PIERCING THE "HISTORICAL MISTS"…AND LOOKING TOWARD THE FUTURE

The Foreign Intelligence Surveillance Act and Those Who Influenced its Passage and Implementation.

By Jesselyn Radack and Diane Piette

> Some time in the 1980s—the exact moment is shrouded in historical mist—the Department applied the *Troung* analysis to an interpretation of the FISA statute[1] [and] began to read the statute as limiting the Department's ability to obtain FISA orders if it intended to prosecute the targeted agents—even for foreign intelligence crimes.[2]

With these words a never before convened super secret court proceeded to issue a ruling, in tone and manner, which sent shock waves through the executive, judicial and legislative branches of government.[3] Legal scholars, civil libertarians, the media, and law students will debate the Foreign Intelligence Surveillance Court of Review's (FISCR) findings, and the events surrounding the decision, for years to come.[4] Many will focus on

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[1] *In re: Sealed Case*, 310 F.3d 717, 727 (FISCR 2002).
[2] *Id.* at 723.
[3] Shannon McCaffrey, *Wiretap Limits Relaxed*, St. Paul Pioneer Press, 1A, 9A, Nov. 19, 2002 (article notes the various reactions to the Foreign Intelligence Surveillance Court of Review's (FISCR) decision including: Attorney General John Ashcroft—"it revolutionizes our ability to investigate terrorists and prosecute terrorist acts," Mikal Condon, Electronic Privacy Information Center—"It chips away at what were once incredibly high standards that the government had to meet to monitor U.S. citizens," Jameel Jaffer, American Civil Liberties Union—"meaningful judicial oversight has effectively been eliminated."); *see also* Washington Post, *Broad Federal Wiretapping Powers Are Upheld*, reprinted in the Minneapolis Star Tribune A7, Nov. 19, 2002 (quoting Senator Charles Grassley, R-Iowa—"the decision should untie the government's hands and help prevent terrorist attacks," and Joshua Dratel, Nat. Assoc. of Crim. Def. Lawyers—"Having found out that the court has decided the fox has eaten half the chickens, the court has decided the fox should have more authority over the chicken coop with virtually no oversight").
[4] *See generally* Michael P. O'Connor and Celia Rumann, *Going, Going, Gone: Sealing The Fate Of The Fourth Amendment*, Vol. 26 Fordham International Law Journal 1234-1264 (April 2003); Kevin Bankston, Megan E. Gray, *Government Surveillance and Data Privacy Issues: Foundations and Developments*, 3 NO.8 GLPRINLR 1 (April 2003); *see also* Associated Press, *Court OKs Government Surveillance*, The New York Times, Nov. 19, 2002 (available at http://www.nytimes.com/aponlin…/AP-Spy-Court.html?pagewanted=print&position=botto) (accessed Nov. 19, 2002); Washington Post, *Broad Federal*

the constitutional and separation of powers implications of the ruling, some will analyze the role of the judiciary in foreign intelligence decisions, others will debate civil liberties. This paper does none of the above. But as a result of its unique focus it may ultimately shed light on many of the issues raised by the events of 2002.

Defining moments in history don't just happen in a vacuum. Before any significant event occurs, all kinds of other acts—some little and some big—have taken place. And behind each of those acts are people. Like individual parts to a giant puzzle, each act and each person has its own special place in the scheme of things. Only by looking at the sequence of events and the people involved, can one hope to have any chance of putting the pieces of the puzzle together correctly; of understanding what happened and why; of seeing the complete picture.

Prior to the summer of 2002 most Americans were unaware that, in addition to the state and federal court systems they learned about in grade school, another judicial system existed that operated in total secrecy. This judicial system—created in 1978 by the Foreign Intelligence Surveillance Act (FISA)[5]—was specifically tailored to provide a check and balance between Fourth Amendment principles[6] and the government's authority to use electronic surveillance for foreign intelligence/national security purposes.[7] Americans would be even more surprised to discover that during the 24 years the hush-hush judicial system had been in existence it had "always given the government

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Wiretapping Powers Are Upheld, reprinted in the Minneapolis Star Tribune A7, Nov. 19, 2002; Editorial, *Federal Wiretap Ruling New Cause For Concern*, St. Paul Pioneer Press 16A, Nov. 22, 2002.

[5] Pub L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801-1811 (1982 & Supp. III 1985), 18 U.S.C. §§ 2511, 2518-19 (1982 & Supp. IV 1986) 2002.

[6] 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. U.S. Const. amend IV.

[7] Americo R. Conquegrana, *The Walls (And Wires) Have Ears: The Background And First Ten Years Of The Foreign Intelligence Surveillance Act of 1978*, 137 U.Pa.L.Rev. 793 (Jan. 1989).

what it wanted"[8]…until May 17, 2002. On that date the Foreign Intelligence Surveillance Court (FISC) broke decades of silence by issuing its first ever published opinion.[9] The opinion was signed by all seven judges, an "en banc" occurrence not addressed in FISA but also not unprecedented.[10] The FISC opinion dealt with modifications, minimization and "wall" procedures (separating criminal and foreign intelligence investigations) in rejecting the Justice Department's request to use the recently passed USA Patriot Act[11] to allow counterintelligence agents and criminal prosecutors to work more closely together. The seven judges appeared to be taking a stand against their perceived misuse of FISA surveillance for law enforcement purposes instead of what they believed was the statutes intended purpose—the gathering of foreign intelligence information. The FISC opinion was carefully crafted by the presiding judge, Judge Royce Lamberth, for public release by omitting references to anything classified.

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[8] Anne Gearan, Associated Press Writer, *Secret Court May Limit Government Power To Spy On Domestic Terror*, The Detroit News, Aug. 24, 2002 (available at http://www.detnews.com/2002/politics/0208/28/politics-570042.htm.) (accessed Oct. 10, 2002). The Foreign Intelligence Surveillance Court ("FISC") did issue one denial of a Department of Justice FISA application in 1981, but that denial was at the DOJ's request. Americo R. Conquegrana, *The Walls (And Wires) Have Ears; The Background And First Ten Years Of The Foreign Intelligence Surveillance Act Of 1978*, 137 U.Pa.L.Rev. 793, 822-823 (Jan. 1989). This will be discussed in more detail later.

[9] *In Re All Matters Submitted To The Foreign Intelligence Surveillance Court*, 218 F.Supp2d 611 (FISC 2002). *See* William F. Brown and Americo R. Cinquegrana, *Warrantless Physical Searches For Foreign Intelligence Purposes: Executive Order 12,333 And The Fourth Amendment*, 35 CATHULAR 97,164 (Fall 1985) (for a discussion of the reasons behind the release of the first FISC opinion by FISC Chief Judge George L. Hart, Jr. That opinion stated the FISC had no authority over physical searches for foreign intelligence purposes. *In re the Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property* (U.S.F.I.S.C., June 11, 1981), reprinted in SENATE SELECT COMM. ON INTELLIGENCE REPORT ON THE IMPLEMENTATION OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978 (1980-81), S. Rep. No. 280, 97th Cong., 1st Sess. 16-19 (1981).

[10] *See* Americo R. Conquegrana, *The Walls (And Wires) Have Ears: The Background And First Ten Years Of The Foreign Intelligence Surveillance Act of 1978*. 137 U.Pa.L.Rev. 793, 821-823 (Jan. 1989) (stating that all seven of the FISC judges concurred in a 1981 decision denying a FISA application—the only denial ever—at the governments request; *see also* Memorandum of Applicant, *In re the Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property* (F.I.S.C., June 11, 1981), reprinted in SSCI FISA Rep. 280, 97th Cong., 1st Sess. app.b. at 10-16 [hereafter Physical Search Memorandum].

[11] *See* Uniting and Strengthening America Act by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub.L. No. 107-56, Sec. 202.

When the DOJ didn't release the decision on its own, the FISC judges took the unprecedented step of releasing it to the Senate Oversight Committee (per the request of Senators Leahy, Specter and Grassley).[12]

Six months later the never before convened FISA Court of Review (FISCR) issued a stinging rebuke to the FISC judges. In a sharply worded twenty-nine page decision, the court wrote that the FISC's earlier order "not only misinterpreted and misapplied minimization procedures it was entitled to impose… [it] may well have exceeded the constitutional bounds that restrict an Article III court." [13] The court went on to say that "the 20-year-old practice of keeping the two [criminal and intelligence investigations] largely separate was never required and was never intended by Congress" in the first place.[14]

If the FISCR was correct—and just about everyone agrees with the court's ruling that the "wall" was never part of the original FISA statute[15]—it appears that a colossal misunderstanding regarding FISA had occurred, possibly from the very start. So what happened? How could so many intelligent people—congressmen and women, federal judges, Department of Justice (DOJ) officials, agency counsels, legal scholars, Attorney Generals, CIA and FBI directors, and so on—have been so wrong for so long? And why? Why did the DOJ's department responsible for implementing FISA, the Office of Intelligence Policy Review (OIPR) insist on a "wall" separating criminal and intelligence

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[12] *See* July 31, 2002 letter to FISC Presiding Judge Colleen Kollar-Kotelly from Senators Patrick Leahy, Charles Grassley and Arlen Specter requesting the release of FISC classified memorandum opinions to the "Judiciary and Intelligence Committees, and if unclassified, to the public." (available at http://www.fas.org/irp/agency/doj/fisa/leahy073102.html) (accessed May 27, 2003).

[13] 310 F.3d 717 at 731.

[14] Neil A. Lewis, *Court Overturns Limits on Wiretaps to Combat Terror*, The New York Times, nytimes.com, Nov. 19, 2002 (available at http://www.nytimes.co…/19COUR.html?ex=1038373200&pagewanted=print&position=to) (accessed Nov. 19, 2002).

[15] Telephone conversations with Dr. Morton Halperin and Kenneth Bass (both were part of the negotiation and compromise team that resulted in the 1978 Act.).

interests? Why did the OIPR seek a higher standard for FISA applications than required by statute? The answers to those questions lie in the big and small events, and the people who were a part of them, dating back almost three decades.

Setting the Stage for Putting Limits on (or Seeking Cover) for Warrantless Intelligence Surveillance

Laws are simply words written in ink on a piece of paper. People bring the words to life. Behind every statute is a story—a reason for its existence—and the people who wrote it, interpreted it and enforced it.

The Foreign Intelligence Surveillance Act was a hard fought compromise between the executive and legislative branches of government. Watergate and the abuses revealed in the Church Committee Report,[16] combined with the threat of civil and criminal liability against individuals in the government,[17] and the telephone company, had a chilling effect on warrantless electronic wiretaps.[18]

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[16] *See* 94th Cong., 2d Sess, *Final Report of the Senate Select Comm. to Study Governmental Operations With Respect to Intelligence Activities, Intelligence Activities and the Rights of Americans*, Book II, S. Prep.. No. 755, 19,139, 151-53, 169-70, 183-92, 198-202, 290 (1976) [hereinafter Church Committee Report] (available at http://www.aarclibrary.org/publib/church/reports/contents.htm).

[17] Antonin Scalia, *In Memoriam: Edward H. Levi (1912-2000)*, 67 U.Chi.L.Rev. 983, 985 (Fall 2000) (noting that in the D.C. Circuit Court decision, *United States v. Ehrlichman*—a post-Watergate prosecution involving a break-in by the "Plumbers"—two of the judges, in their concurrence, expressed their opinion (therefore the majority view) that "no intelligence or counterintelligence exception to the warrant requirement existed. That opinion placed the attorney general at "considerable personal risk with regard to all intelligence and counterintelligence approvals.").

[18] *See* Senate Judiciary Committee Subcommittee on the Constitution, Federalism and Property Rights, October 3, 2001 [hereinafter "Halperin Testimony"] testimony of Dr. Morton H. Halperin, Senior Fellow, The Council on Foreign Relations, and Chair, Advisory Board, Center for National Security Studies. Dr. Halperin was part of the committee that drafted the final legislation that became FISA. He represented the ACLU in 1978). *See also* House of Representatives, Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, *Foreign Intelligence Surveillance Act Hearings*, June 22, 1978 testimony of the Hon. Griffin B. Bell, Attorney General of the United States at 20, ("I am sued and the FBI agents are sued constantly. I think if we had a judicial warrant, we would have fewer suits because it would appear to most lawyers that a suit would be frivolous. If a judge ordered and

While the executive branch continued to assert its long-held position of "inherent authority" to authorize warrantless surveillance for "national security" purposes, the constant threat of lawsuits and the never ending Fourth Amendment challenges to the surveillance left them in a precarious position. There was always a chance that a case could make its way to the United States Supreme Court and there was no guarantee what that Court would do.

The only clue to the Supreme Court's mindset was its 1972 decision in *United States v. United States District Court* (more commonly known as the *Keith* case). [19] There, the Court held that the Nixon Administration's warrantless surveillance of domestic groups "to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of Government" violated the Fourth Amendment.[20] The Court stated the term "domestic organization" meant "a group or organization composed of citizens of the United States and which has no significant connection with a foreign power, its agents or agencies." [21] The Court's ruling left open the question of

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authorized it by court order, I think that would be the end of [the] suing business."). Another reason the government began seeking congressional authorization was that the telephone company (AT&T) had become reluctant to cooperate with DOJ wiretaps since it too faced possible litigation and liability. House Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, *Foreign Intelligence Surveillance Act Hearings*, June 28, 1978 testimony of Hon. Morgan F. Murphy, Chairman of the Subcommittee on Legislation of the House Intelligence Committee (H.Rep.. Ill.) at 64 (testifying that "the telephone company would feel much more secure, as I know the FBI agents and CIA agents will feel, with this legislation"); Telephone conversation between Diane Piette and Dr. Mort Halperin at 10:15 a.m. CST, Aug. 12, 2003 (notes on file); *see also* Antonin Scalia, *In Memoriam: Edward H. Levi (1912-2000)*, 67 U.Chi.L.Rev. 983 (Fall 2000) (noting that the D.C. Circuit Court decision in *United States v. Ehrlichman*—a post-Watergate prosecution involving a break-in by the "Plumbers"—placed the attorney general at "considerable personal risk with regard to all intelligence and counterintelligence approvals." Two of the judges, in their concurrence, expressed their opinion (therefore the majority view) that "no intelligence or counterintelligence exception to the warrant requirement existed.").

[19] 407 U.S. 297 (1972).

[20] *Id.* at 300.

[21] *Id.* at 309 n. 8.

whether surveillance of those *with* ties to a foreign power, its agents or agencies—for national security purposes—required judicial authorization as well.[22]

Edward Levi

Following the resignation of Richard Nixon in August of 1974, President Gerald Ford made an unusual, but inspired selection for his Attorney General. He appointed Edward Levi, a Washington outsider and former president of the University of Chicago Law School.[23] The fact that Levi harbored no political aspirations simply added to his credibility.[24] He was an ideological neutral and—most importantly—enjoyed enormous respect throughout the legal community as a consummate scholar and defender of the constitution.[25]

Levi's reputation for integrity and neutrality was critical in re-establishing a sense of trust in an office, and a Justice Department, that was reeling from wave after wave of damaging revelations of abuses by the executive branch. Watergate had just ended and the Church Committee hearings were in full swing. In his role as Attorney

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[22] United States Senate Committee on the Judiciary, *The USA PATRIOT Act in Practice: Shedding Light on the FISA Process*, Testimony by Mr. Kenneth C. Bass, III, Senior Counsel, Stern, Kessler, Goldstein & Fox, 1-8, 1-2, Sept. 10, 2002 [hereinafter Bass Testimony] (Bass was the first head of the Office of Intelligence Policy and Review in charge of handling all surveillance requests to the FISC and, while testifying before the FISA Oversight committee, was explaining the reason why the *Keith* case "and subsequent revelations during the Watergate investigations lead to an effort…to create a Foreign Intelligence Surveillance Court to issue judicial warrants for national security investigations.") (available at http://www.fas.org/irp/congress/2002_hr/091002bass.html) (accessed July 29, 2003).

[23] James R. Harvey III, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WMMLR 1569, 1584-85 (Summer 1996); *see also Nomination of Edward Levi To Be Attorney General: Hearings Before the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 7 (1975).

[24] Antonin Scalia, *In Memoriam: Edward H. Levi (1912-2000)*, 67 U.Chi.L.Rev. 983, 986 (Fall 2000) (noting that "Washington never did know what to make of him [because] for one thing he was too genuinely unpartisan.").

[25] *Id.*

General, Levi testified before the hostile committee about past and current DOJ practices several times.[26]

In his first appearance, Levi told the committee he firmly believed "electronic surveillance conducted for foreign intelligence purposes, essential to the national security, is lawful under the Fourth Amendment, even in the absence of a warrant, at least where the subject of the surveillance is a foreign power or agent or collaborator of a foreign power." [27] But Levi also quickly assured the committee that regardless of national security, "in no event…would [he] authorize any warrantless surveillance against domestic persons or organizations such as those involved in the *Keith* case" and that it was the DOJ's policy to always secure a Title III warrant whenever possible.[28]

In his final appearance, Levi quoted the warning of Harlan Fiske Stone, the Attorney General who created the FBI in 1924 (and appointed J. Edgar Hoover as its first director):

> There is always the possibility that a secret police may become a menace in free government and free institutions because it carries with it the possibility of abuses of power which are not always quickly apprehended or understood. It is important that its activities be strictly limited to the performance of those functions for which it was created and that its agents themselves be not above the law or beyond its reach.[29]

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[26] *See* Church Committee Report, Vol. 5: *The National Security Agency and Fourth Amendment Rights, supra* n. 17, *Testimony of Hon. Edward H. Levi, Attorney General of The United States,* Before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, at 66-130 (Nov. 6, 1975) (available at http://www.aarclibrary.org/publib/church/reports/vol5/html/ ChurchV5_38a.htm) (accessed Aug. 8, 2003); Church Committee Report, Vol 6. *Testimony of Hon. Edward H. Levi, Attorney General of The United States*, 313-330 (Dec. 11, 1975) (available at http>//www.aarclibrary.org/publib/church/reports/vol6/pages/ChurchV6_0163B.gif) (accessed on Aug. 8, 2003).

[27] *Id.* Vol. 5 at 82, 107.

[28] *Id.* at 113 (Levi told the committee "I assure you that it is much easier for me to sign the title III than it is to handle these [foreign surveillance] cases.").

[29] Church Committee Report, Vol. 6, *Testimony of Hon. Edward H. Levi, Attorney General of The United States*, at 314, *supra* n. 22.

While acknowledging that Stone's warning "must always be considered relevant," Levi argued it didn't necessarily mean traditional counterintelligence investigations should cease. [30] Levi assured the senators that a system of rules could be developed within the agency to prevent future abuses, and he told the senators he already had a committee in place drafting appropriate guidelines.[31] "26 or 27 drafts" later, Levi was finally satisfied[32] and in March of 1976, he implemented the first ever written rules for the FBI dealing with counterintelligence surveillance investigations—rules that quickly became known as the Levi Guidelines. [33]

Levi impressed the Church Committee. They singled him out for praise in their final report writing, "Attorney General Edward H. Levi has exercised welcome leadership by formulating guidelines…developing legislative proposals requiring a judicial warrant for national security wiretaps…initiating investigations of alleged wrongdoing…and cooperating with [the] Committee's requests for documents."[34] Still, the final report issued by the Church Committee in 1976 was devastating to the FBI and

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[30] *Id.*

[31] *Id.* at 316-17 (identifying a "committee within the Department of Justice, chaired by Mary Lawton, Deputy Assistant Attorney General in the Office of Legal Counsel…has been working for 8 months reviewing FBI procedures…and drafting guidelines to govern those procedures in the future. Some of the proposals could be promulgated as departmental regulations. Congress may feel some ought to be enacted into statutory law."); *see also* Jim McGee & Brian Duffy, *Main Justice: The Men and Women Who Enforce The Nation's Criminal Laws and Guard its Liberties*, 310 (Simon & Schuster 1997) (noting that that "system of rules" became known as the Levi Guidelines); FBI Statutory Charter: Hearings Before the Subcomm. On Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 93-115, 93 (1978) testimony of Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice that "ultimately the Attorney General [Edward Levi] approved what I believe [was] the 26th or 27th draft [of the Levi Guidelines] which the FBI operates under today."

[32] Edward Levi, *Guidelines by Attorney General Edward Levi on Domestic Intelligence*, March 1976 (available at http://www.derechos.net/paulwolf/cointelpro/leviguidelines.htm) (accessed on Aug. 2, 2003). Levi drafted and implemented his voluntary guidelines in an effort to dissuade Congress from passing legislation making them mandatory. It took 27 or 28 drafts of the guidelines before Levi was satisfied with the end result. *Supra* n. 31 (testimony of Mary C. Lawton before the Senate)

[33] *Id.*

[34] Church Committee Report, Book II, *Intelligence Activities and the Rights of Americans*, 274 (available at http://www.aarclibrary.org/publib/church/reports/book2/pages/ChurchB2_0145b.gif) (accessed on Aug. 28, 2003).

the Justice Department. The report documented decades of abuse by the executive branch to secretly wiretap and search hundreds, if not thousands, of people [35] and it revealed that many times the secret surveillance had nothing whatsoever to do with national security or criminal activity.[36] As a result of the Church Committee Report, Congress began exploring various ways to rein in the executive branches warrantless intelligence surveillance practices.[37]

Following the release of the Church Committee Report, there was little question that some sort of legislation would be passed. The goal for Levi was (1) to convince Congress that the DOJ was serious about addressing past abuses (which he did with the implementation of the Levi Guidelines), [38] and (2) if Congress was determined to pass a law addressing the executive branches electronic surveillance practices, he wanted to have input and control over what the final bill would look like (in order to preserve as

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[35] *See* Church Committee Report, Book II, S. PREP. NO. 755, 94th Cong., 2d Sess, 19,139, 151-53, 169-70, 183-92, 198-202, 290 (available at http://www.aarclibrary.org/publib/church/reports/contents.htm); *see also* Americo R. Cinquegrana, *The Walls (And Wires) Have Ears: The Background and First Ten years of The Foreign Intelligence Surveillance Act of 1978*, 137 U.Pa.L.Rev. 793, 806-07 (Jan. 1989) (for an in depth discussion concerning the history of the enactment of FISA).

[36] Cinquegrana at 807; Church Committee Report, Book II, *Intelligence Activities and the Rights of Americans*, 272-273 (noting the "FBI was used by White House officials to gather politically useful information...[t]his misuse…contributed to the atmosphere in which abuses flourished"); Mark Rasch, *America's Domestic Spying Renaissance*, BusinessWeek Online, June 28, 2002 (noting that Watergate-era revelations revealed "that the bureau had engaged in extensive surveillance of political and religious groups for unlawful purposes" including "disrupting the lives and careers of those it considered to be disloyal to America" (i.e., Martin Luther King)) (available at www.businessweek.com).

[37] Indeed, during questioning of Attorney Levi while appearing before the Church Committee, Senator Gary Hart (Colo.) asked about the establishment of a congressional oversight committee to which the DOJ would bring their surveillance requests. Levi responded that he believed Senator Hart's proposal would "raise serious constitutional problems." Church Committee Report, Vol. 5 at 126.

[38] Edward Levi, *Guidelines by Attorney General Edward Levi on Domestic Intelligence*, March 1976 (available at http://www.derechos.net/paulwolf/cointelpro/leviguidelines.htm) (accessed on Aug. 2, 2003). Levi drafted and implemented his voluntary guidelines in an effort to dissuade Congress from passing legislation making them mandatory. It too 27 or 28 drafts of the guidelines before Levi was satisfied with the end result. *Supra* n. 31 (testimony of Mary C. Lawton before the Senate); *see also* Mark Rasch, *America's Domestic Spying Renaissance*, BusinessWeek Online, June 28, 2002 (noting that attorney general, John Ashcroft was removing the voluntary restrictions contained in the Levi Guidelines that had been in place since 1976) (available at http://www.businessweek.com:/print/technology/ content/jun2002/tc20020627_3227.htm?tc) (accessed Aug. 2, 2003).

much of the executive's "inherent authority" on national security matters as possible).[39] Years later, U.S. Supreme Court Justice Antonin Scalia, remarked that his former boss's tenure as Attorney General was a constant battle to preserve the principle of separation of powers: "He took over a discredited Justice Department, in a beleaguered Executive Branch, immeasurably weakened in the competition between the two political branches."[40]

To make matters worse, in addition to dealing with Congress and a demoralized DOJ, Levi also had another problem—the courts. During his tenure as Attorney General, the D.C. Circuit Court decided a case called *United States v. Ehrlichman*—a post-Watergate prosecution involving a break-in by the "Plumbers."[41] In his defense, Ehrlichman, the former assistant to the President, argued that the activity he had authorized was a national security, counterintelligence operation and therefore not illegal.[42] The three-judge panel rejected that defense because Ehrlichman could not show presidential authorization for his approval of the activities.[43] But two of the judges wrote a separate concurrence expressing their view (and therefore the majority opinion) that no intelligence or counterintelligence exception to the Fourth Amendment warrant procedure existed.[44] That view, according to Justice Scalia, placed Levi, and any future attorney general, "at considerable personal risk with regard to all intelligence and counterintelligence approvals."[45] Lawsuits became a regular occurrence.[46]

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[39] *Supra* n. 31.
[40] Antonin Scalia, *In Memoriam: Edward H. Levi* (1912-2000), 67 U.Chi.L.Rev. 983 (Fall 2000).
[41] *United States v. Ehrlichman*, 546 F.2d 910 (D.C.Cir. 1976).
[42] *Id.* at 913
[43] *Id.*
[44] *Id.* at 934-40
[45] Scalia, *In Memoriam: Edward H. Levi (1912-2000)* at 985.
[46] *See* House of Representatives, Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, *Foreign Intelligence Surveillance Act Hearings*, June 22, 1978

While the executive branch continued to believe it had inherent authority to conduct wiretaps it had to face the reality that neither the telephone company nor any government official was willing to approve an electronic wiretap—without a Title III warrant—for fear of the potential legal consequences.[47] The government's ability to conduct wiretap surveillance for foreign intelligence purposes was quickly drying up.[48] Levi sought to minimize the risk through controlled congressional legislation and he turned, once again, to the Assistant Deputy Attorney General in the Office of Legal Council who had written his Levi Guidelines, to draft a foreign intelligence statute.[49]

In an ironic twist, 24 years later the FISCR would write that the "the 20-year-old practice of keeping the two [criminal and intelligence investigations] largely separate was never required and was never intended by Congress" in the first place.[50] The FISCR pinpointed "sometime in the 1980s" as the period when the FISA statute began to be misinterpreted.[51] However, that seems highly unlikely since the person responsible for

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testimony of the Hon. Griffin B. Bell, Attorney General of the United States at 20, ("I am sued and the FBI agents are sued constantly. I think if we had a judicial warrant, we would have fewer suits because it would appear to most lawyers that a suit would be frivolous. If a judge ordered and authorized it by court order, I think that would be the end of [the] suing business.").

[47] In fact, Levi testified before the Church Committee (Vol. 5, 82) that at that time there was "no warrantless electronic surveillance directed against any American citizen" and that while it was "conceivable that circumstances justifying such surveillance may arise in the future" he would not "authorize the surveillance unless it is clear that the American citizen is an active, conscious agent or collaborator of a foreign power." Levi's "qualifications" for approving warrantless surveillance later became the basis for FISA.; *see also* Senate Judiciary Committee Subcommittee on the Constitution, Federalism and Property Rights, October 3, 2001 [hereinafter "Halperin Testimony"] testimony of Dr. Morton H. Halperin, Senior Fellow, The Council on Foreign Relations, and Chair, Advisory Board, Center for National Security Studies. Dr. Halperin was part of the committee that drafted the final legislation that became FISA. He represented the ACLU in 1978). Another reason the government began seeking congressional authorization was that the telephone company (AT&T) had become reluctant to cooperate with DOJ wiretaps since it too faced possible litigation and liability. Telephone conversation between Diane Piette and Dr. Mort Halperin at 10:15 a.m. CST, Aug. 12, 2003 (notes on file).

[48] Telephone conversation on August 12, 2003 at 10:15 a.m. CST with Mort Halperin, Director of Washington Division of the Open Society Institute.

[49] *Supra* n. 31; *Main Justice* at 310-313

[50] Lewis, *Court Overturns Limits on Wiretaps to Combat Terror, supra* n. 14.

[51] *In re: Sealed Case*, 310 F.3d 717, 723, 727 (FISCR 2002) (court says the "misguided interpretation goes back 20 years" placing the beginning of the misinterpretation in 1982); *see also supra* n. 14 (Neil A. Lewis,

interpreting FISA for the Department of Justice in the 80s was the same person who not only drafted the original version of FISA in 1975 for Levi, [52] she was part of the intense negotiations and compromises under the next administration's Attorney General (Griffin Bell) that ultimately resulted in the passage of the Foreign Intelligence Surveillance Act by Congress in 1978.[53] Furthermore, from January 1982 until her untimely death in October 1993, this same woman was the head of the Office of Intelligence Policy and Review (OIPR)—the central clearinghouse for submitting surveillance requests to the FISC—during what has been called OIPR's "golden era." [54] Throughout her almost twelve year tenure as OIPR's general counsel, she was known for routinely providing informal contact between FBI agents and prosecutors.[55]

Her name was Mary C. Lawton.

Mary C. Lawton—The "Career" Lawyer

Court Overturns Limits on Wiretaps to Combat Terror, The New York Times, nytimes.com, Nov. 19, 2002 (available at http://www.nytimes.co…/19COUR.html?ex=1038373200& pagewanted=print&position=to) (accessed Nov. 19, 2002)).

[52] Dec.11, 1975 testimony of Edward Levi before the Church Committee, Vol. 6, page 316 (identifying Deputy Assistant Attorney General, Mary Lawton as chairing a committee within the Department of Justice to draft FBI guidelines—which later became known as the Levi Guidelines—as well as draft language for a statute addressing intelligence surveillance to be called the Foreign Intelligence Surveillance Act.). *See also Main Justice* at 311-13. Levi was unsuccessful in getting the new law for conducting electronic surveillance in national security investigations (called the Foreign Intelligence Surveillance Act (FISA) approved by a leery and distrustful Congress. *Main Justice* at 312.

[53] *Main Justice* at 313 (noting that a very reluctant and distrustful Congress ultimately passed FISA based on Attorney General Griffen Bell's promise before the Senate Select Committee on Intelligence that DOJ lawyers would police the FISA process saying "There are some honest people left." Bell promised that when Justice Department attorneys went into the secret FISA court hearings, "we will be fair with the court, candid and we won't go unless we have reason to.").

[54] Vanessa Blum, *Roadblock at Justice? Some Say an Obscure DOJ Unit Has Hindered the Terrorism Fight*, Vol. 25, No. 35, Legal Times, Sept. 9, 2002 (noting that following Lawton's death in 1993, there was a crack down on what had been routine contacts between FBI agents and prosecutors and it was from that point on that OIPR came to be viewed as a roadblock by both the FBI and the Criminal Division).

[55] *Id.*

Mary C. Lawton was a "force of nature." Words like brilliant and genius, incorruptible and eccentric have all been used to describe her.[56] Relatively unknown to outsiders, she was revered in the halls of the Department of Justice, succeeding in a field dominated by men.[57] Today, the Justice Department's prestigious Life Achievement Award carries her name.[58]

Mary Lawton graduated first in her law school class at Georgetown,[59] entered the Department of Justice in 1960 through the Honors program and quickly worked her way up the ladder, earning a slew of awards and commendations along the way.[60] She worked under 13 different Attorney Generals, counted Supreme Court Justice Antonin Scalia as one of her former bosses,[61] and met every president since Truman.[62] In a book, written about the inner workings of the Department of Justice in 1996, *Main Justice: The Men and Women Who Enforce the Nation's Criminal Laws and Guard Its Secrets*, Mary Lawton was described with the following words:

> In the modern age of intelligence gathering and federal law enforcement, no one was more important to the management of the most critical legal issues binding the two communities than a Justice Department lawyer named Mary Lawton…Lawton was possessed of one of the most brilliant legal minds of her

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[56] *Main Justice* at 304. Telephone conversations with Dr. Morton Halperin, Kenneth Bass.
[57] *Main Justice* at 304-306 (At Lawton's memorial service held in the Great Hall of Main Justice Attorney General Janet Reno announced that she was naming the prestigious Justice Department's Life Achievement Award after Lawton. FBI Director Louis Freeh followed Reno and appointed Lawton a special agent of the FBI, an honor that had been bestowed only eighteen times in history, mostly on retired presidents and attorneys general). *See also* William Funk, *Government Service Award Named For Mary Lawton*, 19-SPG ADMRLN 5, Spring 1994.
[58] *Id.*
[59] William Funk, *Government Service Award Named For Mary Lawton*, 19-SPG ADMRLN 5, Spring 1994.
[60] *Id.* (noting that through the years Lawton earned a Sustained Superior Performance Award, two Special Commendation Awards, the John Marshall Award, the Distinguished Service Award and the Attorney General's Exceptional Service Award for her work in OIPR).
[61] *Id.* (noting that Lawton's former boss and Supreme Court Justice Antonin Scalia delivered a funeral oration at her funeral mass).
[62] *Main Justice* at 305.

> generation, and she used her intellect to construct the legal framework in which the nation's spies and spy chasers were required to operate.[63]

Lawton was the interface between the intelligence gatherers and federal law enforcement. When the FBI, the Central Intelligence Agency, the National Security Agency and the Defense Intelligence Agency had questions concerning the legality of anything dealing with intelligence issues, they headed straight to her office.[64]

Mary Lawton was a career lawyer. But more than that, Lawton was part of a fraternity of super-senior DOJ attorneys—roughly 20—who were recognized as having more permanent influence on the DOJ than the transient political administrations that controlled the more visible positions.[65] This "high priesthood" felt it was their mission to guard the "institutional soul of DOJ," a mission that transcended attorney generals.[66] In an almost prophetic statement made the year before his appointment as the FISC's presiding judge, D.C. District Court Judge Royce Lamberth said:

> The great ability of…senior career lawyers is in making sure…political leaders have the background and knowledge to make the decisions they have to make. They know how matters have been interpreted over a long time. They can tell a new administration how its positions compare to past positions and where the attacks will come from. [They] have a unique perspective in making sure the department acts in accordance with the law rather than what is politically expedient at the moment."[67]

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[63] *Main Justice* at 304.
[64] *Id.* at 306. Attorney General Griffin Bell said, "She was probably the only person in government who interfaced with all these agencies…and she was the one they trusted most."
[65] DOJ Alert, *Recent Departures Deplete DOJ's Inner Sanctum*, 4 No. 16 DOJALT 4, September 5-19, 1994.
[66] DOJ Alert, *Recent Departures Deplete DOJ's Inner Sanctum*, 4 No. 16 DOJALT 4, September 5-19, 1994.
[67] *Id.* The value of "career lawyers" impartiality and ability was recently touted by Senator Arlen Specter (R. Pa) in connection with the investigation into the source of the disclosure of an undercover C.I.A. officer's identity. Carl Hulse and Richard W. Stevenson, *Democrats Want Ashcroft Out of Inquiry*, The New York Times, Oct. 3, 2003 (available at http://www.nytimes.com/2003/10/03/politics/03LEAK.html) (accessed on Oct. 3, 2003).

Mary Lawton took that responsibility to heart and through the years earned the trust and admiration of every new administration appointee.[68]

Among her many achievements over the years, Lawton helped write the Freedom of Information Act,[69] headed up the committee that wrote the Levi Guidelines,[70] drafted the original version of the Foreign Intelligence Surveillance Act,[71] and ran the Office of Intelligence Policy and Review—the department that acted as the interface between the intelligence community and the FISC court—for almost twelve of its first fifteen years of existence.[72] She was known as an "exacting master" who "would frequently butt heads with intelligence agencies," [73] but under her leadership, OIPR "earned a reputation for high standards and scrupulous integrity." [74]

While Lawton had spent the bulk of her career—prior to running OIPR—writing legal opinions, department guidelines and legislation, and then making the crucial rulings and decisions interpreting those provisions for the DOJ, she strongly believed that some things were better "left undefined."[75] Lawton never issued written guidelines for her

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[68] *Main Justice* at 306 (At her memorial service former Attorney General Griffin Bell said, "She was probably the only person in government who interfaced with all the agencies…and it turned out she was the one they trusted most.").

[69] *Id.* In an interesting side note, when the FBI refused to give her a copy of their internal telephone directory claiming it was a confidential document, Lawton promptly filed a request under her Freedom of Information Act to secure one.

[70] The Church Report, *Testimony of Hon. Edward H. Levi, Attorney General of The United States,* Vol. 6, 316-317, 321, December 11, 1975 (acknowledging that Lawton was chairing a committee working on drafting FBI guidelines as well as drafting guidelines for counter-espionage investigations and stating that Congress might feel some of the guidelines should be enacted into law.). *See also supra* n. 31 (testimony by Lawton that Levi finally approved what she thought was the 26th or 27th draft of the guidelines).

[71] *Id.*

[72] Lawton was appointed head of OIPR in January 1982 by President Ronald Regan's first attorney general, William French Smith. *Main Justice* at 314. Lawton's tenure as head of OIPR has been called the "golden era." Contact between FBI agents and prosecutors on intelligence matters was regularly facilitated by her. Blum, *Roadblock at Justice? supra* n. 54.

[73] Blum, *Roadblock at Justice? supra* n. 54.

[74] *Id.*

[75] *Main Justice* at 306, 316-17 (relating an interesting story of Lawton dissuading Congressional lawyers from further defining "assassination" by pointing out that their definition would have eliminated the option of an Entebbe type raid).

small OIPR office of five lawyers, perhaps in part because she didn't feel the need since she was the DOJ's expert on FISA (and anything else having to do with the world of counterintelligence), and, if questions arose, everyone knew where to find her.[76] "Running something by Mary" before taking action was a standard practice for the FBI, CIA, NSA and the DIA.[77] She was known for providing "fast answers that would settle the vexing legal questions that invariably" came with the job for "investigators who chased spies and terrorists and senior managers of the nation's foreign intelligence-gathering agencies." [78]

During Lawton's tenure as Counsel for OIPR, she was also known for making sure that the FBI regularly and informally briefed the Criminal Division prosecutors to ensure that "investigative steps by the FBI would not under cut a potential prosecution and that intelligence probes would not be unduly prolonged at the expense of a prosecution." [79] In fact, in the very last article Mary Lawton ever wrote, which was published after her death, she noted that "attorneys from the intelligence agencies frequently consult on an informal basis with attorneys of the Department of Justice, who specialize in intelligence matters."[80]

There was no "wall" on Mary's watch.

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[76] Blum, *Roadblock at Justice? supra* n. 54; *Main Justice* at 315.
[77] *Main Justice* at 304-06.
[78] *Id*.
[79] George Lardner Jr., *Report Criticizes Stumbling Block Between FBI, Espionage Prosecutors*, Washington Post, Dec. 13, 2001 (noting the Bellows Report, a 778-page report detailing the bungled Wen Ho Lee investigation, found that under Lawton, the Criminal Division was regularly and informally brief by OIPR). Note: The Bellows Report is available at http://www.usdoj/ag/readingroom/bellows. *See also* Vanessa Blum, *Roadblock at Justice? Some Say an Obscure DOJ Unite Has Hindered the Terrorism Fight*, Vol. 25, No. 35, Legal Times, Sept. 9, 2002 (noting that during Lawton's tenure as head of OIPR there were "routine contacts between FBI agents and prosecutors" but that practices was stopped following her death).
[80] Mary C. Lawton, *Review and Accountability in the United States Intelligence Community*, OPTIMUM, The Journal of Public Sector Management, 101-104, 103 (Autumn 1993).

United States v. Troung Dinh Hung

Nor—contrary to the assertion by the FISCR—was the *Troung* case ever an issue with Lawton or the OIPR during the 1980s.[81] In fact, as will soon become clear, senior lawyers within the DOJ considered *Troung* irrelevant once Congress passed FISA.

Troung involved the authorization by both President Jimmy Carter and Attorney General Griffin Bell for warrantless electronic surveillance and physical searches of a suspected agent of the government of Vietnam and the U.S. citizen believed to be providing the Vietnamese spy with classified American documents.[82] The surveillance occurred between May 1977 and January 1978 (prior to the passage of FISA). However, in mid July of 1977, internal DOJ documents indicated the focus of the surveillance had shifted from "gathering foreign intelligence" to discussing availability of documents and witnesses for a criminal trial.[83] It was that shift in "purpose" that led the district court to rule that—at that point—a Title III warrant should have been secured as the "primary focus of the investigation had shifted away from foreign intelligence gathering," noting "little by way of foreign intelligence occurred after June 1977 but the taps remained." [84]

The court ruled (and the Fourth Circuit affirmed) that evidence secured after mid-July 1977 was suppressed as it was clear that—from that point on—the investigation had become primarily a criminal investigation and therefore the defendant's Fourth Amendment rights had been violated (since no judge had approved the surveillance).[85]

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[81] *In re: SEALED CASE*, 310 F.3d 717 (FISCR 2002) (discussing *United States v. Troung Dinh Hung*, 629 F.2d 908 (4th Cir. 1980).
[82] *United States v. Troung Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); *see also Main Justice* at 325-326.
[83] *United States v. Troung Dinh Hung*, 456 F.Supp. 51, 59 (D.C.Va. 1978).
[84] *Id.*
[85] *Id.*; *Troung*, 629 F.2d at 916.

The federal district court decision in Virginia was handed down in 1978 and the appeal was decided by the Fourth Circuit in 1980.

Troung drew a lot of attention within the halls of the DOJ for the simple reason that Attorney General Griffen Bell was forced to testify before the district court to justify the department's actions (and his approval of the surveillance measures) at a hearing on a motion to suppress evidence obtained from the warrantless physical searches and electronic surveillance.[86] It is unusual for an Attorney General to be subpoenaed to testify in court by the defendant, and that alone made this case standout at the DOJ.[87] In fact, as will be shown later, it was just such a possibility—an attorney general being hauled into court again—that was instrumental in the creation of the "wall" fifteen years later.

As the Deputy Assistant Attorney General in the Office of Legal Council during the time *Troung* was making its way through the court system, and later as the head of OIPR, Mary Lawton knew all about *Troung* and its relationship to FISA.[88] Furthermore, since *Troung* involved questions concerning warrantless foreign intelligence surveillance *without* judicial authorization—an issue at the heart of, and addressed by, the FISA legislation Lawton helped write and get passed into law—Lawton followed the case closely.[89]

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[86] *Troung*, 629 F.2d at 916; *Troung*, 456 F.Supp. 51.
[87] *Id.*
[88] Foreign Intelligence Surveillance Act: Oversight Hearings Before the Subcomm. On Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 98 th Cong. 1st. Sess. 6, 2-25, 24 (June 8, 1983) testimony by Mary C. Lawton, Counsel for Intelligence Policy, Office of Intelligence Policy and Review, Department of Justice [hereinafter Lawton's 1983 Testimony] (distinguishing *Troung-Humphrey* decision as a pre- versus post-FISA case and not applicable since the FISA process provides judicial authorization for the surveillance).
[89] *Id.* It's important to note that one of the most crucial pieces of FISA was the creation of a separate judicial court whose job was to oversee the issuance of surveillance orders (warrants) as long as the affidavit met the FISA requirements. Therefore, the *Troung* courts concern—that surveillance was

Lawton was legendary for her ability to "rattle off the history of intelligence decisions taken in past administrations…and recall with precision the positions each of the various government agencies took over the years" as well as the court decisions and laws passed that applied to the various positions espoused.[90] Lawton put that ability on display while testifying before the House Committee on the Judiciary about FISA in 1983.[91] In direct questioning from congressmen about the logic of *Troung* to the FISA process even though *Troung* was a "pre-FISA surveillance case,"[92] Lawton responded, "[O]ne judge says, "Yes," and one judge says, "No," and then she went into a detailed explanation why, in addition to the fact that *Troung* was a pre-FISA case, the facts of the case alone made it rare in the world of counterintelligence surveillance:

> [T]he *Troung-Humphrey* case, on its own facts, was more like a…case where prosecuting the two individuals wraps up the whole problem. The foreign power to which they were reporting was outside this country, there were two individuals involved…[and] no others with any connection inside this country. That fact pattern has been different from what we faced…in Provisional IRA cases, where the IRA goes on with or without the prosecution…and the efforts to purchase guns go on. So, on its facts, *Troung* may be distinguishable, besides the whole issue of pre-versus post-FISA.[93]

Lawton was then asked point-blank if it wouldn't "be more appropriate for a Title III warrant to be required rather than continue [with] a foreign intelligence surveillance warrant…when "the focus of the investigation" changes "from intelligence to criminal?" She responded:

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continued without a judicial warrant in place—was fully addressed in FISA since no surveillance could take place without a FISC judge's approval.

[90] *Main Justice* at 317 (quoting Mark Richard, the senior career lawyer in the Criminal Division specializing in national security affairs).

[91] Lawton's 1983 Testimony, Foreign Intelligence Surveillance Act Hearings, *supra* n. 88. Lawton was a familiar figure on Capitol Hill. Between 1972 and 1990, she testified before either the House or the Senate on 43 different issues concerning the DOJ (including FISA) for a total of 109 times.

[92] *Id.* at 24 (questioning by Senator Kastenmeier, Chairman of the Subcomm. On Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary).

[93] *Id.*

> Generally speaking, these continue to be intelligence cases. Several of the cases that I cited in the circuits, the criminal information was purely incidental to an intelligence investigation. In others, even in the international terrorism cases which are more likely to go to prosecution, the apprehension of a single terrorist does not …stop the international terrorist organization…We have a broader intelligence interest in the entire international terrorism framework than we do in the prosecution or not of that individual, so that the intelligence needs and the intelligence purpose continue even though there may be a prosecution[94]

Lawton went on to say:

> As you are well aware, we have had the argument made in litigation that there should come a time when you convert from FISA to Title III if you believe there is going to be a prosecution. We have yet to see a fact pattern, nor have the courts, where that has been the case. I'm not ruling it out as a possibility. With a single target with no other ramifications, it is possible that the prosecution of that one individual would end our interest. In that case, it is possible that we would have to go to Title III. But, up to now, that has not been the fact pattern. [95]

Lawton made it clear that *Troung*, in her opinion, had been a rare anomaly in the world of counterintelligence.

As previously mentioned, Lawton was the second person to take over the reins of OIPR. However, there was no chance that the department's first boss misunderstood the importance of *Troung* either. Ironically, Kenneth C. Bass III, the man who created and was the very first head of OIPR, not only was aware of *Troung*, he was *intimately* involved with the case. During the late 70s, Bass was a senior lawyer in the Office of Legal Counsel (along with Mary Lawton) and personally argued the *Troung* appeal for the government before the Fourth Circuit.[96] In testimony before the Senate Oversight

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[94] *Id*. at 22-23.
[95] *Id*.
[96] United States Senate Committee on the Judiciary, *The USA PATRIOT Act in Practice: Shedding Light on the FISA Process*, Testimony by Mr. Kenneth C. Bass, III, Senior Counsel, Stern, Kessler, Goldstein & Fox, 1-8, 3, Sept. 10, 2002 [hereinafter Bass 2002 Senate Testimony] (Bass stated "I argued on appeal that the District Court correctly upheld the validity of the early searches, but had erroneously adopted the "primary purpose" test to suppress evidence obtained after July 20." Bass went on to note that the Fourth Circuit characterized the government's position differently from the argument he had made and affirmed the District Court's reliance on the "primary purpose" test.) (available at http://www.fas.org/irp/congress/2002_hr/091002bass.html) (accessed July 29, 2003); *Troung*, 629 F.2d 908.

Committee in September 2002 (two months before the FISCR issued its opinion) Bass talked about his role in creating, and being, the first head of the Office of Intelligence Policy and Review, and the relevance—or lack of relevance—of *Troung* to OIPR's procedures.[97] Bass was clear that he *never* considered *Troung* applicable to the FISA process:

> The Troung decision involved searches and surveillances undertaken without any prior judicial approval…and was concerned with the limits of warrantless surveillance in a prosecution context. That concern is absent whenever a FISA order has been issued…since FISA searches have been authorized by an Article III judge under the FISA procedures. Thus the basis for concern about the "primary purpose" of an FBI surveillance is not present when a FISA order has been obtained. [98]

Bass told the committee that he and his staff in OIPR:

> [W]ere totally comfortable with an understanding that if the purpose for undertaking the surveillance was to gather information about the activities of agents of foreign powers *that was not otherwise obtainable*, then "the purpose" of the surveillance was to gather foreign intelligence…Dissemination and use of the information for criminal law enforcement purposes was expressly authorized by FISA and that use did not, to us, affect "the purpose" of the surveillance… Counterintelligence investigation of U.S. persons always contemplated a possible criminal prosecution.[99]

Bass went on to tell the Senate Oversight Committee that the "key provision" for him in FISA was actually the "certification language" restricting the authorization authority to Executive Branch officials "employed in the area of national security" and requiring the personal approval and signature of the Attorney General certifying that the request was for *foreign intelligence* purposes. [100] Only then would the request be submitted to the FISC. That authorization process, Bass said, was a direct response to the

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[97] Bass 2002 Testimony at 3.
[98] Bass 2002 Testimony at 3-4.
[99] *Id.* at 4. Emphasis added.
[100] *Id.*

U.S. Supreme Court's ruling in *Keith*[101] that surveillance of domestic organizations *which had no significant connection to a foreign power, its agents or agencies* without a warrant, was unconstitutional. For Bass, any lingering questions concerning the constitutionality of counterintelligence surveillance was settled once and for all when FISA was passed establishing the Foreign Intelligence Surveillance Court (FISC) to issue judicial orders for national security investigations.[102]

The same was true for Mary Lawton. In her last public comments about FISA, in an article written by her and published after her death, Lawton took great pains to detail the FISA authorization process noting that:

> When setting the requirements for agency head certification and approval, Congress was well aware that this would entail multiple levels of review within the agencies concerned…ensuring extensive review and fixed accountability. The head of the relevant intelligence agency…and the Attorney General of the United States must [each] certify personally that the purpose of the application [to the FISC] is to collect foreign intelligence. [F]inally, the judge must sign the order authorizing the surveillance.

According to Lawton, the rationale behind the time-consuming approval process was simple:

> The conscious use of bureaucratic processes is the principal preventive measure…[against] ill-conceived or abusive use of intelligence agencies. It…not only force[s] careful consideration in advance of intelligence operations, but also document[s] the action taken and the person responsible, for later review.[103]

It is clear that, contrary to the FISCR's assertion, *Troung* was a non-factor at the Justice Department (and particularly within the OIPR) during the 1980s. The FISCR was wrong. Neither Kenneth Bass III nor Mary Lawton—the only people in charge of OIPR

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[101] 407 U.S. 297 (1972).
[102] Bass 2002 Testimony at 4.
[103] Lawton, *Review and Accountability in the United States Intelligence Community*, at 104 (Lawton also noted that the "bureaucratic paper flow in a linear fashion" up the chain of command allowed "each position in the chain of command…the opportunity to kill a proposal, either by refusing to send it forward, or by sending it backward with questions or suggestions for change. Paper reaching the final level of approval…reflects the consensus [including the dissents] of those who have reviewed it along the way.").

from its creation in 1979 until 1993—*ever* considered *Troung* relevant to FISA nor did they *ever* advocate any kind of "wall." Communication between the DOJ's law enforcement and intelligence agencies was routine on their watch. The "wall" came later—along with the incorrect analysis of the importance of *Troung* to the FISA process—for one simple reason. Mary Lawton died.

MARY'S DEATH AND THE "WALL"

In mid October of 1993, Mary Lawton had routine back surgery.[104] While recovering at home from the operation, she died unexpectedly of a cerebral embolism.[105] The "grand old lady of intelligence law was gone." [106] 33 years of intelligence expertise was wiped out in an instant. Lawton's death left a "gaping hole" in the intelligence community[107] and it couldn't have happened at a worse time. As John Lewis, then FBI chief operations officer for national security investigations put it, after Mary Lawton died, everything "changed overnight."[108]

A turf war erupted. [109] There was talk of carving up the OIPR office; placing its FISA review responsibilities in the Criminal Division and its policy operation in the

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[104] *Main Justice* at 304.
[105] *Id.* at 305
[106] *Main Justice* at 333. While Lawton had worked for the Department of Justice for 33 years and was viewed as the "grand old lady of intelligence" the fact was, she was relatively young when she died. She was only 56
[107] *Id.*
[108] *Main Justice* at 333.
[109] George Lardner Jr., *Report Criticizes Stumbling Block Between FBI, Espionage Prosecutors*, Washington Post, Dec. 13, 2001 (available at http://www.crimelynx.com/stumblock.html) (accessed July, 20, 2003) (article summarizing the 778 top-secret report written by federal prosecutor Randy Bellows, concerning the Wen Ho Lee investigation, quoting. John L. Martin, former head of the Justice Department's internal security section, when discussing internal jealousies as saying "Turf is the biggest four-letter word in this town.").

Office of Legal Counsel.[110] As will be explained in detail later, Lawton's replacement was determined not to let that happen, and sought to ensure the survival of the office by expanding its authority.

To make matters worse, Lawton's death wasn't the only blow the Department of Justice suffered. In the span of the next 12 months, 6 of the 20 so-called "super-senior career attorneys" at the Department of Justice either died or left the DOJ.[111] Every litigation division, except the Criminal and Civil Divisions, lost their senior career official. It was the passing of a generation—a critical brain-drain—and led future FISC Chief Judge, District Court Judge Royce Lamberth, to make yet another prophetic statement: "The loss of institutional knowledge will be difficult to replace."[112] He was right.

The jockeying for power began in earnest.[113]

When the dust settled two years later, the *Troung* analysis and the "wall" were adopted as official department policy. They were the cornerstone of Attorney General Janet Reno's 1995 Guidelines establishing "new rules of conduct for FBI agents and Criminal Division lawyers working on counterintelligence investigations and employing electronic surveillance under the FISA statute."[114] Contact, which had been routine under Lawton, was now banned.[115]

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[110] *Main Justice* at 334 (noting that Philip Heymann, Janet Reno's first deputy attorney general, was advocating this approach and with Lawton gone, "there was no one to " stand up for OIPR).
[111] *Id*.
[112] DOJ Alert, *Recent Departures Deplete DOJ's Inner Sanctum*, 4 No. 16 DOJALT 4, Sept. 5-19, 1994.
[113] Beverly Lumpkin, *Intelligence Coordination in Espionage & Terrorism Cases*, ABC NEWS.com, Aug 17, 2001 (quoting a DOJ prosecutor as saying that "in the years since the legendary OIPR Counsel Mary Lawton—absolutely venerated by Justice, the FBI, and the intelligence community—died, her successors as head of OIPR have too often been concerned with power-building.") (available at http://abcnews.go.com/sections/us/HallsOfJustice/hallsofjustice91.html) (accessed on July 20, 2003).
[114] *Main Justice* at 341. *See* Philip Shenon & Eric Lichtblau, *F.B.I. Is Assailed for Its Handling of Terror Risks*, The New York Times, nytimes.com, April 14, 2004 (Attorney General John Ashcroft, while

Why the "Wall" Was Created

In 1993, the FISA process only covered electronic surveillance for intelligence purposes. If a physical search was needed, the buck still stopped at the Attorney General's office for approval of the warrantless intrusion. Consequently, if there was ever a question about the validity of a physical search, the Attorney General who authorized it was still subject to lawsuits and being subpoenaed as a witness by the defense—just like Griffin Bell had been in *Troung* in 1978.

There had been discussion within OIPR and the DOJ that the original FISA statute did cover physical searches and, in fact, under the Carter Administration, Kenneth Bass's OIPR office sought and obtained three physical search orders from the FISA court.[116] However, those approvals became somewhat controversial within and without the DOJ. Bass recalled that "some officials in the Intelligence Community were concerned that we were 'going too far' in involving the judiciary in sensitive matters" and "some Members of Congress were concerned that we were 'amending the statute

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testifying before the independent commission investigating the Sept. 11 attacks, revealed that the memo written by Gorelick, a member of the commission, had been declassified two days earlier, and outlined the "wall" procedures.) (available at http://www.nytimes.com/2004/04/14/ politics/ 14PANE.html?th=&pagewanted-print&posit...) (accessed Apr. 14, 2004); *see also* Jamie S. Gorelick, *Ashcroft is Wrong to Blame Me For "The Wall"*, Commentary, Minneapolis Star Tribune, A11 (Apr. 20, 2004) (acknowledging that the final guidelines were based on a March 1995 classified internal memo, written by her—Jamie Gorelick--while Asst. Deputy Attorney General to Remo which established the "new rules of conduct for FBI agents and Criminal Division lawyers working on counterintelligence investigations and employing electronic surveillance under the FISA statute" but claiming that the FISCR had traced the wall to practices in the Regan and Bush I Administrations).

[115] Vanessa Blum, *Roadblock at Justice?* Legal Times (Sept. 9, 2002).

[116] Testimony of Kenneth C. Bass, III Before The House Permanent Select Committee on Intelligence on Physical Search Amendments to the Foreign Intelligence Surveillance Act, 2-9, 4, July 14, 1994 [hereinafter Bass 1994 House Testimony] (Bass noted that Attorney General Civiletti and other Administration officials believed that the establishment of the FISA court provided an "inherent" mechanism for judicial approval for physical searches and that, even though the FISA statute didn't demand DOJ seek FISC approval for searches, the constitutional preference for a judicially approved warrant meant they should seek judicial approval anyway).

through executive action.'"[117] Eventually, some of the FISA judges became "troubled by congressional reaction and began to question whether it was wise to continue to authorize physical searches."[118]

When the Reagan Administration took office they "came to a different conclusion" and took the position that the previous Administration, Bass and the FISA Court had been wrong as a matter of law.[119] They also decided it was important to wipe out previous FISA search precedents, so, the first time "they were faced with the necessity of a physical search for intelligence purposes [in the spring of 1981], they prepared an application for a FISA Court order, but submitted it with a memorandum explaining that they did not believe the FISA Court had any jurisdiction to issue such orders."[120] There was no competing argument made, the application was not "subjected to the normal adversarial process," and was instead "referred to the clerk of the FISA Court" who prepared a memo agreeing with the Re[a]gan Administration's position."[121] The FISC agreed and issued its first formal order ever stating simply that it did not have jurisdiction over intelligence physical searches.[122] For FISA to include physical searches, the statute would have to be amended.

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[117] Bass 1994 House Testimony at 4.
[118] Bass 1994 House Testimony at 4.
[119] Bass 1994 House Testimony at 4-5 (The Reagan Administration believed the executive branch had "inherent authority" to authorize physical searches for national security purposes and the judiciary shouldn't be involved in "sensitive intelligence matters.").
[120] Bass 1994 House Testimony (Bass described the government's spring 1981 application for a search order to the FISC as being submitted with the expressed intent that the court reject it.); *see also* Cinquegrana, *The Walls (And Wires) Have Ears*, at 822 (describing in detail how and why Attorney General William French Smith submitted the order for rejection and even accompanied the request with a memorandum of law arguing that the FISC lacked jurisdiction to grant such an order).
[120] Bass 1994 House Testimony at 5; *see also* Benjamin Witte, *Inside American's Most Secretive Court*.
[121] Bass 1994 House Testimony at 5.
[122] Bass 1994 House Testimony at 5; Cinquegrana, *The Walls (And Wires) Have Ears*, at 822 (noting all seven of the FISC judges concurred in the 1981 decision denying a FISA application – the only denial ever - at the government's request); Memorandum of Applicant, *In re the Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property*, (F.I.S.C., June

But neither the Reagan Administration nor the Bush Administration aggressively pursued expanding FISA authority to cover physical searches—they didn't see the need, and, in fact, believed it would be an improper encroachment on executive branch authority. Consequently, FISA wasn't expanded to include physical searches until 1994[123] when the push for congressional approval was motivated by the following events—the same events that lead to the creation of the "wall."

The "Wall" is Born

Just prior to Mary Lawton's back surgery, her office recommended that President Clinton's Attorney General Janet Reno authorize the warrantless search of a home owned by CIA officer and suspected spy Aldrich Ames (Ames was already under a FISA-approved electronic surveillance order).[124] Reno approved the request based on her own (i.e., the executive branches) "inherent authority" for national security purposes.[125] And even though the affidavit for the physical search would not be submitted to the FISC for

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11, 1981), reprinted in SSCI FISA Rep. 280, 97th Cong., 1st Sess. app.b. at 10-16 [hereafter Physical Search Memorandum].

[123] Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, Sec. 807(b), 108 Stat. 3423, §807 (codified as amended at 50 U.S.C. §§1821-1829 (1994 & Supp. III 1997). In 1998 the statute was amended to include pen registers and the placement of "trap and trace" devices on communication lines. Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, 112 Stat. 2396 (codified at 50 U.S.C.A. §§4041, 1841-1846, 1861-1863 (West 2003). "Trap and trace" authority was expanded under the USA PATRIOT Act. 50 U.S.C. §§1842-1843. And in 2001, "roving" wiretaps were added to FISA. 50 U.S.C. §1805(c)(2)(B) was amended by the USA PATRIOT Act (Pub. L. No. 107-56, 115 Stat.272 (2001)) to include "roving wiretaps."

[124] *Main Justice* at 321-323

[125] *Id.*

approval, the certification process within the DOJ and OIPR followed the *same* chain of command procedure as that for FISA approved electronic surveillance.[126]

Like attorney generals before her, Janet Reno trusted Mary Lawton. Reno had only been appointed to the position in February of 1993 but it didn't take her long to realize that Lawton "carried the [DOJ's] secrets around in her head" and could put every intelligence issue into proper legal context.[127] Reno was also intimately familiar with the Ames case—she had previously authorized the application for a FISA electronic surveillance order—so when the OIPR presented her with the Ames search application she signed off without hesitation.[128]

Less than two weeks later, Lawton was dead and the void left by her passing was devastating. Lawton had written or interpreted almost every law or policy governing the shadowy world of foreign intelligence surveillance for three decades. She was considered such an authority at the DOJ that counterintelligence rules simply became known as "Mary's Law."[129] Unfortunately, Lawton had always been so busy that she didn't leave a paper trail explaining the basis for her rulings. Furthermore, Lawton's belief that some things were better left undefined, combined with her lack of OIPR guidelines covering internal operations (including her routine practice of informal contacts between the FBI and internal security prosecutors), while not an issue when she

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[126] *Main Justice* at 321 (noting that the approval Reno signed "was attached to a thick affidavit that described the evidence the FBI had gathered" and had been reviewed by OIPR which "recommended that Reno authorize the search of the home").
[127] *Main Justice* at 360
[128] *Main Justice* at 321.
[129] *Main Justice* at 315-316 (noting that Mary's Law was considered the "gold standard of legality in the world of counterintelligence" and quoting John Harmon, former head of the Office of Legal Counsel as saying, "The questions that reached Mary Lawton wouldn't wait. The folks that Mary dealt with needed an answer. Yes or no. Yes you can do it, no you can't. And Mary would tell them." Harmon said he knew of no case where the FBI had appealed one of her rulings.).

was alive, became critical after her death. FISA and OIPR practices were left vulnerable to conflicting interpretations.[130]

Instead of promoting someone from within the OIPR—a "career lawyer" with prior FISA and counterintelligence experience—to replace Mary Lawton, Janet Reno made a selection that led to a seismic shift in FISA interpretation and DOJ policy. Reno turned to Richard Scruggs, one of five special assistants she had brought with her from Florida,[131] to be Lawton's successor.[132]

Richard Scruggs was a former federal trial prosecutor who began his career in the Justice Department under the Honor's Program and spent several years in the Internal Security Section in the Criminal Division before moving to Florida to work as an assistant U.S. attorney in Miami.[133] Scruggs had an enormous amount of experience as a trial prosecutor and had supervised the Criminal Division in the U.S. Attorney's Office in Miami (the largest in the country),[134] but he had relatively little experience in foreign counterintelligence matters.[135] In the six months Scruggs had been working for Reno he had handled some intelligence issues, but the bulk of his time had been spent attempting to coordinate a merger of the FBI and the Drug Enforcement Administration.[136] That merger fell through right before Mary Lawton died.[137]

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[130] George Lardner Jr., *Report Criticizes Stumbling Block Between FBI, Espionage Prosecutors, Washington Post*, Dec. 13, 2001 (article summarized the 778 top-secret report written by federal prosecutor Randy Bellows, concerning the Wen Ho Lee investigation) (available at http://www.crimelynx.com/stumblock.html) (accessed on July 20, 2003).
[131] *Main Justice* at 34 (four were prosecutors who had worked in the Dade County State Attorney's Office and the fifth was a career federal prosecutor).
[132] Lardner Jr., *Report Criticizes Stumbling Block Between FBI, Espionage Prosecutors*.
[133] *Main Justice* at 34.
[134] *Main Justice* at 329.
[135] *Main Justice* at 327.
[136] *Main Justice* at 34-35, 327
[137] *Main Justice* at 39-40.

Once Scruggs took over the OIPR, he began to familiarize himself with office operations by reviewing cases and talking to Lawton's former aides.[138] In looking over the case files he began "catching mistakes" which he attributed to the massive volume of FISA applications handled by the tiny office.[139] Scruggs became increasingly concerned by (1) the lack of written guidelines, (2) a proposal that was circulating to "carve up Lawton's staff," and (3) alarmed over contacts between prosecutors and FBI agents that he thought were improper—he was convinced the FISA statute might have been violated.[140]

Scruggs was especially concerned about the physical search on the Aldrich Ames house that Reno had approved just prior to Lawton's death.[141] Scruggs had done some research and was aware of the pre-FISA *Troung* case. After reading a Washington Post article about questions asked during Ames' bond hearing, Scruggs became convinced that Ames' attorney, Plato Cacheris, might be planning to challenge the legality of the warrantless physical search "by arguing that the 'primary purpose'" of the surveillance had shifted from intelligence gathering to criminal prosecution—an analysis based on *Troung*.[142]

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[138] *Main Justice* at 331.
[139] *Main Justice* at 331.
[140] *Main Justice* at 327-333; *see also IV Final Report of the Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation*, Chapter 20, 713 (May 2000) [hereinafter AGRT Report] (noting Scruggs was convinced that Reno's certification of the Ames physical search was inaccurate).
[141] *IV Final Report of the Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation*, Chapter 20, 713-714 (May 2000) [hereinafter AGRT Report] (noting Scruggs was convinced that Reno's certification of the Ames physical search was inaccurate).
[142] AGRT Report at 714; Justice Department Supplemental Brief to the U.S. Foreign Intelligence Surveillance Court of Review, No. 02-001, 1-36,10 (Sept. 25 2002) [hereinafter Supplemental Brief]; *Main Justice* at 334. In fact, Ames pleaded guilty to the charges and the warrantless search was never challenged. *See also* Beverly Lumpkin, *Intelligence Coordination in Espionage & Terrorism Cases*, ABCNEWS.com, Aug. 17, 2001 (noting there were some within DOJ and OIPR "who were genuinely fearful that Ames' clever attorney, Plato Cacheris, could have challenged and maybe gotten thrown out the intelligence gathered without a warrant at Ames' home.").

Internal DOJ documents reveal that a worried Scruggs went to Reno and "ginned her up" about "contacts that the FBI had been having with prosecutors" and warned her that—like Griffin Bell in the *Troung* case—she might be called as a witness since she had authorized the search.[143] Scruggs also told Reno he believed there was a strong possibility the evidence could be suppressed.[144] Reno was not pleased. She had been on the job for barely a year, had already weathered the tragic Branch Davidian fire in Waco, Texas, and was in no mood to hear that there might be problems with yet another high-profile case.[145] She told Scruggs, "Don't let this happen again."[146]

Scruggs went to work drafting a set of guidelines that mandated OIPR be the *only* conduit for contact between the Criminal Division and counterintelligence agents, and then sent out the "word…that there were to be no further contacts with prosecutors in foreign counterintelligence cases without OIPR permission."[147] John L. Martin, the FBI agent overseeing the Ames investigation in 1993-1994, was convinced the FBI had done nothing wrong and there was no danger of the evidence being suppressed but, "Turf," he later remarked, "is the biggest four-letter word in this town." [148] Scruggs argued differently and he had the ear of the Attorney General.[149] In the end, Scruggs's guidelines were implemented staking out a huge amount of "turf" for OIPR, securing the

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[143] AGRT Report at 714; Supplemental Brief at 10; *Main Justice* at 334-336; *see also* Beverly Lumpkin, *Intelligence Coordination in Espionage & Terrorism Cases*, Halls of Justice, ABCNEWS.com (Aug. 17, 2001) (noting the fear that Ames' attorney might have successfully challenged the warrantless search of his home became an "all-consuming fear [that] has continued to haunt the FBI and OIPR, while the criminal division believes they are at best worry-warts—and I won't go into at worst.").
[144] *Id*. *See also Main Justice* at 335-336; Lumpkin, *Intelligence Coordination in Espionage & Terrorism Cases*.
[145] *Main Justice* at 335-336.
[146] *Main Justice* at 336.
[147] Lardner Jr., *Report Criticizes Stumbling Block Between FBI, Espionage Prosecutors, supra* n. 117; AGRT Report at 714; *Main Justice* at 336.
[148] George Lardner, Jr, *Report Criticizes Stumbling Block Between FBI, Espionage Prosecutors*, Washington Post, Dec. 13, 2001 (quoting Martin, who later became the head of the DOJ's internal security section, concerning the aftermath of the Ames case which was documented in the Bellows Report).
[149] *Id.; Main Justice* at 339-340.

survival of the office and greatly expanding its authority within the halls of the DOJ. From that point on the informal "backdoor" channel between the FBI and the Criminal Division was closed."[150] Any contact had to go through OIPR.

The "wall" was born.

The dramatic changes in OIPR procedures following Mary Lawton's death are well documented in a 778-page DOJ internal report written by federal prosecutor Randy Bellows (commonly referred to as the Bellows Report) which investigated the FBI's later bungling of the Wen Ho Lee FISA investigation,[151] The report was completed in May of 2000, portions of which were released to the public in August of 2001.[152] The Bellows Report clearly identifies Lawton's successor, Richard Scruggs, as the person instrumental in erecting the "wall."[153]

In an interesting side note, it appears Scruggs's 1994 guidelines were written by Allan Kornblum, the then deputy counsel of OIPR.[154] The reason this is worth mentioning is Allan Kornblum was a DOJ career attorney who had worked with Mary Lawton for decades. He was on Lawton's committees that created the Levi Guidelines

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[150] AGRT Report at 714.

[151]AGRT Report. Wen Ho Lee was a Los Alamos National Laboratory scientist who was accused of giving nuclear secrets to China. *See also* Beverly Lumpkin, *Intelligence Coordination in Espionage & Terrorism Cases*, Halls of Justice, ABCNEWS.com (Aug. 17, 2001) (noting Bellows Report pinpoints the change in OIPR policy to fear of a challenge to the warrantless search conducted in the Aldrich Ames case).

[152] Lardner Jr., *Report Criticizes Stumbling Block Between FBI, Espionage Prosecutors*, *supra* n. 117; Vanessa Blum, *Roadblock At Justice?* Vol. 25, No. 35, Legal Times, Sept. 9, 2002 (noting that "following Lawton's death in 1993, OIPR cracked down on what had been routine contacts between FBI agents and prosecutors and came to be viewed as a roadblock by both the FBI and the Criminal Division").

[153] Lardner Jr., *Report Criticizes Stumbling Block Between FBI, Espionage Prosecutors*, *supra* n. 117 (Bellows noted that the system had appeared to have worked "quite satisfactorily" under Lawton but that her successor, Scruggs, grew concerned about the lack of written guidelines and warned Reno about contacts between the FBI and prosecutors during the Aldrich Ames investigation that Scruggs felt shouldn't have taken place"); *see also* Bass 2002 Testimony at 5 (stating that the wall did not exist until the Clinton era and the "July 1995 directive from the Attorney General")

[154] AGRT Report at 714 & n. 949; *see also* Beverly Lumpkin, *Intelligence Coordination in Espionage and Terrorism Cases*, Halls of Justice, ABCNEWS.com (Aug. 17, 2001) (noting Bellows report documented change in OIPR philosophy came with worry over the Ames case); *Justice Department Supplemental Brief to the U.S. Foreign Intelligence Surveillance Court of Review*, 1-36, 10 (Sept. 25, 2002).

and drafted the original FISA legislation.[155] Kornblum regularly appeared alongside Lawton before Congress on issues concerning FISA—he was her "second-in-command" in the OIPR—and was the office's interface with the FBI on the Ames investigation.[156] Kornblum was deputy counsel for OIPR until 2000 when he left the DOJ to become Legal Advisor for the FISC and was working in that capacity when the FISC issued its controversial decision in May of 2002. In its blistering rebuke to the FISC the Court of Review alluded to Kornblum's presence as legal advisor to the FISC and implied he had influenced their analysis of the "wall."[157] In its opinion, the FISCR referred to the Bellows Report (an internal DOJ investigation into the Wen Ho Lee fiasco of 1997 and why the Justice Department decided not to seek a FISA order to place the nuclear scientist under electronic surveillance) as identifying the OIPR's Kornblum as a "primary proponent of procedures that cordoned off criminal investigators and prosecutors from those officers with counterintelligence responsibilities."[158] And yet, there is no indication whether Kornblum actually believed the "wall" was necessary and required by the statute (especially after physical searches were included in FISA in 1994) or if he was simply following OIPR department procedures that were established under Scruggs and

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[155] *See* FBI Statutory Charter: Hearings Before the Subcomm. On Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. No. 8 92-129, 96 (Aug. 15, 1978) testimony by Allan N. Kornblum, Chief Attorney, Investigation Review Unit and Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, Justice Department. During questioning regarding a discrepancies between the Levi Guidelines and the FBI Manual of Operations Allan Kornblum explained, "I helped draft the guidelines. It [the discrepancy] was really a typographical oversight…"

[156] *Main Justice* at 329, 339.

[157] *In re Sealed Case*, 310 F.3d 717, 728 n. 15 (FISCR 2002) (noting that "According to the [AGRT/Bellows] Report, within the Department the primary proponent of procedures that cordoned off criminal investigators and prosecutors from those officers with counterintelligence responsibilities was the deputy counsel of OIPR. *See* AGRT Report at 714 & n. 949. He was subsequently transferred from that position and made a senior counsel. He left the Department and became the Legal Advisor to the FISA court.").

[158] *Id.*

expanded under other OIPR bosses.[159] However, Kornblum has been called the chief "architect of the Wall guidelines by some."[160] Not long after the FISCR's decision, Allan Kornblum left the FISC. On May 14, 2003 he was confirmed as a Magistrate Judge for the Northern District of Florida.[161]

How *Troung* and the "Primary Purpose" Standard Became the Basis For DOJ Policy

As previously mentioned, the Ames case set off a war within the DOJ. On the one side, Richard Scruggs was convinced that communication between prosecutors and intelligence agents was prohibited by FISA and *Troung's* "primary purpose" standard, and that, in the future, before anyone from the Criminal Division could talk to FBI agents they had to check in with, and get approval from, OIPR first. On the other side, the Criminal Division believed Scruggs was seriously overreacting and overreaching with his guidelines and was interpreting the "primary purpose" standard incorrectly.[162] The Bellows Report confirmed that Scruggs's proposal "touched off considerable controversy and led to a series of meetings among the principals in the Criminal Division, OIPR, the FBI…[a component of the Office of the Deputy Attorney General]."[163]

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[159] Several attempts were made to contact Allan Kornblum in Gainesville, Florida where he is currently serving as Magistrate Judge for the Northern District of Florida, for comment on this article, but my phone calls were never returned.
[160] Heather MacDonald, *FBI Handcuffed*, New York Post (Oct. 27, 2002) (available at http://www.manhattan-institute.org/html/_nypost-fbi_handcuffed.htm) (accessed on July 30, 2003).
[161] Judicial Staff Directory, *Judicial Confirmations and Appointments*, 1-11, 3, August 8, 2003 (announcing magistrate judge confirmation of Allan Kornblum, for the U.S. District Court of the Northern District of Florida, on May 14, 2003) (available at http://www.jsd.cq.com/) (accessed Aug. 8, 2003).
[162] *Main Justice* at 334-341.
[163] AGRT at 715. *See also Main Justice* at 334-341(describing the reaction by the Criminal Division and their attempts to fight what they thought was serious overreaching by Scruggs).

Even though the Aldrich Ames case ended without a challenge to the validity of the warrantless search approved by Reno (Ames pled guilty to all charges), Reno was worried by what Scruggs had convinced her was a close call.[164] She was determined that neither she, nor any future Attorney General would ever again have to approve a warrantless search without judicial authorization. She directed the DOJ to get FISA amended to cover physical searches. The 1994 amendment passed easily in Congress.[165]

But the dispute over contacts between intelligence agents and prosecutors continued to rage within the DOJ. In an effort to clarify and resolve the legal issues involved once and for all, Reno turned to the head of her Office of Legal Counsel, Walter Dellinger, III, a highly regarded Duke University law professor, for his input on the "primary purpose" standard and its impact on criminal prosecutions that have their basis in foreign intelligence surveillance.[166]

Dellinger summarized the law in a seven-page memorandum dated February 14, 1995 and predicted that, based on *Troung* and four other cases "courts are more likely to adopt the 'primary purpose' test than any less stringent formulation."[167] Dellinger wrote that while the law "unquestionably contemplates the use in criminal trials of evidence obtained in FISA searches," the case law on the issue "offers little guidance for

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[164] *Main Justice*; Beverly Lumpkin articles; Lardner, Jr. article.

[165] Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, Sec. 807(b), 108 Stat. 3423, §807 (codified as amended at 50 U.S.C. §§1821-1829 (1994 & Supp. III 1997). In 1998 the statute was amended to include pen registers and the placement of "trap and trace" devices on communication lines. Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, 112 Stat. 2396 (codified at 50 U.S.C.A. §§4041, 1841-1846, 1861-1863 (West 2003). "Trap and trace" authority was expanded under the USA PATRIOT Act. 50 U.S.C. §§1842-1843. And in 2001, "roving" wiretaps were added to FISA. 50 U.S.C. §1805(c)(2)(B) was amended by the USA PATRIOT Act (Pub. L. No. 107-56, 115 Stat.272 (2001)) to include "roving wiretaps."

[166] *Main Justice* at 340; AGRT at 720

[167] Justice Department Supplemental Brief to the U.S. Foreign Intelligence Surveillance Court of Review, at 10 (Sept. 25, 2002) [hereinafter Supplemental Brief]; Office of Legal Council Memorandum at 1, Feb. 14, 1995 [hereinafter OLC Memo] (memo identified other pertinent cases as *Duggan, Radia, Pelton, and Johnson*).

identifying the precise line where the use of intelligence information by prosecutors might make law enforcement the 'primary purpose' of a FISA search."[168] Still, Dellinger believed that some basic principles could be discerned from the case law, the main point being: "the greater the involvement of prosecutors in the planning and execution of FISA searches, the greater is the chance that the government could not assert in good faith that the 'primary purpose' was the collection of foreign intelligence."[169]

Dellinger's memorandum ended up making the same point Scruggs had made about the necessity of "managing" the involvement of prosecutors in the FISA process.[170] The end result was that in March of 1995, Reno had her Assistant Deputy Attorney General, Jamie Gorelick draft a classified memo detailing "new rules of conduct for FBI agents and Criminal Division lawyers working on counterintelligence investigations"[171] On July 19, 1995, Reno codified those rules in her July 1995 Procedures which effectively served to create a "wall" of regulations separating counterintelligence and law enforcement investigations.[172]

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[168] OLC Memo at 2, 5.
[169] Supplemental Brief at 10; OLC Memo at 2, 5 & n. 7.
[170] *Main Justice* at 341.
[171] Jamie S. Gorelick, *Ashcroft Is Wrong to Blame Me For "The Wall"*, Commentary, Minneapolis Star Tribune, A11 (Apr. 20, 2004) (acknowledging that the final July 1995 guidelines were based on a March 1995 classified internal memo, written by her—Jamie Gorelick--while Asst. Deputy Attorney General to Remo which established the "new rules of conduct for FBI agents and Criminal Division lawyers working on counterintelligence investigations and employing electronic surveillance under the FISA statute" but claiming that the FISCR had traced the wall to practices in the Regan and Bush I Administrations).
[172] *See* July 1995 Intelligence Sharing Procedures: Supplemental Brief at 10; AGRT Report at 721-734; *FBI Intelligence Investigations: Coordination within Justice on Counterintelligence Criminal Matters is Limited* (July 2001) (GAO-01-780). The guidelines were based on a classified internal memo, written by Jamie Gorelick, Asst. Deputy Attorney General, for Reno establishing the "new rules of conduct for FBI agents and Criminal Division lawyers working on counterintelligence investigations and employing electronic surveillance under the FISA statute."). *Main Justice* at 341; Philip Shenon & Eric Lichtblau, *F.B.I. Is Assailed for Its Handling of Terror Risks*, The New York Times, nytimes.com, April 14, 2004 (Attorney General John Ashcroft, while testifying before the independent commission investigating the Sept. 11 attacks, revealed that the memo written by Gorelick, a member of the commission, had been declassified two days earlier, and outlined the "wall" procedures.) (available at http://www.nytimes.com /2004/04/14/politics/14PANE.html?th=&pagewanted-print&posit...) (accessed Apr. 14, 2004); *see also* Jamie S. Gorelick, *Ashcroft Is Wrong to Blame Me For "The Wall"*, Commentary, Minneapolis Star

Bottom line—instead of being carved up and merged into different departments following the death of Mary Lawton, the Office of Intelligence Policy and Review was now the official overseer of the FBI. OIPR was the door through which all foreign intelligence surveillance must flow. Scruggs' had secured the future of OIPR by staking out a major piece of "turf"—a gatekeeper role for the office—and cementing it in Reno's 1995 guidelines.

In yet one final interesting side note, some believe that FISC presiding judge Royce Lamberth might have had a hand in the creation of the July 1995 Procedures and the establishment of the wall.[173] However, it seems unlikely that Lamberth had any meaningful input into the creation of the critical 1995 Procedures (which were dubbed "the Wall" from the moment they were issued).[174] Lamberth didn't begin his seven-year term on the FISC until May of 1995.[175] The process for creating the "wall" based on the *Troung* analysis clearly had its roots in the events following the death of Mary Lawton beginning in November of 1993 (when Richard Scruggs took over Lawton's OIPR[176]), followed by the guidelines issued by Scruggs's in 1994, Walter Dellinger's crucial memo

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Tribune, A11 (Apr. 20, 2004) (acknowledging that the final guidelines were based on a March 1995 classified internal memo, written by her—Jamie Gorelick--while Asst. Deputy Attorney General to Remo which established the "new rules of conduct for FBI agents and Criminal Division lawyers working on counterintelligence investigations and employing electronic surveillance under the FISA statute" but claiming that the FISCR had traced the wall to practices in the Regan and Bush I Administrations).

[173] Telephone interview with Kenneth Bass, III, creator and first head of the OIPR on July 29, 2003, 2 p.m. CST in which Bass stated his belief that "Judge Lamberth might have had a hand in the development of the "wall."; *see also* Beverly Lumpkin, *FISA Court Speaks, and Justice Objects*, Halls of Justice, ABCNEWS.com, Aug. 23, 2002 (noting that during Judge Lamberth's seven year term on the FISA court he "loomed for years over U.S. FISA policy and procedures, and some law enforcement officials believed he had demanded that "the wall" between criminal prosecution and intelligence gathering be much higher than the Act actually required.") (available at http://abcnews.go.com/sections/us/HallsOfJustice/hallsofjustice136.html) (accessed on July 30, 2003).

[174] Heather MacDonald, *FBI Handcuffed*, The New York Post (Oct. 27, 2002) (available at http://www.manhattan-institute.org/html/_nypost-fbi_handcuffed.htm) (accessed on July 30, 2003).

[175] Judge Royce C. Lamberth, *Chambers Information* (available at http://www.dcd.uscourts.gov/lamberth-bio.html) (accessed on July 30, 2003).

[176] Scruggs was not officially appointed to the position of head of OIPR until April 1994.

written in February of 1995, culminating in Reno's classified internal memorandum (written in March by Jamie Gorelick) outlining the "new rules" of procedure. The last event occurred two full months before Judge Lamberth was appointed to the FISC.

But, it is entirely possible that Judge Lamberth did have a hand in "fortifying" the "wall" through his later dealings with those in OIPR. He was known as a "fiery" judge who strongly believed that the courts "have an important role in ensuring, as we fight the war on terrorism, that we don't lose the rights of our own citizens."[177] The "wall" had been in existence throughout Judge Lamberth's tenure, but it wasn't until 2000 when, as the FISC's May 2002 opinion documented, violations began to occur at an alarming rate.[178] All told, more than 75 breaches of department policy were recorded.[179] While some within the DOJ characterized the violations as "minor"[180] there is little doubt the FISC judges were concerned the secret surveillance process was in danger of being abused for law enforcement purposes.[181] That concern was evident in the way they crafted their opinion and then signed it "en banc."[182] Six months later the FISA Court of Review disagreed.

The Foreign Intelligence Surveillance Court of Review

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[177] The Third Branch, *An Interview with Judge Royce C. Lamberth*, 1-3 (June 2002) (available at http://www.uscourts.gov/ttb/june02ttb/interview.html) (accessed on July 30, 2003).
[178] *In Re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F.Supp.2d 611 (May 2002).
[179] *Id.*
[180] Heather MacDonald, *FBI Handcuffed*, The New York Post (Oct. 27, 2002) (calling the 75 violations "trivial" and "minor disseminations of FISA information to criminal anti-terror agents, and failures to disclose that FISA suspects were also being investigated for crimes [to the FISC].").
[181] *In Re All Matters submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 661 (May 2002).
[182] *In Re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F.Supp.2d 611 (May 2002).

Events surrounding the FISCR's reversal of the FISC ruling are interesting from several perspectives. First, it should be noted that even though the FISC's opinion was based on 75 instances of errors and misrepresentations made to it by the government, the FISCR barely mentioned the violations. The errors and misrepresentation made to the FISC by the DOJ—errors that were a source of alarm to the FISC judges and civil libertarians (who appeared to believe the Justice Department was using FISA as an end run around the Fourth Amendment to "orchestrate domestic criminal investigations")[183]—were never really addressed by the FISCR.[184] Instead, the Court focused its efforts on making as strong a case as possible that the "wall" was never required by FISA and that the statute "at least as originally enacted, [never] even contemplate[d] that the FISA court would inquire into the government's purpose in seeking foreign intelligence information."[185]

Second, the make-up of the never-before-convened FISCR is also worth mentioning. All three judges were conservative Republicans, named to the bench by Ronald Reagan and appointed to their seven-year terms on the special review court by Supreme Court Chief Justice William Rehnquist.[186] The judges were: Presiding Judge

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[183] Jason Hoppin, *D.C. Confidential: An Obscure 25-Year-Old Court Convenes for the First Time*,, The Recorder, San Francisco (Jan. 29, 2003) (available at http://www.cfac.org/Attachments/fisa_review_court.html) (accessed July 19, 2003).

[184] Jason Hoppin, *D.C. Confidential*, The Recorder, San Francisco (Jan. 29, 2003) (Hoppin noted that when Silberman was questioned regarding why the "FISCR didn't address more fully the errors and misrepresentations in the FISA applications" he "declined to say.").

[185] *In re: Sealed Case*, 310 F.3d 717, 723-24 (FISCR 2002) (referring specifically to Section 1805 which governed the standards a FISA court judge was is to use in determining whether to grant an order. The court said that the "language certainly suggests that, aside from the probable cause, identification of facilities, and minimization procedures the judge is to determine and approve…the only other issues [the judge can consider] are whether electronic surveillance is necessary to obtain the information and whether the information sought is actually foreign intelligence information—not the government's proposed use of that information.").

[186] Bob Egelko, *War on Terrorism: Spy Court to Review Prosecutors' Powers, Ashcroft's Appeal for Looser Rules Goes to Panel*, San Francisco Chronicle, Sunday, September 1, 2002 (available at

Ralph Guy—a semi-retired judge on the Sixth U.S. Circuit Court of Appeals in Cincinnati; Judge Edward Leavy—a semi-retired judge on the Ninth U.S. Circuit Court of Appeals in San Francisco; and Judge Laurence Silberman—a semi-retired judge on the U.S. Court of Appeals for the District of Columbia.[187] None of the judges had ever served on the lower FISC before, nor had they ever ruled on a case involving the government's anti-terrorism powers.[188] However, in yet another ironic twist, Judge Silberman' views concerning the executive branches "inherent authority" to conduct surveillance for foreign intelligence purposes were well-known. He had long been on record as believing the judiciary had no place in the process and testified before Congress to that effect 24-years earlier during hearings on proposed FISA legislation:

> The judiciary is neither theoretically nor actually more neutral than the executive, or, for that matter, the Congress, in reaching answers to the difficult questions which national security electronic surveillance presents. It can as easily be argued that the judiciary will overweigh the interests of individual privacy claims because it is, after all, the protection of those claims on which judicial authority is based…And since judges are not politically responsible, there is no self-correcting mechanism to remedy their abuses of power.[189]

The government made sure to remind Judge Silberman of his earlier concerns about judicial excess by including his 1978 statement in their 2002 Supplemental Brief.[190] The government hammered home its belief that the FISC had done exactly what Silberman had long ago warned of—gone "too far in second-guessing the government's

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http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2002/09/01/MN220045.DTL&type-pri…) (accessed July 19, 2003).

[187] *Id.*

[188] *Id.*

[189] *Foreign Intelligence Electronic Surveillance: Hearings on H.R.5794, 9745, 7308 and 5632* Before the Subcomm. On Legislation of the Permanent Select Committee on Intelligence, 95th Cong. 2d Sess. 221 (1978) (statement of Laurence Silberman).

[190] Justice Department Supplemental Brief to the U.S. Foreign Intelligence Surveillance Court of Review at 15 (Sept. 25, 2002).

judgments, and in regulating its investigations" and it was now up to the FISCR to correct the FISC's "abuse of power."[191]

Finally, the highly-charged circumstances surrounding the government's appeal and oral arguments before the FISCR must also be taken into account. Oral arguments were held on September 9, 2002, two days prior to the one-year anniversary of the 9/11 tragedies. Pleading the case for the government was Solicitor General Theodore Olson. Every single person in the courtroom that day was acutely aware that Olson's wife, Barbara, had died aboard the plane the hijackers had crashed into the Pentagon.[192]

By a 3-0 per curiam ruling, the FISA Court of Review overturned the lower FISA Court and in the process, issued a precedent setting opinion—one that could be cited by all other future courts.

Conclusion

So what does all of this mean? This paper began with the following quote:

> Some time in the 1980s—the exact moment is shrouded in historical mist—the Department applied the *Troung* analysis to an interpretation of the FISA statute[193] [and] began to read the statute as limiting the Department's ability to obtain FISA orders if it intended to prosecute the targeted agents—even for foreign intelligence crimes.[194]

There's no question, the FISCR was wrong. Far from being "shrouded in historical mist" the DOJ's adoption of the "wall" and its application of *Troung* on department procedures

[191] Justice Department Supplemental Brief to the U.S. Foreign Intelligence Surveillance Court of Review at 15 (Sept. 25, 2002

[192] Jason Hoppin, *D.C. Confidential*, The Recorder, San Francisco (Jan. 29, 2003) (quoting Leavy as saying "the judges were well aware that Olson was arguing an issue—terrorism—that was deeply personal to him.").

[193] *In re: Sealed Case*, 310 F.3d 717, 727 (FISCR 2002).

[194] *Id.* at 723.

could easily be, and had been, traced back to 1995. Its roots were clearly in the events following the death of Mary Lawton—the Aldrich Ames case, the threat to carve up the Office of Intelligence Policy and Review, the selection of Richard Scruggs as Lawton's successor, and the Dellinger memo. The documentation of those events was voluminous and discussed in great detail in the 1997 best-selling book, *Main Justice*, the May 2000 AGRT Report (Bellows Report), the July 2001 General Accounting Report, numerous newspaper articles, and even Kenneth Bass, III's 2002 Senate Testimony. Indeed, the FISCR did acknowledge the Bellows Report and the GAO report in its decision but still seemed determined to place the blame for the misguided policies as beginning during the 1980s. Which begs the question—why?

Why would the FISCR go to such great lengths to make it appear as though the "wall" had its roots in a practice begun 20 years earlier."[195] Maybe the answer is as simple as recognizing the fact that the FISCR didn't know any better. The FISCR was made up of judges lacking any judicial experience in this area of law, who then allowed themselves to be cut off from any information that might have contradicted the Bush Administration's point-of-view. The FISCR based its ground-breaking decision on the views of only one side—the governments.

When the government appealed the FISC's decision to the three-judge FISCR panel, the government submitted briefs and aggressively argued its position in oral

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[195] Neil A. Lewis, *Court Overturns Limits on Wiretaps to Combat Terror*, The New York Times, nytimes.com, Nov. 19, 2002 (noting the court said "the 20-year-old practice of keeping the two [criminal and intelligence investigations] largely separate was never required and was never intended by Congress" in the first place) (available at http://www.nytimes.co…/19COUR.html?ex=1038373200& pagewanted=print&position=to) (accessed Nov. 19, 2002).

arguments before the court.[196] More than "a dozen government lawyers appeared" before the FISCR on September 9, 2002 but, amazingly—stunningly—*no one was allowed to appear on behalf of the FISC*![197] FISCR Judge, Edward Leavy attempted to justify this egregious omission by stating that while "he is a strong supporter of the adversarial process…there was little that could be done…in this case" because the "security of the United States was at stake."[198] However, Leavy, and the other two FISCR judges, Ralph Guy and Laurence Silberman, ignored the clear precedent set in the *Keith* case in which the U.S. Supreme Court *appointed* legal counsel to represent the United States District Court's position in briefs and oral arguments. This seems odd when one considers the FISCR took great pains to make the point that *Keith* was the *only* case that was even remotely connected to the issues at hand.[199]

Stranger still is Leavy's assertion that the "security of the United States was at risk." That justification ignores the unmistakable fact that (1) the FISC itself had a legal advisor and (2) Judge Lamberth, while no longer serving as the presiding judge for the FISC, was still just a stone's throw away from the FISC chambers. Both the FISC legal advisor and the former presiding judge had—or had held—security clearances at the highest levels, were intimately involved with the May 2002 decision, and could have

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[196] Jason Hoppin, *D.C. Confidential: An Obscure 25-year-old Court Convenes for the First Time*, The Recorder, San Francisco (Jan. 29, 2003) (noting "a dozen government lawyers appeared, with no opposition.").

[197] *Id.* (article noted that the dozen DOJ lawyers faced "no opposition."). The article does reveal that the FISCR did accept two amicus briefs submitted by the American Civil Liberties Union and the National Association of Criminal Defense Lawyers, however, those groups would have had no way of knowing the real basis for the FISC's decision. Indeed, the FISCR noted that "Neither *amicus* brief defends the reasoning of the FISA court." *In re: Sealed Case*, 310 F.3d at 734. However, neither *amicus* brief *could* defend the reasoning of the FISA court since they lacked the appropriate security clearances, and access to the events and the thought processes of those involved.

[198] *Id.*

[199] *In re: Sealed Case*, 310 F.3d at 737 (noting that the Supreme Court explicitly declined to consider foreign intelligence surveillance in relation to a Title III warrant). The FISCR proceeded to dismiss all other case precedent dealing with the "primary purpose" and FISA as being based on an improper precedent (*Troung* which was a pre-FISA case).

easily helped represent the FISC on appeal without ever jeopardizing the safety of America.

Ironically, the FISCR's casual dismissal of the cornerstone of our judicial process serves to highlight the perils that come from eliminating the adversarial process from the courtroom. Without adequate opposition, there was no one to challenge the government's chronology of events, or its interpretation of the facts which was—as is the case in the time honored practice of advocacy in the legal system—structured to aggressively present the *government's* version of the issues and to *minimize* the FISC's point-of-view. While the FISCR did allow two amicus briefs to be filed in the case, the court noted that neither brief attempted to defend the FISA court's reasoning.[200]

They weren't supposed to. That wasn't their job.

Kenneth C. Bass, III, the creator and very first head of the Office of Intelligence Policy Review, the man who argued *Troung* on appeal to the Fourth Circuit, has long advocated the appointment of counsel to serve as a "devil's advocate" in the FISA process.[201] In 1994, Bass told the House Permanent Select Committee that the "total absence of opposing counsel [in the FISA process] is a deficiency in our system."[202] Bass then outlined a process that he believed could easily address FISA security concerns while providing a much needed challenge to the "close questions" concerning

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[200] *In re: Sealed Case*, 310 F.3d at 734.

[201] *See* Testimony of Kenneth C. Bass, III Before the House Permanent Select Committee on Intelligence on Physical Search Amendments to the Foreign Intelligence Surveillance Act, 2-9, 7-8, July 14, 1994 [hereinafter Bass 1994 House Testimony) (advocating the use of appointed counsel in cases targeting U.S. persons to appear before the FISA Court to present arguments against the issuance of an order); United Sates Senate Committee on the Judiciary, Hearings on The USA PATRIOT Act in Practice: Shedding Light on the FISA Process, Testimony of Kenneth C. Bass, III, Senior Counsel, Sterne, Kessler, Goldstein, & Fox, 1-8, 6-7, Sept. 10, 2002 [hereinafter Bass 2002 Senate Testimony] (lamenting the fact that the FISCR did not appoint counsel to represent the FISC's point of view on appeal).

[202] Bass 1994 House Testimony at 7.

surveillance of U.S. persons for foreign intelligence purposes.[203] Eight years later, on September 10, 2002, Bass appeared before the Senate Judiciary Committee and again expressed his belief that the presence of a strong advocate was not only possible, but crucial, to the validity and legitimacy of any decision made by the FISC or the FISCR and that "as an Article III court" the courts had "the inherent authority to make such appointments."[204] Bass was aware that the FISCR had convened and held oral arguments the previous day and expressed his disappointment remarking ruefully that while he "had hoped that the Court of Review would appoint counsel to serve as amicus curiae to defend the FISC order and decision… [u]nfortunately the Court of Review proceeded to hear arguments yesterday in a closed proceeding." [205] Bass speculated that "[t]he secrecy of that hearing and the absence of any meaningful adversary process [would] diminish the quality—as well as the public acceptability—of the Court's ultimate decision."[206]

It appears Bass was correct. The lack of advocacy in the process does seriously "diminish the quality" of the Court's decision.

The American legal system has long honored the principle that rigorous advocacy is the only way to ensure justice. Vigorous opposition challenging facts, evidence and inferences made by the other party, is vital to keeping the system honest. Without it,

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[203] *Id.* at 7-8 (Bass testified that "In those few cases of surveillance targeted at U.S. persons, it is almost always possible to produce a sanitized application package that would not disclose the identity of the target or the human intelligence sources involved in the operation. Such a sanitized application could be given to an attorney in private practice who could undertake an independent review and appear before the FISA Court to present arguments against issuance of an order. There are now enough former government attorneys who have been involved in the FIS process who could be asked to undertake such reviews on a *pro bono* basis that is feasible to appoint counsel for the target in many, if not all, applications involving targets who are U.S. persons.").
[204] Bass 2002 Senate Testimony at 7.
[205] Bass 2002 Senate Testimony at 7.
[206] *Id.*

judges are left making decisions based on inaccurate, incomplete, and oftentimes, slanted assertions. Such was the case with the FISA Court of Review.

In the final analysis, the historic decision handed down by the FISCR will always be marred—qualified by an asterisk for accuracy. Regardless of whether or not the FISCR was correct in holding that the "wall" was never required by FISA, its ruling is tainted by the inaccuracies embraced by the judges—inaccuracies that could have easily been addressed had the Court respected and honored the cornerstone of our legal process and appointed counsel to represent the FISC's point of view.

Far from being "shrouded in the historical mist" the truth was within reach, unfortunately the FISCR couldn't see it. For reasons known only to the three-judge panel, they allowed the Court's hands to be tied, dealt themselves half a deck, and made their historic precedent setting decision based on only one sides version of the facts. Justice *was* blind and the American people were the losers. Americans have forever been denied the opportunity to know what the FISC's response to issues raised by the government on appeal would have been. Americans will never know if the FISCR's decision would have been different—if those 75 instances of government abuse of the FISA process would have been addressed—had the FISC simply been allowed to present its side of the case.

Which leaves one last unsettling question: If the FISCR was so obviously wrong in its analysis of the origin of the "wall," what other incorrect assumptions—what other mistakes—were made by the court when it issued its groundbreaking ruling? Hopefully, the answer to that question won't be forever "lost in the historical mist." Legal scholars, civil libertarians, the media and Congress have a duty to pierce the fog and shine a light

on the circumstances surrounding the FISCR's decision. Constitutional freedoms are at stake.