



# SKATING | ON STILTS

## Why We Aren't Stopping Tomorrow's Terrorism

Stewart A. Baker

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**M**arch 9, 2001, was cold and gusty in Washington. No one without a clearance even knew that Royce Lamberth, the chief judge of the Foreign Intelligence Surveillance Court, had sent a letter that day to John Ashcroft, the recently confirmed Attorney General of the United States.<sup>1</sup>

But almost immediately, the letter set off the worst turmoil ever experienced in the clubby world of foreign intelligence wiretaps. For the first and only time in its history, the FISA court was disciplining an FBI agent, singling him out by name and barring him from any appearance before the court. Even papers that he signed would be rejected. Why? Because the court no longer trusted his assurances that the FBI was observing the elaborate set of rules that the court had erected to protect the civil liberties of terrorist suspects.

This could not be tolerated. The court was determined to bring the FBI to heel; this ruling would show just how seriously the court took its civil liberties procedures.

Widely described inside the FBI as a contempt order, the ruling looked like a career killer. Indeed, the court's letter seemed to accuse the agent of making false statements to the court, a felony under federal law. That's how the attorney general saw it. The Justice Department's Office of Professional Responsibility was called in to consider what other sanctions might be proper.

This was the beginning of a years-long nightmare for the agent. But in the secret cloisters of intelligence law, it would not be his nightmare alone; it would spread and spread, like ripples on a still lake.

It sent a chill of fear first through the FBI counterterrorism machinery in Washington, then deep into the warrens of the National Security Agency at Fort Meade.

In August, though, the chill had not yet engulfed the FBI counterterrorism squad in New York. They were champing at the bit, having just learned that an al Qaeda terrorist had recently entered the United States. They didn't know for sure that he was planning an attack, but they'd been hearing all summer that a big one was coming. If a major-league terrorist was in the United States it might be real trouble. They geared up to go looking for him.

That's when the nightmare reached them, too. They shouldn't have the information, they were told, and were forbidden to act on it. They could end up like the other agent, censured for breaching the civil liberties protections erected by the court. They were stopped in their tracks.

A few days later the nightmare became America's.

## Spies and Cops

The letter Judge Lamberth sent John Ashcroft on March 9 was a long time in the making. In fact, it marked the climax of a decade-long undercover battle over civil liberties and intelligence wiretaps. The basic story can be teased out of official documents, particularly a staff report of the 9/11 Commission that was not declassified until 2009 and a Justice Department Inspector General report from 2004, and many of the participants are now willing to talk about those events.

The March 9 letter had its roots in the difference between law enforcement and intelligence wiretaps. Law enforcement wiretaps are heavily regulated. They can only be initiated if other investigative techniques have failed; they can only be carried out for a limited time. They require constant supervision and review. They are approved only for specific kinds of crime. Wiretaps that don't keep producing new criminal evidence must be halted. And once a criminal case begins, the defendant can see transcripts of the wiretaps and challenge their

legality. If the law enforcement agencies have gone beyond the law, the courts will exclude the evidence, and the defendant will likely escape justice. Everyone in criminal justice understands that and conducts himself accordingly.

Intelligence wiretaps are different. They don't have to pay off right away, and they can be renewed repeatedly. Sometimes they're left in place for years before they reveal something useful. And they aren't triggered by suspected criminal activity. Any representative of a foreign government is fair game for an intelligence tap. The rules that apply to law enforcement taps just aren't appropriate for intelligence wiretaps. So, in 1978, when the United States embarked on the experiment of putting intelligence wiretaps under judicial oversight, it wrote a special statute for them. FISA sets much more flexible rules for wiretaps aimed at agents of a foreign power than the law sets for law enforcement wiretaps.

Once Congress had created two parallel wiretap statutes, civil liberties conflicts were nearly inevitable. Usually, there wasn't much overlap between the two. Law enforcement wiretaps were for organized crime and politicians. Intelligence wiretaps were for foreign spies and the like.

But espionage is both a crime and an intelligence matter. We usually expelled foreign government spies without prosecution, but we could prosecute Americans when we caught them spying. Which raised the question whether the suspected spy should be wiretapped using FISA or the law enforcement wiretap law.

Civil libertarians and judges had nightmares about such cases. They feared that law enforcement agencies would game the system, picking and choosing the wiretap law that gave them the most latitude. If they couldn't persuade a court to grant a law enforcement wiretap, they'd just use a FISA wiretap instead.

The intelligence agencies had a similar nightmare. What if they found an American spy while conducting an intelligence wiretap and Justice decided to prosecute? As soon as the accused spy got in front of a judge, he would claim that his privacy rights had been violated.

He'd claim that the government had played a shell game, using a FISA tap to catch him when it should have used a law enforcement tap.

If the court agreed, the wiretap could be declared illegal. The spy could go free—but first, he'd likely get a chance to read transcripts of all the government's wiretaps and to figure out how they were done. Years of intelligence gathering could be put at risk.

Even worse, there was no way of knowing when the line had been crossed. It might take years before an intelligence wiretap was put at issue in a criminal trial. By the time a judge told them the intelligence agencies were out of bounds, it would be way too late to fix the problem.

They had to know where the line was. But the law was sparse. The courts had given a few hints. They seemed to say that a proper intelligence wiretap would morph into an improper law enforcement wiretap when the primary purpose of the tap shifted from intelligence gathering to building a criminal case. If the main reason for the tap was gathering evidence, the prosecutors would have to get their own wiretap and live by the rules that the law set for those intercepts.

So if the intelligence agencies wanted to stay out of court and out of legal trouble, all they had was a rule of thumb: The less contact the better between the agencies running the intelligence taps and the prosecutors and investigators handling the criminal case. That reduced the chances that the courts would think that there'd been a shell game in progress. Or, to put it in terms the *New York Times* might have used, the less contact there was between prosecutors and intelligence wiretaps, the less likely it was that American liberties would be eroded by the misuse of FISA for criminal justice purposes.

For a while, the concern was mostly theoretical. When FISA was adopted in 1978, no Americans had been prosecuted for espionage since Julius and Ethel Rosenberg more than a quarter-century earlier. But 1985 turned out to be the Year of the Spy. A dozen Americans were caught spying for foreign governments. They were legitimate FISA counterintelligence targets. They could also be arrested and prosecuted.

But if the authorities were getting ready to prosecute someone, shouldn't they use ordinary wiretaps with all their built-in privacy and civil liberties protections? Suddenly the intelligence agencies' nightmares seemed to be coming true. A solution had to be found. And it was. The two investigations would be kept separate. FISA taps could be used to keep track of likely spies for years, waiting for their tradecraft to slip. When it did, if criminal prosecution looked like an option, the case could be handed off to the prosecutors, who would have to meet all the usual criminal standards if they wanted to carry out wiretaps or other searches. The two things would be independent of each other. The prosecutors didn't need the details of the intelligence. All they needed was a tip that they should begin a separate criminal investigation.

The first course of the wall had been laid, but it seemed to work. The Department of Justice successfully prosecuted several of the spies caught in 1985. America's spies and cops had found a way to live together.

Until the wheels nearly came off.

It was 1993. Janet Reno had taken the helm at Justice as attorney general. She had not brought a contingent of loyalists with her to the department. But she did bring Richard Scruggs, once her boss in Miami, who had come north to handle national security matters for her. Reno was comfortable relying on the career professionals. At first. But within months of arriving, she'd relied on them in approving a raid on the Branch Davidian compound at Waco, Texas, that had gone badly wrong. Dozens of cult members died in a fire, and later investigation cast doubt on much of the advice she'd been given before the raid.

Now it looked as though the career professionals had let her down again. Scruggs could barely contain his disbelief. Shortly after the Waco disaster, he and the attorney general had been briefed on the worst espionage case the United States had seen in a generation. Aldrich Ames, a CIA operative with intimate knowledge of the agency's Soviet sources had sold them all to the Soviets for several million dollars.

To move its investigation forward, the FBI asked the attorney general to personally approve a physical search of Ames's home. Because the search was done for foreign intelligence purposes, the FBI told her, no court-ordered warrant was required. It felt odd to tell the police they could break in to an American's home without going to court for a warrant, but she had relied on the professionals. This wasn't a criminal matter.

Or was it? Scruggs had heard a rumor, and he wanted the truth. He called the two top criminal division prosecutors in national security cases to his office.

—Has the FBI been briefing you about the fruits of their foreign intelligence search of Ames's home? Scruggs demanded to know.

They had.

Scruggs exploded.

—And how are we going to explain that at trial? he asked. How can we tell the court that the attorney general personally authorized the FBI to break in to an American's home without a court order and that the evidence was then turned over to the prosecutors?

It was a debacle, and a civil liberties windfall for Ames. Almost as soon as he was arrested, in early 1994, his lawyers began making precisely the argument that the intelligence agencies and Scruggs had feared. Ames had betrayed the identities of nearly a dozen men. They had almost certainly paid for his treason with their lives, and he could have faced the death penalty if his case had gone to trial. Instead, he was able to negotiate a quick plea for himself and his wife that kept him alive and allowed her to leave prison in 1998.

The Ames case opened a chasm in the little community that understood intelligence wiretaps. For the intelligence agencies, the case was a bullet dodged. The plea deal had kept the courts from deciding whether intelligence techniques violated civil liberties when they were used to help prosecutors. But the intelligence agencies didn't think they could dodge many more bullets like that one. The rules of the road had to be clarified so they could steer clear of retroactive second-guessing by the courts.



As NSA's top lawyer, I was part of the intelligence community at the time, and I shared its concern about privacy claims. In 1994, after I left NSA, I argued in a *Foreign Policy* article<sup>2</sup> that intelligence and law enforcement should be strictly separated. The privacy risks that came from blurring the lines between intelligence and law enforcement might be more abstract than real, I thought, but they had to be taken into account: "However theoretical the risks to civil liberties may be, they cannot be ignored."<sup>3</sup> Foreign intelligence gathering is intrusive, harsh, and deceitful—and should be. I didn't think the courts would or should tolerate the application of these qualities to ordinary criminal defendants. And so I argued for an approach that "preserves, perhaps even raises, the wall between the two communities."<sup>4</sup>

I had plenty of allies in that little world. The FISA court had its own reasons for wanting strong civil liberties protections. Since its creation, it had been incessantly attacked by civil liberties groups as being too secretive and too friendly to the government. It was called a rubber stamp court because it almost never turned down a wiretap application.

The slurs hurt. "I have struggled with the perception for years that we did whatever the government wanted and were rubber stamps," said Judge Royce Lamberth, who became chief judge of the FISA court in 1995. "That was not and is not true."<sup>5</sup>

But making that case was an uphill fight. The court's proceedings were so highly classified that the judge could do little to rebut the charge. Perhaps he felt he had a little more to prove than most. A Republican appointee and a former prosecutor, Lamberth was a colorful, aggressive judge. When not on the bench he sometimes attended sober Washington events in a cowboy hat. A tribute to his Texas roots, he says. Truth in advertising, say some of the lawyers who've appeared before him.

Whatever the truth, Judge Lamberth didn't want anyone to mistake his court's commitment to civil liberties. That was Job One. "We worked to protect civil liberties while protecting the country itself. The judges asked themselves: Are we going to lose our liberties if we

approve this kind of surveillance?" Lamberth told one reporter. "We knew that the country has not always done things right."<sup>6</sup> But those days were over; the FISA court was on the job.

In its mission to head off civil liberties objections, the FISA court had an ally—an obscure but powerful Justice Department office. The Office of Intelligence Policy and Review (OIPR) was the liaison between the court and the executive branch. No paper was filed and no word was spoken in the FISA court without the approval of the intelligence review office. As the guardian of intelligence wiretaps, OIPR wanted to make sure there were no civil liberties abuses on its watch.

When I was at NSA, I had worked with Justice's intelligence review office. It was a small office, and for a generation it had been run by a legend. The counsel for intelligence policy was Mary Lawton, a tiny, tough-talking, hard-smoking spinster with a fine legal mind. She had taken over soon after the intelligence scandals of the 1970s. She believed strongly in the intelligence mission, and especially in her boys at the FBI. She usually found a way to justify the wiretaps and other operations they wanted to carry out.

But she had sharp elbows and a keen sense for the politics of survival. No one talked to her court but her. She was almost as effective at keeping others from talking to the attorney general about classified matters. In government, there's almost nothing that can't be accomplished if you're the only person in the room with the decision-maker, and Lawton knew that.

She also knew how to deal out punishment for bureaucratic offenses. From time to time, someone would cross a line with Lawton. FBI agents would complain to the director about a ruling. Or I'd raise doubts about her refusal to make a particular argument to the FISA court.

The punishment was always the same. She'd stop taking our calls. We'd be referred to her deputy, Alan Kornblum. Bald, bullet-headed and energetic, Kornblum meted out the punishment. He would demand endless rewrites of the same documents. They were never good enough. He wouldn't send the applications to the court without changes. And the changes weren't good enough either. Finally, desperate at the prospect that we'd miss the deadline and have to drop an

important wiretap, I'd call Mary and surrender. Then she'd help us get our paperwork filed in time. Lesson learned. It was a small world, but she ruled it absolutely.

Then, in 1993, Lawton died suddenly. Shaken by the near miss in the Ames case, Attorney General Reno asked Richard Scruggs to take over. Scruggs decided immediately that the tension between law enforcement and intelligence could not be allowed to fester any longer.

He wanted tough new civil liberties guidelines, including a "Chinese wall" between criminal prosecutors and investigators on the one hand and intelligence operations on the other. There would be no more casual mixing of investigations like the Ames case. Instead, the informal understanding would become formal. If the intelligence agencies found a spy, they could use FISA to watch him for as long as they liked, identifying his contacts and drawing a bead on what he had compromised. But they'd have to do all that without any help from the prosecutors.

At some point, the intelligence community would see no value in continuing to watch him, or the case would begin to look like something that could lead to an arrest. Then they could tell the law enforcement agents what they knew. The prosecutors could seek a law enforcement tap and use it to gather the evidence they'd use to prosecute. The earlier work by the intelligence agencies would stay out of the case; no one could say the prosecutors had misused a FISA tap they barely knew about.

Scruggs's relationship with the attorney general was strong. She was determined to avoid another civil liberties debacle of the sort that only a plea bargain had avoided in the Ames case. And he had the solution—a wall in time between intelligence gathering and criminal investigation. It seemed to the lawyers of the intelligence review office, and of the intelligence community, that we had found a safe place to stand, protecting both civil liberties and intelligence sources.

But no sooner had we taken a stand than the ground began to slip from under our feet, like sand in a withdrawing tide.

We had reckoned without the determination of al Qaeda—and the machismo of America's prosecutors.

## Prosecutors and Terrorists

While the lawyers argued nice points of civil liberties doctrine in Washington, Islamic extremists had begun to target New York City. We had granted an immigrant visa to a vicious Islamist ideologue. Omar Abdel-Rahman, also known as the blind sheikh, was allowed to stay as a “religious worker” spreading his faith. And spread it he did, preaching death to Americans with enthusiasm and to great effect.

Shortly after his arrival, his allies and acolytes had killed the radical Jewish activist, Meir Kahane. The case was handled by FBI agents and prosecutors based in Manhattan. These offices saw themselves as a criminal justice elite, the center of criminal justice excellence in the country. The U.S. attorney for the Southern District of New York only occasionally accepted guidance—and certainly never direction—from Washington, where the office was known as the “Sovereign District” of New York. The FBI office in Manhattan had a similar esprit. In Washington, agents made coffee; in New York, they made cases. Big ones.

But they had booted the Kahane case, wrapping it up quickly in a trial that portrayed the shooter as a lone nut. In fact, he was part of the blind sheikh’s Islamist circle, and the blind sheikh was planning on much more than a one-off murder.

Indeed, his acolytes were just getting started. Soon, they would set off a huge car bomb in the World Trade Center, hoping to bring the whole complex down. While the elite of federal law enforcement was struggling with that case, the blind sheik’s allies planned an even more ambitious attack. Their scheme was eerily similar to the assault on Mumbai that would take place in 2008. Bombings on the bridges and tunnels to Manhattan would isolate the island one evening; in the confusion, several luxury hotels would be seized by terrorists disguised as kitchen workers. Mass executions would follow.

The first plot succeeded, though the buildings did not fall. The second plot failed; it was thwarted by an informer. But the plotters’ contempt for the authorities was plain. The cream of federal law

enforcement had overlooked the blind sheikh's organization the first time. Now they took the new attacks personally.

The commitment today of the Obama administration's Justice Department to prosecuting terrorists like common criminals in civilian courts can be traced back to those early years. Prosecutors were riding high. They had indicted a sitting head of state, Manuel Noriega of Panama, in 1988, and the country had invaded Panama to bring him to justice. Prosecutors are to the Justice Department what fighter pilots are to the Air Force. The most talented ones have a bit of a swagger, and there's nothing they think they can't do.

Islamic terrorists, the Southern District's prosecutors believed, had messed with the wrong people. Southern District prosecutors and investigators weren't afraid of international conspiracies. They had convicted over a dozen Mafioso in the "pizza connection" cases of the 1980s. Now, spurred by a mix of shame and outrage, they marshaled their full resources against the terror plotters.

And they delivered. By 1995, nearly fifty extremists were on trial for the Mumbai-style plot.

But this wasn't the Mafia, playing by well-understood rules. In the middle of the trial, the hunted became the hunter. The judge, prosecutors, and witnesses all received death threats. The prosecutors put criminal wiretaps in place. They came up dry. Mary Jo White, the ambitious head of the Southern District, called for FISA wiretaps to keep the coverage up.

Now the fat was in the fire. It was too late to follow the old practice of closing any intelligence taps before opening a criminal case. There were several ongoing criminal investigations into Islamist terrorism in New York. Worse, law enforcement wiretaps had already been tried and failed. It looked as though the prosecutors were doing exactly what civil libertarians and the intelligence review office has always feared—using FISA because criminal wiretaps weren't producing enough information.

Scruggs's OIPR offered a simple solution that would protect defendants' rights fully. If Mary Jo White wanted intelligence taps,

all she had to do was drop the criminal case. Either that, or she could stop asking for intelligence taps in a case that had clearly gone criminal long ago. If FISA taps were launched now, the FISA court would think that its broad authorities were being hijacked to serve the prosecutors of the Southern District. To protect against civil liberties objections, the court would reject the wiretap applications. Or, worse, it would grant them, and the whole thing would come crashing down later, when the wiretaps were reviewed by the trial court in the middle of a high-stakes terrorism prosecution.

But the fighter jocks of the Sovereign District weren't used to taking orders from a no-name intelligence aide like Scruggs, no matter how close he might be to the attorney general. The prosecutors wanted intelligence wiretaps, right now, and they wanted to know everything the taps were producing. After all, if the intelligence community couldn't go looking for a foreign conspiracy to kill American officials, what good was it?

They argued for the greatest possible sharing of intelligence and the narrowest possible view of the civil liberties problem. They wanted anything that might help them make a case.

And what about civil liberties? The prosecutors were used to the claim that they were violating defendants' civil liberties. That's what practically every criminal defendant says these days. The prosecutors could take the heat, and they expected to win in the end. The intelligence guys, they thought, were being nervous nellys. They should just grow a pair.

OIPR's effort to save FISA from civil liberties attack was suddenly at risk.

## **The Intelligence Review Office Takes on the Prosecutors**

In the spring of 1995, Richard Scruggs went to New York to face off with Mary Jo White. Scruggs took Alan Kornblum, who remembers that White was assisted by a well-regarded junior prosecutor named

Patrick Fitzgerald. Fitzgerald would eventually become famous in his own right as the man who prosecuted both Scooter Libby, Vice President Cheney's chief of staff, and Illinois Governor Rod Blagojevich.

White rejected Scruggs's demand that she choose between FISA taps and her criminal case. Kornblum says White wanted a new kind of procedure that would keep the intelligence and criminal cases technically separate while permitting information to slip across the boundary. The intelligence review office rejected the idea but, as he remembers, Deputy Attorney General Jamie Gorelick forced the two sides to agree on something close to White's proposal: An intelligence investigation, complete with FISA wiretaps, would be opened. But to ensure that the wiretap did not become an end run on the civil liberties protections that applied to law enforcement taps, the prosecutors would have no control or direction over the intelligence investigation. Intelligence memoranda would only be given to prosecutors with the permission of the intelligence review office. A single prosecutor would have full visibility into the intelligence "take," but no say in shaping the operation.

Most fateful was the way the deal treated the FBI. The bureau's investigators were divided into criminal and intelligence teams; the criminal team would not be allowed to influence the course of the intelligence investigation.

The wall had arrived. What had been a wall in time—first do the intelligence investigation, then do the criminal investigation—was now a wall between investigators.

The deal made sense as a way to protect civil liberties. Without it, there was a risk that intelligence taps would be influenced by the evidentiary needs of the criminal investigators and prosecutors. If the government was serious about making the criminal investigators turn square corners, there had to be restrictions on how they dealt with the intelligence gatherers.

But it made no sense in terms of countering terrorism. How could two sets of federal agents hunt the same Islamic terrorists without

working together? No one was entirely happy. In OIPR's view, the wall would only protect civil liberties if it were strictly enforced. The procedures sounded good. In theory they kept intelligence intercepts separate from criminal investigations.

But the intelligence review office feared that the prosecutors might win the fight in practice. After all, a prosecutor would see everything the intelligence agencies turned up as soon as it was gathered; he could talk to the intelligence side freely, and if he were as good as Fitzgerald was rumored to be, he'd have no trouble giving the agencies hints about how to improve the criminal case. In the same vein, there were separate FBI teams for intelligence and criminal work. But they all worked for the same bureau; it would be impossible to keep them from talking to each other. The prosecutors were surely counting on exactly that.

Who had won depended on how strictly the wall was enforced. The intelligence review office soon began to fear that it would lose the enforcement battle. The deal with the Southern District only resolved matters for that office. In July of 1995, Deputy Attorney General Gorelick released department-wide guidelines for cases where intelligence and criminal investigations ran parallel. The basic rules were hard to argue with. Prosecutors could have information from the intelligence operation but no control over it. Prosecutors were expressly prohibited from exercising any direction or control over intelligence taps that intersected their criminal investigations. If the intelligence taps turned up evidence indicating the commission of "a significant federal crime" it had to be reported to the Justice Department's Criminal Division.<sup>7</sup> These guidelines were adopted by the attorney general in July of 1995.

But the details made the intelligence review office antsy. Its lawyers feared that the prosecutors wouldn't really respect the wall that was supposedly protecting the rights of defendants. Sure, everyone agreed that prosecutors could not control or direct intelligence taps. And the intelligence officials knew that, like every federal employee, they were obliged to report evidence of a crime to the Justice department.



But the attorney general's guidelines went well beyond reporting of crimes. They didn't just call for a report; they required a detailed description of the facts and circumstances of the crimes, and ongoing consultation. This seemed to stretch "crimes reporting" to the point of artificiality. ("Hello, Justice? CIA here. I'm calling to report a crime. You won't believe it, but al Qaeda is *still* plotting to kill Americans in gross violation of federal criminal law. Here's today's detailed evidence of exactly how they're planning to do that.")

Sure, the guidelines said that prosecutors couldn't direct or control the intelligence tap, but the temptation to cheat would be strong. The intelligence review office and the intelligence community's lawyers all feared that prosecutors would ask questions that were really hints about what the intelligence agents should do next. And that eager-to-please intelligence agencies would turn the informal guidance into their own direction. The FBI criminal investigators, many of whom were experienced lawyers in their own right, could informally lobby their intelligence colleagues to shore up the weak spots in the criminal case. Everyone would get along famously, chiseling away at the wall and the rule that criminal defendants can't be wiretapped without intense judicial supervision.

It would all be good—until the music stopped. Then some judge would put everyone under oath and pull the whole story out of them. At which point the intelligence wiretaps would be held to violate the defendants' civil liberties, with incalculable consequences.

Then the prosecutors who had boasted of their *cojones* would stand before the judge like naked men in an arctic gale.

Or, even worse, when the risk of a bad ruling became clear, the prosecutors would turn against the intelligence agencies, displaying the mix of self-righteousness and flop-sweat that replaces the prosecutors' swagger in the weeks before trial. Nothing would be more important to them than winning the case. Not classified information, not future intelligence operations. Nothing. Suddenly, to ensure victory, the prosecutors would become fierce internal advocates for whatever civil liberties rules they thought the judge was likely to want.

The only way to avoid this, the lawyers of the intelligence review office thought, was to keep the wall high from the start. That meant putting them in the middle. They had to act as chaperone and gatekeeper, overseeing the exchanges between intelligence collectors and prosecutors. Before anything could get across the wall, the intelligence office would have to approve it. The office, after all, was exquisitely responsive to the FISA court and the civil liberties risks. If it could police the wall, it would keep overeager prosecutors and over-cooperative agencies from sliding into forbidden territory.

The only problem was that the attorney general's guidelines didn't give the intelligence review office a chaperone's role. They left the wall in place as a technical matter, but they didn't give OIPR the tools to enforce it.

The attorney general had made her decision. But as far as OIPR was concerned, that was just the beginning of the fight.

Within two years, the attorney general's decision was a dead letter. Whatever the guidelines might say, the FBI was refusing to share intelligence wiretap information with criminal prosecutors without the permission of the intelligence review office.

How did that happen? Put simply, the office had outmaneuvered the prosecutors.

It had the FBI over a barrel. All of the bureau's FISA wiretaps had to go through the intelligence review office, which controlled their drafting and filing. They were always on a tight time frame. And Alan Kornblum had learned one lesson well. Delay was OIPR's trump card.

If the intelligence review office said the documents weren't ready for filing, then they wouldn't go to the court. That meant the wiretaps would lapse, or never be set up. The targets, who might be extraordinarily dangerous terrorists or spies, would escape surveillance. OIPR could punish any FBI agent who talked too much to the criminal division by threatening to wreck his investigation.

But wasn't that a violation of the guidelines? Couldn't the FBI go to the attorney general and object? Sure, if the intelligence review

office was dumb enough to say that it was punishing the bureau for too much cooperation with prosecutors. But FISA filings are immensely complicated. If the intelligence office thought an FBI unit needed disciplining, it only had to send the applications back at the last minute with a host of research to do and changes to make. The unit would have to work nights and weekends and still might lose the tap. If it complained, the intelligence review office could simply say that the office had done an unprofessional job of preparing the application. There was no recourse.

Proud as it was, the bureau had to capitulate. And it did. No one would be allowed over the wall without a chaperone.

The prosecutors soon realized what had happened. They sent complaint after complaint to the attorney general; report after report declared that the guidelines were being flouted. If the intelligence review office and the FBI wouldn't provide information more freely, the prosecutors argued, then the guidelines needed to be revised. A drumbeat began, from the Southern District to the Criminal Division. The guidelines would have to be rewritten to take the intelligence review office out of its "babysitter" role. The prosecutors had to have access to FISA information, free from OIPR's oversight.

This was serious. Prosecutors didn't usually lose battles in front of the attorney general, who was after all the nation's chief prosecutor.

In 1998, the prosecutors showed their power by cutting the intelligence review office's Kornblum down to size. He had turned down several FBI requests for applications to conduct surveillance of Wen Ho Lee, a suspected Chinese nuclear spy at Los Alamos National Laboratory. He didn't think they met the legal standard under FISA, and he knew they'd likely end up being challenged if Lee were arrested and tried. True to type, he had sent them back time and again for more work, never quite saying no. Eventually, the agents shelved the requests. Later, when the government's lethargic handling of the matter blew up into a political scandal, they managed to tag Kornblum with much of the blame.

Also in 1998, the intelligence review office got a new leader. Frances Fragos Townsend (later George W. Bush's homeland security adviser) came from the prosecutor's side of the house. She had spent time in the Criminal Division and the Southern District of New York. When she arrived, she quickly pushed the wounded Kornblum aside, taking him out of the direct line of communication to the court and bringing in a new deputy to handle FISA applications.

Now OIPR's back was to the wall. It seemed only a matter of time before the wall had been eroded as a practical matter. But once again, the wall's defenders had a hidden trump card, and it was time to play it.

As designed by Mary Lawton, the relationship between the FISA court and the intelligence review office was uniquely tight-knit. FISA judges were appointed to seven-year terms from the ranks of existing federal judges around the country. Most had no intelligence background whatsoever before being appointed. They had no familiarity with the immensely complex statute governing intelligence wiretaps. There were no reported cases to read and evaluate. Everything was classified. They were deeply dependent on the OIPR lawyers who guided them through the applications. They thought those lawyers "were top-notch, very impressive," says Judge Lamberth, remembering his first impression.<sup>8</sup> The intelligence review office, in turn, worked hard to earn the court's trust by not taking a traditional litigator's approach to the court.

"Historically," Fran Townsend remembers, "we had more a comfortable than an adversarial relationship with the court."<sup>9</sup> So it was only natural that Chief Judge Lamberth would have been fully briefed on OIPR's fear that the prosecutors would never be satisfied until they had undone the intelligence review office's strict view of what civil liberties required.

And so, as the prosecutors circled, the FISA court itself began to stir.

## The FISA Court Stages a Coup

The issue came to a head in 1998. Al Qaeda's bombing of two U.S. embassies in East Africa had put the Southern District's latest criminal investigation of the group into overdrive. But it also put the wall front and center. As with other al Qaeda cases, the criminal investigation was practically inseparable from the ongoing intelligence monitoring. So what rules would govern this investigation?

The intelligence review office did not want to return to New York for another chest-bumping showdown over the wall. The prosecutors were winning. If the guidelines had to be reworked for the East Africa cases, the intelligence review office would go into battle with half the department arrayed against it.

Staring defeat in the face, the intelligence review office finally played its trump card—the FISA court. Judge Lamberth remembers Kornblum suggesting that the guidelines be turned into FISA court orders. “He felt, and we agreed, that if you have rules, you should follow them,” says the judge.<sup>10</sup>

The idea had understandable appeal from a civil liberties viewpoint, too. Unlike the attorney general, who was, after all, a prosecutor at heart, the court would be an honest broker. It could give the rights of defendants their due weight, without a conflict of interest and without yielding to the importunings of the prosecutors. And so it was done. The FISA court simply annexed the attorney general's guidelines, making the wall a matter of court order.

It was as simple as that; a quiet coup on the top floor of the Justice Department. From now on, the court would decide what was needed to prevent misuse of FISA taps, and the rules it settled on would simply be imposed as a condition on any antiterrorism wiretaps approved by the court.

For the prosecutors it was check and mate. The FISA court had the department over a barrel. The government had to keep the wiretaps up; an attack could occur at any time, and the government could

not afford to be deaf to the planning. If the department wanted the taps, it had to accept that the FISA court was making the rules.

In theory, this court order could have been appealed. There was a pretty good reason to think that the court's action was inconsistent with the law. The Justice Department did at last appeal the wall orders in 2002, when the FISA court insisted on keeping them in place despite the investigative debacle they ultimately caused. The department won easily. The review court was scathing in its assessment of the legal basis for the FISA court's judicial coup, saying that the FISA court had "mistakenly categorized" the 1995 guidelines as statutorily required procedures "and then compelled the government to utilize a modified version of those procedures in a way that is clearly inconsistent with the statutory purpose."<sup>11</sup>

At the time, though, Justice didn't utter a peep. The intelligence review lawyers had no interest in overturning their own bureaucratic triumph, and they controlled all appearances before the court. But even the prosecutors must have seen that an appeal would be a nightmare for Justice. The prosecutors would have had to ask the intelligence review office to assemble the first appellate review panel in FISA history, something that would not have been done quietly. The appeal would have turned into a major civil liberties *cause célèbre*. The newspapers would have treated it as an effort by Justice to cut back on the protections for defendants created by criminal wiretap law. One can imagine the headlines turning the FISA court into an unlikely civil liberties hero: "Revolt of the Rubber Stamp Judges" might have been among the milder ones. Many in Congress as well would have seen the issue through a civil liberties lens, and hearings could have been expected, perhaps even legislation to write the wall into law. Civil liberties groups would have filed amicus briefs, as indeed they did in 2002. And, in the end, there was no certainty that the appeal would succeed, at least in the atmosphere that prevailed before 9/11.

Once the applications had been signed and the opportunity for appeal had passed, the wall was law. Neither the attorney general

nor the Sovereign District of New York could defy or modify a court order.

There was a new civil liberties sheriff in town.

For advocates of defendants' rights, the court orders were a triumph. The wall was now far beyond the reach of the prosecutors. But salvaging the wall was only half the battle. The real key was making sure that the wall was enforced. The FBI had been forced to accept the intelligence review office as the gatekeeper between its intelligence agents and the prosecutors, but how could the court be sure that the FBI itself was enforcing the wall between the intelligence and criminal teams that were both pursuing al Qaeda? The members of each team were FBI agents and analysts, after all; it only made sense for them to pool information and resources. But that process could allow criminal investigation motives to infect the intelligence wiretaps. And that would lead to disaster in a later criminal trial. It would look as though the wall had been honored mainly in the breach.

This was no idle worry. FBI agents are tough, proud, and tribal. To them, the intelligence review office was just another Justice office full of lawyers who didn't understand the street. The agents pursuing al Qaeda shared a common bond, and they needed each other's help. It was crazy, they must have thought, to deny information to each other. As long as investigative cooperation could slip cross the wall informally, from one agent to another, it would continue, no matter what the intelligence review office said. Bringing the FBI to heel would not be easy.

But now the civil libertarians had the FISA court in their corner. "If you have rules, you should follow them," Judge Lamberth believes.<sup>12</sup> Soon the FBI would learn just how firmly he held that view.

Several al Qaeda members had been arrested in the East Africa bombing cases, and by 2000, their trial in the Southern District of New York was drawing near. Patrick Fitzgerald was again at the center of the case.

As Fitzgerald prepared to defend the East Africa FISA intercepts against a suppression motion, he noticed something troubling. The FBI affidavits that led to the FISA orders had dutifully mirrored the FISA court's new guidelines, affirming that there had been no contact between the FBI's criminal and the intelligence teams. But Fitzgerald knew the investigators, and he knew that wasn't true. The FBI teams overlapped.

This was a big problem. There was no evidence of deliberate misrepresentation. The affidavits had described the world that the intelligence lawyers thought existed. But, stuck behind the wall, they had evidently not pressed for the actual facts. And in the end, deliberately or not, the affidavits described a world that didn't exist.

It was a nightmare not just for the intelligence office but for the prosecutors. The Sovereign District was on center stage with this latest prosecution of al Qaeda; but its case was suddenly at risk because of problems with the FISA orders. A suppression hearing loomed. The judge overseeing the criminal trial would have to be told of the mistakes. And the judge would surely ask whether the FISA court had been told of the false statements. According to Judge Lamberth, Fitzgerald eventually announced that the clock had run out; if the attorney general didn't tell the FISA court about the error by the end of the day, Fitzgerald would have to disclose it himself.<sup>13</sup>

In a way, it was just what the intelligence review office had always feared. A prosecutor with a case to protect was suddenly claiming that defendants' rights had been jeopardized by the FISA process and was forcing action that could disrupt the functioning of FISA.

### **The Wrath of the Least Dangerous Branch**

Not long after, Judge Lamberth got an unexpected call.

It was Attorney General Reno.

—I'd like to come see you, she said. I need to tell you something.

—All right, Madam Attorney General, the judge replied, but I know you've got a busy schedule. Much more crowded than mine. I'd be happy to come see you.



—No, no, Reno said. My mama always told me that when you're in trouble, you're the one who goes to see the judge. And I'm in trouble. I'm going to come to you.<sup>14</sup>

Taking a seat in the judge's chambers a few hours later, the attorney general confessed to the errors. It was bad. As many as seventy-five orders had been affected by false affidavits.

Judge Lamberth was not a retiring sort of judge. When he thought the government was not living up to its obligations, the chief judge was relentless. In other cases, he has threatened to hold two Interior secretaries in contempt of court and accused federal officials of racism and bias. Whether he was called a straight shooter or a loose cannon, everyone who appeared before him knew that Judge Lamberth was heavy artillery—especially when he thought he'd encountered government wrongdoing.

He certainly brought out the big guns now. He demanded an investigation of the alleged failure to adhere to the wall. Justice's Office of Professional Responsibility was assigned to track down any evidence that the agents who prepared the applications had committed misconduct.

Judge Lamberth was assisted in his work by a new legal adviser. Alan Kornblum had grown tired of his isolation at the intelligence review office and had joined the FISA court as its first clerk in decades. He brought with him the old, uncompromising OIPR view that the only way to preserve FISA's value for intelligence gathering was to maintain a strict separation of criminal and intelligence functions. So, while the affidavit errors were an embarrassment for OIPR as an office, it might in fact serve the office's long-term strategic interests. This was a chance to make sure that the wall was enforced for real. At last even the FBI could be brought to heel.

The court and its new legal adviser set about constructing new enforcement mechanisms. In October, Judge Lamberth reinforced the court's oversight of who got to see FISA wiretaps. From that point on, every agent who had access to FISA-derived intelligence would have to sign a special certification, promising that none of the information

would be conveyed to criminal investigators without the FISA court's permission.

The election of 2000 eventually brought George W. Bush to power and John Ashcroft to the attorney general's suite, but this did nothing to diminish the FISA court's clout or ambition. As a senator, the new attorney general had been notably supportive of civil liberties, playing to an antigovernment, libertarian strain of Republicanism that had grown strong in opposition to the Clinton administration's centrist support for more law enforcement authority. Attorney General Ashcroft had no interest in picking a civil-liberties fight at the start of his term. Quite the reverse.

According to published sources, Judge Lamberth met early with the new attorney general and gave him one piece of advice. If he wanted to mend fences with the FISA court, Townsend had to go.

She had lost the confidence of the court. Some say the problem was how close she was to the prosecutors, others that the affidavit fiasco had left her damaged.<sup>15</sup>

Not long afterwards, Townsend got word from the attorney general. Her services would no longer be needed. She departed, to head the intelligence office of the Coast Guard.

In early 2001, the FBI sat unknowing in a civil liberties bull's-eye. Many of its field agents were still doing what they had always done—informally sharing information about terrorists. They had a job to do and inside the bureau, at least, sharing with other agents was part of getting the job done.

But the ground had shifted. The FBI had no allies. The judicial coup that incorporated the wall into the FISA court's orders had forced the prosecutors to change sides in the fight over information sharing. Now the prosecutors were demanding that any assurances submitted to the FISA court be strictly accurate. So was the court. And so was the intelligence review office. The assurances looked like boilerplate, but they had become deadly serious, especially for the agents who signed them.

How serious soon became clear. In early 2001, OIPR told Judge Lamberth that it had found another group of investigations where the FBI had not observed the wall. These investigations had nothing to do with al Qaeda, so the FBI teams at work on them had not been touched by Fitzgerald's lash. Sharing across the wall had continued despite the flap in the Southern District. More than a dozen applications had been compromised by false assurances that the wall was in place.

It was the last straw for the FISA court—and for the FBI. The court would insist on an investigation, of course, but that would take months. Judge Lamberth's term would end in a year, and he was determined to strictly enforce the civil liberties protections he had put in place. The court's rules had been broken, and someone was going to pay. Now. Not months from now.

All seven members of the FISA court assembled and agreed. According to Judge Lamberth, one of the seven said, "If I discovered that an affiant in my court had made false statements, I wouldn't spend too much time worrying about whether the false statement was negligent or deliberate. I'd bar him from the courtroom immediately. Why don't we do that?"<sup>16</sup>

It made sense to Judge Lamberth. On March 9, 2001, he sent a letter addressing the attorney general in the bluntest possible terms. "I was disturbed to learn this week that we now have another series of cases in which the FBI affidavits contain information that is not true," he said.<sup>17</sup> The affidavits had been signed by a supervisory agent who was widely viewed as a rising star at the bureau. Not anymore.

At least not if the FISA court had anything to say about it. Effective immediately, Judge Lamberth declared, "the court will not accept any affidavits" from the agent.<sup>18</sup> (The agent was later identified by the *New York Times*, but when I tracked him down, he asked me not to use his name in this book, and I'm honoring his request.) Judge Lamberth also demanded that the intelligence review office "must immediately conduct an inquiry and verify the accuracy of the pleadings in these cases, and explain how such inaccurate information came to be presented to the court."<sup>19</sup>

In the end, Justice's Office of Professional Responsibility expanded its investigation to include the FBI agent's actions. Given the court's harsh language, the investigation wasn't likely to come out well for the agent. OIPR had already decided that the statements were false. The only question seemed to be whether the agent had deceived the court negligently or deliberately. Sanctions could be imposed either way, and if worse came to worst, the agent was at risk of a felony prosecution for making false statements to a federal official. (In fact, years later, after the wall had been discredited by the 9/11 attacks, the investigators would find that the misstatements were simple negligence.)

"The agent was crushed," Townsend remembers.<sup>20</sup> The bureau thought the order would put an end to the agent's career. So did the intelligence review office.

The effect on the FBI was immediate. It did all it could to undo the order. According to Judge Lamberth, "everyone was lobbying me to back off."<sup>21</sup>

The attorney general asked him to reconsider. Separately, FBI Director Louis Freeh "came over and begged me to rescind the order, everything under the sun that could be done about that order."<sup>22</sup> So did the head of FBI counterintelligence and other friends and colleagues of the agent. The disciplinary action was causing turmoil in the bureau.

But Lamberth simply dug in harder. He later told a reporter, "We never rescinded it. We enforced it. And we sent a message to the FBI."<sup>23</sup>

What message was the court sending? That the agents should "tell the truth"<sup>24</sup> about enforcement of the wall, said Judge Lamberth.

Maybe so.

But that wasn't the message FBI agents heard.

What FBI agents heard was a little more pointed and a lot more frightening: Nothing was more likely to end their careers than failing to observe the wall.

Caught between the prosecutors, the intelligence review office, and the FISA court, they had nowhere to hide. If they didn't follow

the civil liberties protections set out by the court to the letter, they would be punished, and harshly. Whether the mistake was negligent or intentional “didn’t really matter,” in Judge Lamberth’s words.<sup>25</sup>

Even after that message had been sent, the court was determined to underline it. In April 2001 the court decided to put every supervisory agent with responsibility for an intelligence team on notice. Each one was required to sign the FISA applications filed by their offices. They had to confirm all of the facts that the applications set forth. Assistant U.S. attorneys were required to do the same.

With the lesson of the disciplined agent still reverberating through the institution, the new requirement was a reminder. What the FISA court had done to the first agent it was quite prepared to do to the rest of them. The new requirement forced every agent and every Justice official to double- and triple-check their compliance with the wall. Any error, any misstep could lead to sanctions.

In the confusion, with new players having to flyspeck the massive FISA applications and triple-check their compliance with the wall, the government began to miss deadlines for submitting wiretap applications. The offices just couldn’t process the bulky filings under the court’s new civil liberties standards fast enough. For the first time since FISA was enacted in 1978, FISA taps had to be dropped, not for substantive reasons but simply because the old orders had expired before new ones could be requested and approved.

That meant lost coverage. Suddenly, known terrorists could make plans and exchange information without the government learning what was going on. The biggest impact, according to published reports, came in the cases that inspired the court to write the new protections—the investigations of al Qaeda.

As many as twenty al Qaeda wiretap orders were reportedly dropped in the year leading up to August 2001—just as preparations for the 9/11 attacks were reaching a crescendo. Honoring Osama bin Laden’s right to be free from unlawful criminal wiretaps was turning out to be costly. Enforcement of the wall was protecting his operatives

from scrutiny at a critical time, just as preparations for the September 11 attacks were at their most intense.

All through this period, the intelligence system was blinking red. Everyone feared and expected a spectacular al Qaeda attack. The director of Central Intelligence was urging greater effort to find out what al Qaeda was up to. Even the FISA court knew that something big was in the works.

But the FBI and other intelligence agencies had something more important to deal with. They were in the grip of a full-fledged bureaucratic panic. Law professors might call the judiciary “the least dangerous branch” of government; FBI agents had a different view.

“FBI personnel involved in FISA matters feared the fate of the agent who had been barred,” says one declassified Joint Intelligence Committee report on the 9/11 attacks.<sup>26</sup> FBI intelligence agents “began to avoid even the most pedestrian contact with personnel in criminal components of the Bureau or DOJ [Department of Justice] because it could result in intensive scrutiny by [OIPR] and the FISA court.”<sup>27</sup> If a star agent could be held in contempt, it could happen to anyone, they believed. The personal certifications were a constant reminder of the peril faced by anyone investigating al Qaeda.

The wall was getting higher every month.

## End Game

On August 22, an FBI analyst named Donna got a call that could have stopped the looming attacks cold. The call came from an FBI detailee at the CIA. The detailee had discovered that a major al Qaeda operative entered the United States in July. This couldn't have been an accident. Something was up, and it was serious.

The last, and most promising, opportunity to halt the plot had opened up. Stopping it should not have been hard. Khalid al-Mihdhar had been living under his own name in California and could have been found there before September 11 if the bureau had moved quickly.

But Donna had a lot to do, and it wasn't until August 28 that she sent an alert about al-Mihdhar, including a related NSA report, to the FBI's New York office.

The NSA report was valuable, but it posed a complication. Less than a year earlier, NSA had begun adding a special "caveat" or legend on the face of reports derived from FISA wiretaps. The caveat said that information in it could not be shared with law enforcement unless special permission had been granted.

This rule, too, was part of the wall. NSA carried out fewer FISA wiretaps than the bureau, and it had always been more independent of the intelligence review office; still, it was dependent on both the office and the court. When those offices grew more demanding about policing the wall, NSA had to follow suit.

Donna wanted to stay within the rules set by the FISA court. She therefore sent the alert only to her intelligence contact on the bin Laden squad.

But as if to underscore the risk of unauthorized sharing that the court had been fighting for over a year, the intelligence investigator sent the alert to his supervisor, who ignored the NSA's caveat and sent the intelligence about terrorists in the United States to the entire criminal investigative team responsible for bin Laden.

One of the squad members, a criminal investigator by the name of Scott, was immediately galvanized. The team investigating the Cole bombing was already up and running. It had resources and manpower. He wanted to put those resources to work right away to find al-Mihdhar.

Donna was alarmed. She knew a violation of the new rules when she saw it. She insisted that Scott destroy the alert. It should not have gone to him under the rules as she understood them.

But Scott was not deterred. Known terrorists had entered the country. This was too important to leave to an undermanned intelligence team.

He argued that his criminal investigators could devote more agents to the search. The criminal investigators, he said, could use

grand jury subpoenas and other law enforcement tools that were far quicker than those available to the intelligence side of the Bureau. They had all the resources they needed inside the United States. The intelligence guys didn't.

He was right. At this time, the FBI's intelligence arm was notoriously underfunded and sometimes even disrespected by the rest of the bureau.

Even so, Donna insisted, the resources could not be used. The wall prevented the mixing of criminal and intelligence investigations.

Scott must have been the bravest or the most clueless agent in the bureau. He ignored Donna's advice and kept pressing.

Donna appealed to the FBI general counsel's office for a ruling. That office knew the score. Its lawyers had seen the FISA court's crusade to reinforce the wall up close. The FBI's general counsel, Larry Parkinson, would later tell the 9/11 Commission staff that the disciplined agent's fate was "'a big deal' for a lot of people." It "spooked" them, and they "became less aggressive."<sup>28</sup>

Spooked, the lawyers certainly were. They sided with Donna. Scott was out of line. He was risking a civil liberties scandal that would put his career and theirs in jeopardy. The search would have to be done by the thinly staffed intelligence arm of the bureau. Scott and his resources were off limits.

Even after this definitive ruling, Scott refused to go quietly. He protested in eerily prescient terms: "Someday someone will die—and wall or not—the public will not understand why we were not more effective and throwing every resource we had at certain 'problems.' Let's hope the [lawyers who gave the advice] will stand behind their decisions then, especially since the biggest threat to us now, UBL [Usama Bin (sic) Laden], is getting the most 'protection.'"<sup>29</sup>

From Washington, Scott's fight to get criminal resources into the search for al-Mihdhar looks like an act of courage that borders on the foolhardy. He had already received intelligence in violation of the wall, and now he was kicking up a fuss, bringing in lawyers, drawing



attention to the violation, and advertising his disagreement with the FISA court's rules.

It was as brave in its way as Melendez-Perez's decision to send Kahtani home based on little more than intuition. But unlike Melendez-Perez, Scott got no help from his higher-ups. The wall had become a maze of walls. And in the end, one agent's determination to do his job was not enough to overcome all the walls—the complex civil liberties rules, the harsh enforcement regime devised the intelligence review office and the FISA court, the lurking machinery of scandal.

Scott had nowhere left to go. He did what he was told. He left the job of finding al-Mihdhar to Donna and the understaffed FBI intelligence unit.

They were still looking when September 11 dawned, bright and crisp.

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