

How to **(Mis) Handle** a **Defection**

By Lieutenant Commander Eugene R. Fidell,
U.S. Coast Guard Reserve (Retired)

A former Coast Guard legal officer looks back 38 years to one of the service's darkest hours—a bungled episode that became known simply as the Kudirka Case.





Simas Kudirka—from Lithuania, at the time part of the Soviet Union—was a radio operator on board the *Sovetskaya Litva* (meaning *Soviet Lithuania*), a mother ship of the Soviet fishing fleet. In connection with a conference between Soviet officials and fishing industry leaders in New Bedford, Massachusetts, the *Sovetskaya Litva* came alongside the cutter USCGC *Vigilant* (WMEC-617) on 23 November 1970, a mile off Martha’s Vineyard.

At about 1400 that afternoon, Kudirka told the *Vigilant*’s operations boss that he wished to defect and later leaped from his ship to the *Vigilant* in an effort to do just that. The Soviets learned of this and demanded his return, concocting an obvious cock-and-bull story that he had stolen money from the ship’s safe.

This presented an enormous problem. Accepting a defector under these circumstances could have had a severely corrosive effect not just on the fishery negotiations, but also on overall U.S. Cold War relations with the Soviet Union.

The *Vigilant*’s skipper, Commander Ralph W. Eustis, sought advice from the First District in Boston, where I was serving as the senior assistant legal officer. It was not a good time for a crisis, because the district commander, Rear Admiral William B. Ellis, was not on duty. Instead, he was in his quarters at Beverly, Massachusetts, on the binnacle (sick) list. Acting in his place was the chief of staff, Captain Fletcher W. Brown Jr.

Bring on the Lawyers

That the case was a hot potato is an understatement. Captain Brown consulted the admiral, which was entirely understandable, but it had severe consequences. He also consulted the legal officer, Commander Jerome V. “Jay” Flanagan, who promptly summoned the Legal Office’s lawyers for a conference. None of us had any training—much less experience—with defection issues, but we did have what I thought was a productive conversation.

Present in Boston were, among others, Lieutenant Michael H. Chanin, a direct commission lawyer who later served in the Carter administration. We tried to analyze the issues without much information and under the pressure of what was plainly an emerging crisis. It was personally exciting but professionally frustrating, because we junior officers knew vaguely what was happening but had no real opportunity to affect the course of events.

I recall proposing three alternatives. First, we could launch a helicopter from Air Station Cape Cod, bring Kudirka back, and turn him over to the Immigration and Naturalization Service and let them worry about it. Second, we could simply tell the *Vigilant* to return to New Bedford with Kudirka. Third, we could literally call the White House.

I don’t know what Commander Flanagan thought of these alternatives, or whether he even shared all of them with the chief of staff when the district’s senior officers reconvened in the front office conference room. What I do know from the ensuing investigation is that Captain Brown was advised by his senior staff that Kudirka should be retained on board the cutter until the State Department could arrange his disposition.



U.S. COAST GUARD / INSET: ASSOCIATED PRESS

A DARK DAY Coast Guard Commander Ralph W. Eustis (inset) relinquishes command of the USCGC *Vigilant* after being relieved for mishandling the defection of Lithuanian fisherman Simas Kudirka in 1970. “I have regretted the violation of his [Eustis]’ rights ever since,” the author laments.

The First Mistake

Instead, per orders of the chief of staff, Captain Brown, and at the effective direction, in turn, of Admiral Ellis, Commander Eustis was instructed to permit the Soviets to retrieve Kudirka from the *Vigilant*. Thus, the Soviets were permitted to track down Kudirka in the cutter, then dump him into the *Vigilant*'s waiting small boat. They were seen beating him both on the ship and as they made their way back to their own vessel.

All of this happened while Chief of Intelligence Captain Wallace C. Dahlgren was waiting at Headquarters for guidance from the Soviet Desk at the State Department. What happened later—short-term and long-term—is interesting, important, and disturbing.

First, my own involvement—about which I have never been asked, either for official purposes or for the book and CBS television mini-series that ultimately followed—changed to a more active role.¹ The *Vigilant* was ordered into port after the Soviets removed Kudirka from the ship. Commander Flanagan instructed me to meet her when she tied up at the State Pier in New Bedford and interview Commander Eustis.

I immediately headed for my car, but before leaving the Legal Office, I asked Commander Flanagan whether I should give Commander Eustis Article 31 warnings. He said no. In retrospect, although I understand why he

felt it was important to get the facts, the omission was wrong. I did feel that Commander Eustis was suspected of something—perhaps dereliction—and I have regretted the violation of his rights ever since.

I do not know, however, if it ever became an issue in the investigation and the adverse action that ensued. On the other hand, had we given Commander Eustis warnings, that fact would inevitably have become public, unfairly putting him in a far worse light and accelerating the press and congressional feeding frenzy the Coast Guard was forced to endure.

Relieved of Command

I raced down to New Bedford, flooring my Volkswagen Beetle all the way, but still did not arrive until shortly after the ship tied up. I took notes as I interviewed the CO and had secured his signature on a typed five-page statement when the phone rang. It was Headquarters.

Commander Eustis asked me to leave his cabin as he took the call. When he emerged, he told me he had been relieved of command. The interview was over, and I left shortly thereafter, emotionally drained, for the drive back to Boston.

Meanwhile, a media storm was beginning to darken the horizon, and a lot of running for cover followed. The State Department had been advised of the situation, although its duty officer later sidestepped responsibility. The White House—the Nixon administration—claimed the President was not even aware of the events until days later, a claim I found hard to believe even then. Interestingly, the person in the Nixon White House who appears to have been monitoring the matter was counsel John W. Dean, who later figured in the unraveling of the Watergate cover-up.

Within the Coast Guard, things got very complicated. A one-officer formal board of investigation was appointed, with the Assistant Commandant, Vice Admiral Thomas R. Sargent III, serving as the board. He was selected not only because the public outcry demanded a high-level investigation, but also because he was the only flag officer—other than the Commandant himself—who was senior to Admiral Ellis.

Counsel to the investigation was my brother—this could only happen in our little service—Lieutenant Commander



U.S. COAST GUARD (R. E. BURKE)

RUSSIAN FISHING VESSEL Soon after his ship, the *Sovetskaya Litva*, mother ship of the Soviet fishing fleet, came alongside the *Vigilant*, Kudirka expressed his intent to defect to the cutter's operations boss, setting in motion a series of missteps that led to court proceedings and extensive press coverage.

Jay M. Fidell, who was at the time the senior assistant legal officer on Governors Island, serving under Captain George H. Weller.² Jay was summarily ordered to Boston, despite the fact that he was actively involved in prosecuting a general court-martial in Cape May, New Jersey, at the time.

The Defendants

Admiral Ellis and Captain Brown were both named as parties to the investigation and were represented, respectively, by Commander Flanagan and retired Commander Laurence J. Hoch, who had previously served as First District legal officer himself. Because he was representing the admiral, Commander Flanagan stepped aside as legal officer, and I assumed that position for the duration of the investigation. Happily, I was never called to testify before Admiral Sargent, as that would have meant I would have been subject to examination by my brother as counsel for the investigation and by my boss as counsel for the admiral. In retrospect, this was all much too close for comfort, and I'm sure this would never happen today. It was a simpler age.

Admiral Sargent recommended a general court-martial for Captain Brown, a punitive letter for Admiral Ellis, and an administrative letter for Commander Eustis.

Admiral Ellis was accused of having given advice that he knew or should have known Captain Brown, and through him Commander Eustis, would treat as orders. By doing so, he improperly infringed on Captain Brown's prerogative as acting district commander. He also was accused of having given "instructions on complicated and sensitive issues having obvious national and international import without first apprising himself of established national policy."

Admiral Ellis was said to have acted beyond the authority of himself or anyone in the Coast Guard—and invaded the province of the State Department—by effectively making the final decision denying Kudirka political asylum. It is my understanding that the Coast Guard was far more unforgiving of its people in this case than was the State Department.



TOP: U.S. COAST GUARD / BELOW: ASSOCIATED PRESS

ONE-OFFICER FORMAL BOARD

The officer selected to investigate the Kudirka incident and present his findings was Vice Admiral Thomas R. Sargent (top). For their role, both Captain Fletcher W. Brown Jr. (below left) and Vice Admiral William B. Ellis, here testifying before a House Foreign Affairs Subcommittee, were forced to retire.



Fair Findings?

Whether this is a fair indictment of Admiral Ellis is still unclear in my mind. What was he supposed to do? Not take Captain Brown's phone call? Call Headquarters or the State Department from his sick bed? Was that his job, or was it the job of the acting district commander?

For acceding to, accepting, or adopting Admiral Ellis's advice, Captain Brown was charged with failing to exercise his command powers and accept his command responsibilities. He also failed to keep Headquarters informed of important changes in the case, even though he was asked to do so and required to do so as a matter of general policy in the Coast Guard.

The finding for Commander Eustis, read, in part, while he "cannot be faulted in his decision to allow Soviet crewmembers aboard his ship to remove the defector if he went willingly[,] . . . his failure to impose and exercise effective restraints on these Foreign Nationals to prevent a breach of discipline on an American Military Vessel cannot be condoned." This referred to the manhandling of Kudirka on board the *Vigilant*.

The Commandant, Admiral Chester R. Bender, concurred with Admiral Sargent's recommendation concerning the disposition of Captain Brown, but offered to substitute a punitive letter if he immediately submitted his retirement letter. As for Admiral Ellis, the Commandant disagreed with Admiral Sargent and announced that unless he applied for retirement, he would be charged. Commander Eustis got his letter and was relieved of command.

Admiral Ellis and Captain Brown retired and were taken to Commandant's Mast and issued punitive letters. Admiral Ellis took a mast appeal to then-Secretary of Transportation John A. Volpe, but it was denied. As Secretary Volpe stated in his 9 March 1971 denial: "in violation of customs of the service, [Admiral Ellis] exercised command authority while not in command and in derogation of a properly constituted authority."

Public Outrage

The press and the Congress followed the entire episode closely, including congressional hearings presided over by Representative Wayne Hays (D-OH). One reason for the heightened public attention was that U.S. fishing industry representatives were on board the *Vigilant* and saw the events unfolding with their own eyes, were outraged, and promptly reported their feelings to the press and Congress.

According to Admiral Sargent's comments in the August 2006 Academy Alumni *Bulletin*, Congressman Hays treated Admiral Bender shabbily in those hearings, which were never completed because of opposition from Hays' own constituents.³ (Admiral Sargent, incidentally, inadvertently mentions me as his counsel, whereas he in fact meant to refer to my brother. I am happy to set the record straight here.)

I never had any contact thereafter with Captain Brown, but a few years ago, I did have to communicate with Admiral Ellis on behalf of a client. He was utterly gracious and at once provided me with the information I needed. Both he and Captain Brown retired in their grades.

They are both no longer alive. Commander Eustis is, as readers of the June 2006 *Bulletin* will know.⁴ He retired in 1975. Also very much alive is Paul E. Pakos, who had been executive officer of the *Vigilant*. He went on to command Activities Europe and retired as a captain.

What Happened to Kudirka

Kudirka was taken back to the Soviet Union and jailed. He was released a little less than four years after the incident and—amazingly—wound up back in the United States. It turned out he had a valid claim to U.S. citizenship through his mother, who was born here. He lived for a time in Brooklyn, Los Angeles, and, I believe, New

Jersey. With the renewed independence of Lithuania after the Soviet Union's collapse, he returned there.

The Kudirka case was a low point for the U.S. Coast Guard. The officers in charge exercised bad judgment in permitting the Soviets to retrieve the defector. It cannot have been right by any standard to allow a foreign official to engage in physical violence on a U.S. public vessel. Whether or not it was wise for Admiral Ellis to involve himself by remote control, it was wrong for Captain Brown to abdicate his responsibility while acting as district commander in the admiral's temporary absence. If you're in charge, you're in charge; and if you're not, you're not. Clarity is all where command is at stake.

But the question remains: Were these punishable offenses? It is interesting to contemplate what a court-martial would have looked like if either Admiral Ellis or Captain Brown had turned down mast and demanded a trial.

Commander Eustis later wrote that he felt Kudirka should have been held pending instructions from the State Department, but that he had "no other choice" when Captain Brown gave him orders to permit the Soviets to retrieve the would-be defector. He believed, he wrote, in the chain of command.

Did he do the right thing? Should he have refused and paid the price at mast or in a court-martial? Should Commander Eustis have gone over Captain Brown's head and directly called the Chief of Operations at Headquarters, or the Vice, or the Commandant himself to challenge the order? It is tempting to suggest that. After all, as the *Manual for Courts-Martial*

observes, if an order does not indicate the time within which it is to be complied, either expressly or by implication, a reasonable delay in compliance is permissible.

Is such a scenario realistic? Or does realism have nothing to do with a situation where a human life is at stake? Captain Brown's order wasn't illegal, was it? In this day and age, when all kinds of things have been claimed to have been done in accordance with orders—Abu Ghraib and other cases from Iraq—it is important to note that such issues can arise in non-combat situations, where moral ambiguity may just as easily lurk.

Fallout from the Kudirka Case

Aside from the professional, military justice, and ethical issues the Kudirka case raised, it also had a broader impact on how the Executive Branch deals with non-military incidents. Along with another Coast Guard case involving the Soviet vessels *Lamut* and *Kolyvan* off Alaska in January 1972 (in which, coincidentally, I played a minor role), I believe the Kudirka case was among the reasons President Carter's National Security Adviser, Zbigniew Brzezinski, urged his boss to issue Presidential Directive 27 on 19 January 1978. Its purpose was to establish "uniform and



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A HAPPIER RETURN Simas Kudirka (left) and his wife, Cenovaite, receive a commemorative plaque four years after Kudirka's attempted defection from the commanding officer of the *Vigilant*, Commander William Goetz. Ironically, Kudirka could claim citizenship through his mother, who was born in the United States.

clearly understandable procedures" within the government "for dealing with various types of non-military incidents which could have an adverse impact upon the conduct of our foreign relations."

Was PD-27 a success? Although a post-Kudirka defection has never put it to the test (the near-defection of Ukrainian sailor Miroslav Medved in 1985 came close), it certainly seems to have had a positive impact nonetheless. In the almost three decades since it went into effect, the process has become an integral part of federal interagency operations. Fortuitously, it was in place as the maritime war against drugs began in earnest and quickly became the standard mechanism for coordinating the actions of the Coast Guard, State Department, and Department of Justice during the interdiction and seizure of foreign vessels smuggling narcotics. Similarly, when illegal maritime migration began to present a significant threat in the 1980s, it was quickly pressed into service.

As agency familiarity grew, the PD-27 process was used routinely for incidents as disparate as fisheries enforcement to the investigation of homicides occurring on board foreign-flag vessels on the high seas. The basic model has been adapted for regional interagency cooperation. In 2005, it was selected as the basic model coordination mechanism for the President's Maritime Operational Threat Response Plan. And today, the process or its deriva-

tives are used on almost a daily basis to coordinate federal interagency operations. We can consider this one lesson well-learned from the Kudirka case. Even bad fact patterns can provide valuable learning experiences.⁵ ❄️

1. Algis Rukensas, *Day of Shame*, (New York: David McKay Company, Inc., 1973). According to an article in a Lithuanian scholarly journal, the case inspired a 1975 work of fiction by another author, Margaret Kupčinskas Keshawarz, *Simas Kudirka: A Literary Symbol of Democratic Individualism in Jerzy Kosinski's Cockpit*, see *Lithuanian Quarterly Journal of Arts & Science* (Winter 1979). The television series, *The Defection of Simas Kudirka* (1978), starred Alan Arkin as Kudirka.

2. I am indebted to my brother, who has practiced in Honolulu for many years, and to Commander Flanagan's son, Brian P. Flanagan, a distinguished proctor in admiralty in Boston in his own right, for reviewing this draft.

3. VADM Thomas R. Sargent III, "The Defection of Simas Kudirka: A Commentary from the 'Other Side,'" U.S. Coast Guard Academy Alumni *Bulletin*, No. 4 (August 2006), p. 7.

4. Tom Dunlop, "The Defection of Simas Kudirka," U.S. Coast Guard Academy Alumni *Bulletin*, No. 3, (June 2006), p. 45, reprinted from *Martha's Vineyard* magazine, (Not-Summer [sic] 2005); see also Ralph W. Eustis, *Comments*, *ibid.*, p. 49.

5. The author is indebted to the Office of the Judge Advocate General of the Coast Guard for helpful information on PD-27-related developments in the intervening years.

Retired Reserve Lieutenant Commander Fidell is president of the National Institute of Military Justice and a partner in the law firm of Feldesman Tucker Leifer Fidell LLP, in Washington, DC. He also teaches military law at Yale Law School, the Washington College of Law, and American University. This article is adapted from an address he delivered to a U.S. Coast Guard Judge Advocate General's Conference at the JAG Legal Center and School, Charlottesville, Virginia.