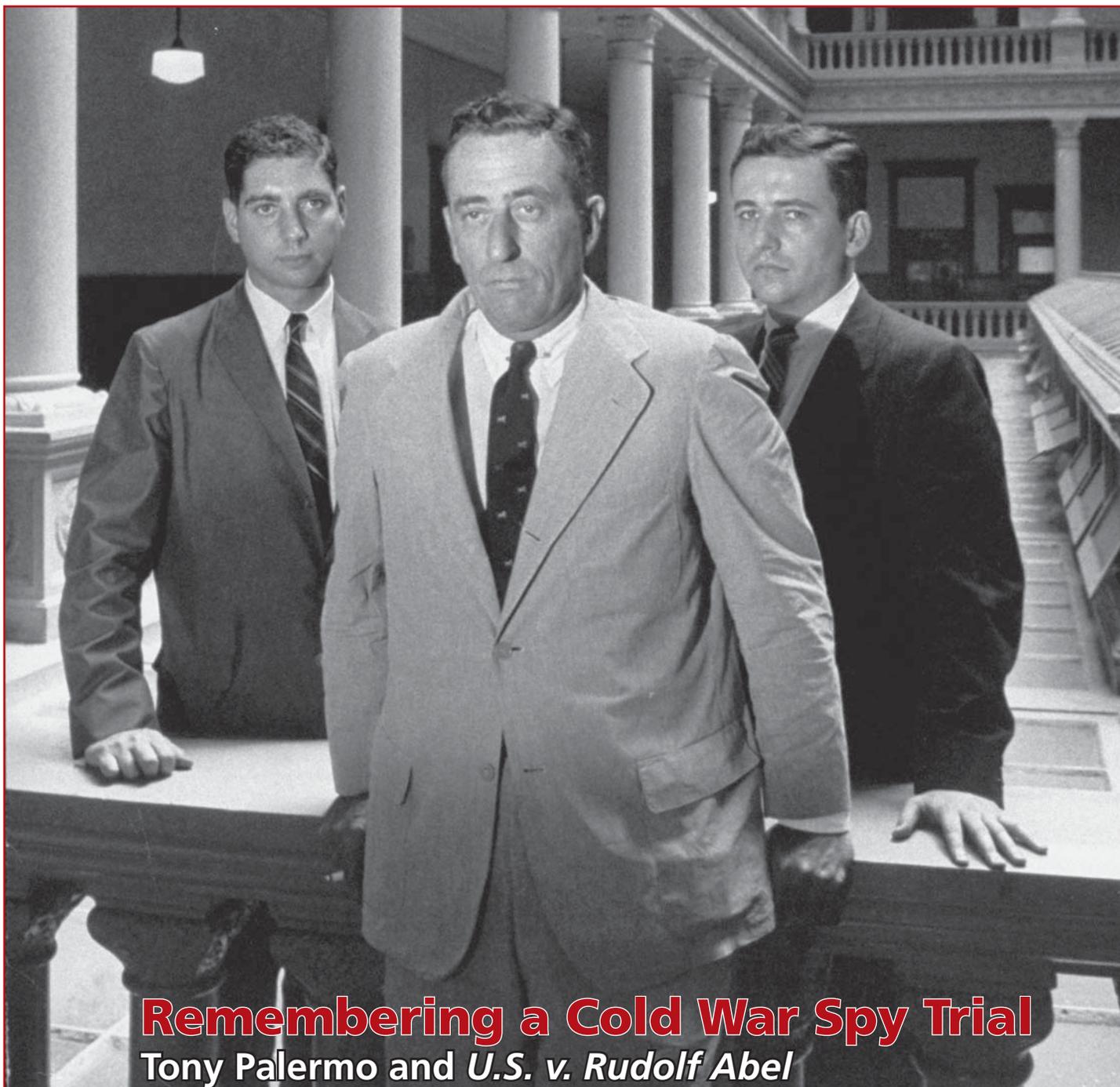


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Remembering a Cold War Spy Trial Tony Palermo and *U.S. v. Rudolf Abel*

Spy's Prosecutor, Assistant Attorney General Tompkins, who directed the operation which resulted in Abel's arraignment, stands in the arcade of Brooklyn federal courthouse with his special assistants, Anthony R. Palermo (left) and James F. Featherstone. (This photo and caption appeared in the August 19, 1957 issue of Life.)

Remembering a Cold War Spy Trial

Tony Palermo and *U.S. v. Rudolf Abel*

By Rosemary C. Byrne

Spanning almost 60 years, the career of Anthony R. Palermo is replete with achievements and accolades. He is a distinguished bar leader dedicated to the practice of law and its core values of ethics, integrity and service to clients and the community. Now Of Counsel with Woods Oviatt Gilman LLP, Tony has been an Assistant U.S. Attorney in both the Southern and Western Districts of New York. He has had broad practice experiences in both small and large firm settings, as well as service as President of the Monroe County and New York State Bar Associations, and Member of the Board of Governors and Secretary of the American Bar Association.

Yet, despite this stellar career, the most memorable “legal first” for Tony was his initiation to the trial bar as a member of the team which successfully prosecuted the Russian spy Rudolf Abel in October of 1957. Some may recall the case because several years after his conviction Abel was swapped for Francis Gary Powers, an American pilot shot down over Russian territory. For most of us, however, that prisoner exchange and the Abel trial which preceded it were lost in history until revived by Steven Spielberg’s Academy Award nominated film, *Bridge of Spies* which earned Mark Rylance a best actor award for his portrayal of Abel.

For Tony Palermo, the Abel case is unforgettable. After all, it was his first trial and he is now the lone surviving member of the cohort of prosecutors and defense attorneys who tried the case.

The year was 1957. America was in the throes of the Cold War. We were gripped with fears of nuclear weapons, the Soviet Union and communism. There were organized civil defense drills. Children were taught to “duck and cover” under their desks to protect against nuclear explosions or go to the school’s bomb shelter at the sound of the air raid siren. The Russians had already tested a nuclear weapon. Later that year they would launch Sputnik I (the so-called “Doomsday Machine”) inaugurating the space race and further exacerbating fears of nuclear attack. (On a personal note, it was also the year the Dodgers abandoned Brooklyn!)

Tony Palermo was a newly minted Georgetown Law School graduate working in the Internal Security Division of the Justice Department in Washington. Prior to attending law school Tony had completed Army Service which included Counter Intelligence School and German Language studies.

In early July of 1957, less than a year after he had graduated from law school, the 27-year-old Palermo was sent to New York for what he believed would be a two-

day assignment working on an investigation and matter in the Eastern District. Six months later, with the trial completed, he would return to Washington having served as a member of the four-man team that prosecuted Rudolf Abel, the highest ranking foreign spy ever convicted in the United States, and having played a key role in one of the most important spy trials of the 20th century.

Tony has graciously taken the time to share with me some of his recollections of the Abel trial and the impact that experience and the release of the *Bridge of Spies* film have had on his career and his seniority.

By today’s standards (and perhaps even those of 1957), the time span of the Abel case is remarkable. The entirety of the trial took less than six months—from the end of June when Abel was arrested, through his indictment in August, the two-week trial in October and his sentencing in November.

Equally extraordinary was the level of Tony’s responsibility in the proceedings. Notwithstanding that he had been admitted to practice less than a year, Tony and a colleague were charged with the preparation and presentation of the case to the grand jury. Their task was particularly difficult since there were few precedents for charging a foreign citizen, such as Abel, with spying, and the government’s star witness was refusing to testify. Tony recalls spending weeks interviewing and prepping FBI and INS investigators and other witnesses, marshalling the evidence, interviewing Reino Hayhanen, the star witness, and then ultimately persuading him to testify before the grand jury. Hayhanen was a Russian defector and KGB agent believed to be Abel’s assistant, who brought Abel to the government’s attention and assisted in locating him. He had steadfastly resisted testifying for many reasons, including fear of Soviet reprisals against family members residing in Russia.

Tony was present in the courtroom for most of the pretrial and trial proceedings. He prepared the submissions in opposition to the defense’s pretrial suppression motion claiming that Abel’s Fourth Amendment rights had been violated. Those claims were rejected by the trial court and a unanimous Court of Appeals for the Second Circuit. The constitutional protection afforded foreign citizens and the legality of the search of Abel’s art studio and his room at the Hotel Latham were key issues the Supreme Court would ultimately address and affirm (5-4) after not one, but two, hearings.¹

Today, it seems inconceivable that an attorney in his first year of practice would be given that degree of responsibility in any trial, let alone one involving national secu-

riety and receiving worldwide attention. While the government was confident of its position on the legal issues, a junior attorney could not help but be concerned about the possibility of his “getting it wrong” and “enabling a spy to go free.”

Tony was not consulted on the film, but he has been invited to share the story of the Abel investigation and trial with audiences ranging from Monroe County attorneys to Los Angeles radio listeners on the eve of the Academy Awards. When the film was first released, a full house at the Brooklyn Historical Society heard Tony’s recollections, as well as those of John Donovan, the son of the late James Donovan (Abel’s defense attorney), and other experts on Abel and the trial. A video of that presentation is available at <http://www.c-span.org/video/?400022-1/trial-soviet-spy-rudolph-abel>. I encourage you to view it.

In these pages I cannot presume to do justice to the story and details of the Abel trial, the twists and turns of the investigation, the personalities of the major characters, or the legal issues the case involved. I leave that to Tony Palermo, Steven Spielberg and his screenwriters, and to others who have researched and written on the subject.² I can, however, share some of the highlights of Tony’s recollections and note some interesting aspects of the story which I have gleaned from my conversations with him. If you love history, or spy stories, or challenging legal issues (or all three), you may enjoy reading more about these topics or considering them as you view (or review) the *Bridge of Spies* film or watch the Brooklyn Historical Society video.

- How the government learned of Abel (a KGB colonel) through Hayhanen (another KGB operative), who defected at the American embassy in Paris and told officials there was a Soviet espionage agent in the U.S.;
- How the government discovered the artist’s studio in Brooklyn rented by Abel using the false identity of a deceased NYC American citizen named “Emil Goldfus.” Note the irony that Abel went by the code name “Mark” and that the studio he rented was just across the street from the U.S. Courthouse in which he would be convicted of conspiracy to commit espionage, transmission of national security information to a foreign government and failure to register as a foreign agent;
- How the government located and lost Abel in May, and then relocated him about a month later in June and apprehended him at the Hotel Latham (not exactly as portrayed in the film!);
- The respective roles of the FBI and the INS in questioning Abel and the searches which would become the subject of the Supreme Court arguments;

- The serendipitous chain of events leading to the 1954 discovery of the famous hollowed out nickel containing an undecipherable numeric message on microfiche and Hayhanen’s role in deciphering it in 1957.

As trial lawyers tend to do, Tony retained memorabilia from his first trial, including copies of the affidavits and briefs submitted in connection with the suppression motion, and a copy of the original indictment. The entire record is available through the Library of Congress. He also has vivid recollections of the characters of Abel and Donovan and many of the memorable moments in the proceedings which reflect them.

Tony recalls Abel as a “man of quiet reserve,” polite, thoughtful, intelligent and articulate. He spoke several languages and was an artist who sketched the judge during the trial. In Tony’s view, Mark Rylance’s portrayal was “spot on” and “absolutely captured the persona of Abel.” He especially recollects early Court proceedings in which Abel was not yet represented by counsel. When the indictment was read Abel was sufficiently astute to “respectfully” request a copy. The record reflects that he was given Tony’s! At that hearing District Judge Matthew Abruzzo, who handled certain of the pre-trial proceedings, told Abel that he was entitled to an attorney—indeed two attorneys since this was a capital case. “Would two be better than one?” Abel laconically asked. “Not if the one is a good one,” replied Judge Abruzzo.

Given a week to retain counsel, Abel was unsuccessful and returned to Court. It was Abel who asked “would the Court consider asking the Bar Association for help.”

Enter Jim Donovan. Contrary to the film’s depiction of him as a rather low-key insurance attorney, at the time of the trial in 1957 James B. Donovan was a well-respected and skilled 43-year-old Brooklyn lawyer and graduate of Harvard Law School, with a distinguished record of government service, including the Nuremberg prosecutions where he served as the assistant to Justice Robert Jackson. At the behest of the Brooklyn Bar Association, Donovan agreed to take the Abel case and vigorously defended him at trial and through appeals to the Second Circuit and the Supreme Court. Five years later it would be Donovan who negotiated the prisoner exchange which would return Abel to Russia, where he died a decade later. Later in 1962 Donovan negotiated the release of over a thousand prisoners held by Cuba following the failed Bay of Pigs invasion.

Tony has high praise for the skill, courage and integrity of Jim Donovan. In a time when fear of nuclear war and communism permeated America, he agreed to defend a Russian spy accused of stealing American defense secrets. He did so at great risk to himself, his family and his career and in so doing he was considered by many “the second most hated man in America.” Notwithstand-

ing the likelihood that he would be publicly vilified, Donovan took the case believing that in America even a Soviet spy was entitled to a fair trial and a capable advocate. In the Spielberg film Donovan argues: “Who we are is our greatest weapon in this cold war.” While it is unclear whether he actually ever uttered those words, they seem to sum up Donovan’s view, and in today’s troubling times they continue to ring true.

Given Donovan’s fortitude and integrity, perhaps even patriotism, in taking the case through trial and appeal, Tony was particularly disturbed by one scene in the film. It depicted a late night visit by Donovan to the trial judge at home urging him to spare Abel the death penalty and suggesting that the time might come when Abel could be useful in a prisoner exchange.

Tony saw Donovan as a zealous and creative advocate in defending his client’s life. He may even have been prescient in anticipating what would happen five years later on the bridge in Potsdam when he argued at sentencing that it was possible that in the future an American of equivalent rank might be captured by the Soviets and use of Abel in an exchange of prisoners might be considered in the best interests of the United States. In Tony’s view, however, he would never have committed an ethical violation of the magnitude portrayed in the film. To the contrary, Donovan discussed his intention to ask the Court to spare Abel’s life in advance of sentencing and, according to Tony, the subject was formally discussed in Chambers with the Court and all lawyers present. The Government did not object to the request and did not ask for the death penalty, but did urge the Court to consider a severe punishment for the serious offense of which Abel was convicted. It is regrettable that artistic license attributed an extraordinary ex-parte communication and breach of ethics to Jim Donovan who Tony believes was a man of the highest ethical caliber.

* * *

Tony Palermo’s work on the trial of Rudolf Abel surely places him in the Hall of Fame of “legal firsts.” For Tony, the release of Spielberg’s film has provided a new focus for his seniority. It afforded him an exciting intellectual challenge and the opportunity (which he has joyously seized) to reminisce—to shed light on a major episode of American history and share his knowledge of the character and personalities of Jim Donovan and Rudolf Abel, two major players in that story. It has given him the chance to keep his mind active and to use his considerable legal prowess and experience in discussing the numerous substantive issues surrounding the case and the dearth of precedents at the time by which to resolve them.

The late William F. Tompkins, former Assistant Attorney General in charge of the DOJ’s Internal Security Division, gave Tony the priceless opportunity to participate in a trial which would be so important to the nation and to him. Tony remains deeply grateful for the faith and confidence Tompkins and the DOJ placed in him.

As Tony puts it:

Today, as I reflect upon my participation in this historic landmark trial in 1957, it is difficult for me to imagine a more memorable initiation to litigation practice. While certainly aware of my substantial involvement in a very significant Cold War event, I could not then have accurately predicted the impact this experience would have upon my future professional career. [The experience] certainly opened new career opportunities for me, including becoming an Assistant U.S. Attorney in the SDNY (which was created by President George Washington by Executive Order) and later becoming AUSA-In-Charge in Rochester, NY, my birthplace where I have engaged in the general practice of law since 1960.

For us, Tony’s recollections of the Abel investigation and trial make a real life spy drama come alive and give us the opportunity to learn history through the eyes of someone who lived it. He helps us see that the challenge of balancing privacy and security is timeless.

In Tony’s words, “*Bridge of Spies* is the gift that keeps on giving” and he has made extraordinary use of that gift. He demonstrates to all of us that while memories and reminiscences may be the products of our past, used well, as Tony Palermo has, they can be the raw materials and building blocks of our futures.

Thanks, Tony, for sharing the memories!

Endnotes

1. *U.S. v. Abel*, 362 U.S. 217 (1960).
2. Of particular note are *Strangers on a Bridge*, written by the late Jim Donovan; *Abel: The True Story of the Spy They Traded for Gary Powers* by Vin Arthey, a British historian; and a case commentary written by Professor Jeff Kahn of SMU Dedman School of Law in Dallas, which was published in the *Journal of National Security Law and Policy* in 2011.

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