears Final Arguments,* N.Y. TIMES, Oct. 25, 1957, at 4.