FISA, THE "WALL," AND CROSSFIRE HURRICANE: A CONTEXTUALIZED LEGAL HISTORY

Bernard Horowitz*

The December 9, 2019, Crossfire Hurricane DOJ OIG Report marks the most publicly visible controversy in the forty-year history of the FISA statute. It also represents a potential trap for well-meaning policymakers: sometimes "the road to hell is paved with good intentions." In contemplating FISA reform, past non-partisan FISA policy disputes within the DOJ—specifically those concerning internal FISA review mechanisms designed to ensure compliance with the statute—demand attention. These past disputes show that the FISA framework has proven unusually reactive to pressure or sudden policy shifts; and when the FISA framework has been destabilized, this has compromised U.S. national security. Policymakers newly concerned about FISA misuse might reasonably envision a "pendulum" analogy whereby FISA restrictiveness and permissiveness have fluctuated over time depending on national priorities. Accordingly, twenty years after the 9/11 attacks, it might seem theoretically desirable to consider reinstating (or partially reinstating) past FISA order review policies from when the framework was most restrictive. However, the compliance regime during this period between 1995 and 2001, featuring a "Wall" between federal prosecutors and investigators conducting FISA surveillance, was flawed both legally and practically; it contributed to the 9/11 intelligence failures. Reinitiating the Wall policies is not an option. Hence, policymakers aspiring to amplify judicial review of FISA orders appear to face the task of constructing wholly new safeguards. The national security surveillance mechanism hangs in the balance. A potential (partial) remedy, favored by

* Antonin Scalia Law School at George Mason University, J.D. Candidate, 2021; Grammy Nominee (as Producer) 2016; Co-editor with Harvey Rishikof and Stewart Baker, *Patriots Debate: Contemporary Issues in National Security Law,* 2012; B.A. Colorado College, 2010. Special thanks to Professors Mark Cummings, Jeffrey Parker, and Ronald Rychlak for their written Commentaries, and to Professor Jamil Jaffer, Professor Daniel Pi, Maj. Patrick Francescon, Brian Farrell, Harvey Rishikof and many others for their helpful feedback. This Article is dedicated to Dennis Showalter (1942-2019). The author may be contacted at bhorowi@gmu.edu.

national security lawyers, is a "Super IG" FISA oversight system, which would facilitate FISA scrutiny without delaying or impeding the process.

INTRODUCTION

> *One major gap in our counterterrorism capabilities was what many called "the wall." Over time, the government had adopted a set of procedures that prevented law enforcement and intelligence personnel from sharing key information.*
>
> —President George W. Bush[1]

On May 31, 2019, Attorney General William Barr granted an interview with Jan Crawford, chief legal correspondent for CBS News.[2] With the recent publication of Special Counsel Robert Mueller's report on Russian interference in the 2016 election,[3] Barr's attention was turning to Department of Justice Inspector General (DOJ IG) and criminal investigations concerning the initiation of the Mueller probe,[4] and related use of the Foreign Intelligence Surveillance Act (FISA).[5] FISA is the legal authorization mechanism for national security-purposed surveillance corresponding to terrorism and espionage investigations.

According to Barr, during the 2016 election, for the first time in U.S. history, a foreign counterintelligence investigation, Crossfire Hurricane, had surveilled a political campaign using FISA authorities.[6] This required the Foreign Intelligence Surveillance Court (FISC or FISA Court) to approve an order drafted by Federal Bureau of

---

[1] GEORGE W. BUSH, DECISION POINTS 160 (2011).

[2] *Exclusive: AG William Barr on Special Counsel Mueller and the Russia Probe*, CBS THIS MORNING PODCAST (May 31, 2019), https://soundcloud.com/cbsthismorning/exclusive-ag-william-barr-on-special-counsel-mueller-and-the-russia-probe [hereinafter CBS Podcast].

[3] *See generally* U.S. DEP'T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019).

[4] OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI'S CROSSFIRE HURRICANE INVESTIGATION (2019) [hereinafter FISA IG REPORT]; OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, MANAGEMENT ADVISORY MEMORANDUM FOR THE DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION REGARDING THE EXECUTION OF WOODS PROCEDURES FOR APPLICATIONS FILED WITH THE FOREIGN INTELLIGENCE SURVEILLANCE COURT RELATING TO U.S. PERSONS (2020) [hereinafter WOODS PROCEDURES MEMO].

[5] *See* 50 U.S.C. § 1804 (2012).

[6] CBS Podcast, *supra* note 2.

Investigation (FBI) and DOJ officials, certifying probable cause that the surveillance would target foreign intelligence activity, which is the established legal standard for FISA surveillance authorizations.[7]

The key allegation of misconduct with respect to Crossfire Hurricane was that political opposition research—the "Steele dossier," named for a former British intelligence agent who compiled the information—was pivotally employed as evidence both to initiate the investigation and to certify probable cause supporting FISA surveillance.[8] Long before the IG Report was released, it seemed likely that if Steele really had been tied to Democratic National Committee opposition research targeting the Trump campaign, the result would be strong bipartisan will from civil libertarian Democrats and Republicans plus hawkish Republicans supporting President Trump to penalize the FBI and amend the FISA framework to make it more restrictive.

The ABA Standing Committee on Law and National Security sponsors a Task Force on FISA that serves as a vehicle for national security and civil liberties lawyers to contemplate FISA policy.[9] At a 2012 Task Force meeting, civil libertarian lawyers suggested a scenario that addressed concerns about the boundaries of FISA surveillance: due to geographic and ethnic realities of the War on Terror, FISA surveillance was presumably being applied to Middle Eastern suspects at a higher rate than other groups.[10] Hence, the civil libertarian lawyers contended, Middle Easterners might face investigation and prosecution for non-terrorism or non-espionage offenses at a higher rate.[11] For example, a Pakistani rug smuggler with no involvement in

[7] *See* 50 U.S.C. § 1804 (2012).
[8] *See* Sarah Grant & Chuck Rosenberg, *The Steele Dossier: A Retrospective*, LAWFARE (Dec. 14, 2018, 8:00 AM), http://www.lawfareblog.com/steele-dossier-retrospective.
[9] American Bar Association Standing Committee on Law and National Security: Report from FISA Task Force Meeting at Morgan Lewis, Jan. 6, 2012 [hereinafter ABA FISA Task Force Report, Jan. 2012] (on file with author); American Bar Association Standing Committee on Law and National Security: Report from FISA Task Force Meeting at Morgan Lewis, Oct. 3, 2012 [hereinafter ABA FISA Task Force Report, Oct. 2012] (on file with author).
[10] ABA FISA Task Force Report, Oct. 2012, *supra* note 9, at 5.
[11] *Id.*

any terrorist activity might be subject to FISA surveillance under the pretext of a terrorism investigation and then implicated for quotidian illegal business activities disclosed by the surveillance.[12] In contrast, an Argentinean rug smuggler, far less likely to face FISA surveillance, could illegally traffic rugs without disturbance.[13]

The concern, while understandable, was unrealistic because the FISA statute specifies that seeking "foreign intelligence information" must be "a significant purpose" of surveillance.[14] Hence, unless DOJ could concretely demonstrate a connection between the rug smugglers and terrorist activities, use of the FISA intercepts in a prosecution would be legally risky: prosecuting a non-terrorism crime using FISA information, which must be declared as part of court procedures, would seemingly raise Fourth Amendment concerns. Moreover, the reality is that FISA evidence is not used to prosecute regular crimes.

The rug smuggler scenario helps establish the scope of the 2016 FISA surveillance abuse allegations. The ABA FISA Task Force civil liberties lawyers had proposed the scenario as the most troubling abuse of FISA that they could realistically imagine.[15] Suggestions that one day FISA surveillance might be politicized most likely would not have been taken seriously. In May 2019, Barr addressed the significance of such allegations, noting:

> Republics have fallen because of a Praetorian Guard mentality where government officials get very arrogant, they identify the national interest with their own political preferences, and they feel that anyone who has a different opinion is somehow an enemy of the state . . . they're there to protect as guardians of the people. That can translate into supervening the will of the majority and getting your own way.[16]

[12] *Id.*
[13] *See id.*
[14] 50 U.S.C. § 1804(a)(6)(B) (2012).
[15] ABA FISA Task Force Report, Oct. 2012, *supra* note 9.
[16] CBS Podcast, *supra* note 2.

Perhaps more revealingly, Barr likened the mindset of those behind the allegedly politicized FISA warrants targeting the Trump campaign to people in 2009 suggesting that "[President Obama] might be a Manchurian candidate for Islam."[17]

Finally, Barr and his interviewer broached a key issue: the repercussions of the forthcoming IG investigation of alleged FISA abuse with respect to the FBI. Asked whether FBI morale might be "undermined," Barr responded that the alleged abuses would have been conducted by a "small group at the top."[18] He did not "think there was a problem rife through the bureau" or other intelligence agencies that might have been involved.[19]

On December 9, 2019, DOJ Inspector General Michael Horowitz issued his 434-page Report on "Crossfire Hurricane," the counterintelligence investigation of the Trump campaign.[20] He found that FISA had been misused by the FBI to arrange surveillance of Carter Page, a Trump foreign policy advisor.[21] The Steele dossier contended that Page was acting in tandem with Paul Manafort and two high-placed Russians as a nexus between the Trump campaign and the Kremlin.[22] But Page had never been in contact with Manafort or the two Russians.[23] While it understandably took some time for the FBI to confirm this reality, the FISA surveillance had continued despite mounting evidence that the Steele information was untrustworthy, incorrect, and apparently political.[24]

IG Horowitz grappled with the practical question of whether FBI missteps in the FISA process reflected political bias. Steele was

---

[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *See generally* FISA IG REPORT, *supra* note 4.
[21] *Id.* at xiii ("We identified at least 17 significant errors or omissions in the Carter Page FISA applications . . .").
[22] *Id.* at 100, 126, 167, 169, 241, 377.
[23] *Id.* at 223, 317, 364, 366.
[24] *See, e.g.*, *Examining the Inspector General's Report on Alleged Abuses of the Foreign Intelligence Surveillance Act: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 27:00 (2019) (statement of Senator Lindsey Graham), https://www.youtube.com/watch?v=bi8V-9EQfec&t=16949s.

directly tied to political opposition research efforts.[25] Furthermore, two key participants in the Crossfire Hurricane investigation had sent text messages not merely discussing political opposition to candidate, and then President Trump, but also suggesting that they would take action on the basis of these sentiments.[26] One of these individuals, a DOJ lawyer, doctored an email he received from the U.S. Intelligence Community, which he then forwarded to the FBI to artificially support probable cause against Page.[27] The other official, Peter Strzok, was one of the highest-ranking members of the FBI Crossfire Hurricane team.[28]

In the end, IG Horowitz's Report detailed seventeen significant FISA transgressions, corresponding to the initial application for surveillance, the renewals, or both.[29] At the same time, the IG cleared the DOJ's Office of Intelligence (OI) and the FISC—their role and responsibilities within the FISA process as it exists today limits their access to information provided by the FBI.[30] Hence,

[25] FISA IG REPORT, supra note 4, at 381 ("Steele and his consulting firm were hired by Fusion GPS, a Washington, D.C. investigative firm, to obtain information about whether Russia was trying to achieve a particular outcome in the 2016 U.S. elections, what personal and business ties then candidate Trump had in Russia, and whether there were any ties between the Russian government and Trump or his campaign. . . . As noted earlier, we determined that Steele's election reporting played a central and essential role in the Department's decision in connection with the Crossfire Hurricane investigation to seek a FISA order in October 2016 authorizing electronic surveillance . . . targeting Carter Page. We . . . found that the FBI was aware of the potential for political influences on Steele's reporting from the outset of receiving it in July 2016 and, in part to account for those potential influences, the Crossfire Hurricane team undertook substantial efforts to evaluate the accuracy of the reporting and the reliability of the sources of Steele's information. We determined that these investigative efforts raised significant questions about the accuracy and reliability of Steele's election reporting. However . . . we concluded that the FBI did not share these questions about the reporting with Department attorneys working on the Carter Page FISA applications and failed to reassess its reliance on Steele's reporting in the Crossfire Hurricane investigation.").

[26] *Id.* at 256 n.400, 348-49.

[27] *Id.* at 372.

[28] *Id.* at 67, 81-82.

[29] *Id.* at 363-69.

[30] *See id.* at 38-42; FISA IG REPORT, *supra* note 4, at 156 (emphasis added) ("Our review revealed instances in which factual assertions relied upon in the first FISA application targeting Carter Page were inaccurate, incomplete, or unsupported by appropriate documentation, based upon information the FBI had in its possession at

practically all of the FISA missteps corresponded to the FBI's Crossfire Hurricane team.

The DOJ IG was left in the position of stating that while there was no testimonial or documentary evidence tying political bias literally and directly to missteps in the FISA applications, the IG "*did not receive satisfactory explanations for the errors or missing information*. We found that the offered explanations for these serious errors did not excuse them, or the repeated failures to ensure the accuracy of information presented to the FISA Court."[31] In March 2020, the DOJ IG released a preliminary report of its pending post-Crossfire Hurricane investigation of FBI FISA practices—the preliminary report confirms widespread FISA compliance problems.[32]

The findings of the two IG reports represent the most serious and public FISA misstep in the history of the statute since its establishment in 1978. However, as noted throughout this Article, the disclosure of the Crossfire Hurricane FISA troubles is not merely problematic because they represent an ostensible civil liberties injustice—the larger question is what happens to the FISA mechanism itself.[33] Inextricably, the history of FISA policy and reform from the mid-1990s through September 11, 2001 (9/11) embodies a warning: excessive pressure on the FBI with respect to FISA has the capacity to "paralyze" the national security surveillance bureaucracy.[34] These past struggles are not widely discussed, but they were well-documented in open sources.[35] Pressure stemming from FISA policy disputes exerted

---

the time the application was filed . . . We found no evidence that the OI Attorney, NSD supervisors, ODAG officials, or Yates were made aware of these issues by the FBI before the first FISA application was submitted to the court.").

[31] FISA IG REPORT, *supra* note 4, at 156, 413-14 (emphasis added).

[32] WOODS PROCEDURES MEMO, *supra* note 4, at 2-3 (2020).

[33] *See User Clip: Mike Lee and Michael Horowitz*, C-SPAN (Dec. 11, 2019), https://www.c-span.org/video/?c4838002/user-clip-mike-lee-michael-horowitz.

[34] RONALD KESSLER, THE SECRETS OF THE FBI 162 (2012).

[35] *See* In re Sealed Case No. 02-001, 310 F.3d 717, 736 (FISA Ct. Rev. 2002); STEWART A. BAKER, SKATING ON STILTS: WHY WE AREN'T STOPPING TOMORROW'S TERRORISM 39-69 (2010); DEP'T OF JUSTICE, ATT'Y GEN.'S REV. TEAM ON THE HANDLING OF THE LOS ALAMOS NAT'L LAB. INVESTIGATION, FINAL REPORT 710 (2000) [hereinafter THE BELLOWS REPORT], *available at* https://www.justice.gov/archives/ag/attorney-generals-foia-reading-room-records-bellows-report.

on the FBI played a direct role in 9/11 intelligence failures, as well as failure to properly investigate and prosecute an alleged Chinese spy believed to have exfiltrated nuclear secrets from the Los Alamos Nuclear Laboratory.[36]

In reality, purported FISA "abuses" in the 1990s had been at worst the result of FBI carelessness, and more readily reflect understandable mistakes in the face of practically and legally tedious regulations.[37] Beginning in 1993, in the wake of the Aldrich Ames case and the death of DOJ FISA policy specialist Mary Lawton, the FISA mechanism deteriorated due to obstructive internal DOJ policies which in effect constructed a Wall between federal prosecutors and intelligence investigators.[38] As designed by DOJ, the Wall theoretically should not have impacted the fundamental capacity to secure FISA surveillance; however, as enacted in practice, Wall policies created an internal conflict within DOJ that did impair the capacity to seek FISA surveillance.[39] In 2000, the struggles with FISA were documented in a report compiled over several years by veteran prosecutor Randy Bellows.[40] Bellows became progressively more discomfited by the impracticability of the warrant authorization system the more he investigated.[41]

The Bellows Report shows that due to a prolonged overreaction to the putative 1990s FISA missteps, the entire FISA bureaucracy ground to a standstill; the overreaction comprised both the imposition of obstructive DOJ policies as well as a bureaucratic

---

[36] THE BELLOWS REPORT, *supra* note 35, at 710.
[37] BAKER, *supra* note 35, at 39-69.
[38] *See generally* BAKER, supra note 35; THE BELLOWS REPORT, *supra* note 35, at 712.
[39] NAT'L COMM'N ON TERRORIST ATTACKS, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 78-79, 270-71 (2004) [hereinafter 9/11 COMMISSION REPORT]; THE BELLOWS REPORT, *supra* note 35, at 721-35.
[40] THE BELLOWS REPORT, *supra* note 35, at 743.
[41] *See* Memorandum from Gary G. Grindler & Jonathan D. Schwartz to the Att'y Gen. through the Deputy Att'y Gen., To Recommend that the Attorney General Authorize Certain Measures Regarding Intelligence Matters in Response to the Interim Recommendations Provided by Special Litigation Counsel Randy Bellows (Jan. 18, 2000) [hereinafter Interim Guidelines], https://fas.org/irp/agency/doj/fisa/ag012100.html.

lockdown.[42] DOJ and FBI officials grappled with the reality that minor mistakes relating to FISA warrant applications could be "a career stopper."[43] The remedies to the alleged abuses only escalated matters as of Spring 2001.

Based on the Bellows Report alone, which concerns FISA policy in the mid and late-1990s, it might be imaginable, though uncertain, that the problems illuminated by Bellows contributed to 9/11 intelligence failures. In 2010, former National Security Agency (NSA) General Counsel Stewart Baker published a book, *Skating on Stilts*, directly demonstrating how FISA problems highlighted by Bellows detracted from national security capabilities.[44] Baker effectively confirmed that FISA paralysis directly contributed to the 9/11 intelligence failures.[45]

Today, the episode of the Wall FISA restrictions stands as a warning about constraining FISA surveillance either directly, through legislation or internal DOJ policy, or indirectly, through bureaucratic pressure on FBI and DOJ officials who handle the FISA mechanism. Hence, despite the FBI's alleged misuse of FISA, policymakers would be well-advised to balance their eagerness to reform FISA with sober recognition that an overreaction could again prove destructive to U.S. national security.

---

[42] *See* THE BELLOWS REPORT, *supra* note 35, at 708.
[43] *Id.*
[44] Baker did not rely on Bellows as a source. *See* BAKER, *supra* note 35, at 39-69.
[45] *See, e.g.*, THE BELLOWS REPORT, *supra* note 35, at 708 (quoting FBI Supervisory Agent Timothy Bereznay, who said that the FBI had been "lucky" that certain problems with FISA have not hampered a case. Bellows, writing c. 2000, comments that this "luck" ran out with the Wen Ho Lee case, where the restrictions on FISA prevented the FBI from getting a wiretap on Lee); In re Sealed Case No. 02-001, 310 F.3d 717, 743-44 (FISA Ct. Rev. 2002) ("Recent testimony before the Joint Intelligence Committee amply demonstrates that the *Truong* line is a very difficult one to administer. Indeed, it was suggested that the FISA court requirements based on Truong may well have contributed, whether correctly understood or not, to the FBI missing opportunities to anticipate the September 11, 2001 attacks.").

I. THE BACKGROUND OF FISA AND FISA POLICY FROM 1978 TO 1993

FISA represents the U.S. government's answer to at least two fundamental questions concerning investigative powers exercised under the aegis of national defense. First, under what circumstances and using what tools may the government gather domestic information relating to espionage and terrorism? Second, once this information is acquired, how may it be utilized? While FISA initially represented a rather narrow aim—telephonic surveillance of Cold War-era foreign espionage agents in the United States—it has been amended many times to adjust for technological, geopolitical and jurisprudential developments, growing in significance so that it now plays a vital role in the legal framework for the War on Terror.[46]

Hence, as the end of the twentieth century approached, FISA-derived information was increasingly useful not just as intelligence, but as potential evidence in federal prosecutions.[47] This opened the door for a series of major legal disagreements and turf wars within DOJ that resulted in what became known as "The Wall."[48] The Wall was an attempt to ensure FISA complied with the Fourth Amendment by separating foreign intelligence and criminal investigations at a time when the difference between the two was increasingly blurred.[49]

Numerous sources, including the *9/11 Commission Report* (*Report*), indicate that the Wall played a direct role in the 9/11 intelligence failures.[50] The *Report* includes a troubling exchange between investigators frustrated that "someday someone will die" because of how the Wall-related restrictions were complicating

---

[46] *See* 18 U.S.C. § 2712(b)(4) (2012) (designating FISA Section 1806(f) as "the exclusive means by which materials [designated as sensitive by the government] shall be reviewed."); Jewel v. NSA, 965 F. Supp. 2d 1090, 1104-05 (N.D. Cal. 2013).
[47] *See* United States v. Duggan, 743 F.2d 59, 77-78 (2d Cir. 1984), United States v. Pelton, 835 F.2d 1067, 1070-71 (4th Cir. 1987); United States v. Sarkissian, 841 F.2d 959, 961-62, 965 (9th Cir. 1988); United States v. Johnson, No. 89-221, 1990 WL 78522, at *4 (D. Mass Apr. 13, 1990).
[48] *See* BAKER, *supra* note 35, at 39-69.
[49] *Id.*
[50] 9/11 COMMISSION REPORT, *supra* note 39, at 78-79, 270-71.

surveillance of Khalid al-Midhar, one of the 9/11 hijackers.[51] However, incongruously, the 9/11 Commission only superficially noted that the FISA Wall legal policies, in practice, were dramatically distinct from DOJ policies, and declined to address or explain this divergence.[52] Some policymakers have suggested that problems within DOJ were under-emphasized and under-addressed by the *Report*. For example, Henry Crumpton, a widely-respected longtime CIA official, contended that the *Report* overwhelmingly misallocated attention towards the CIA and away from other agencies involved with investigating al-Qaeda (specifically including the FBI).[53]

In the post-9/11 era, FISA policy has been yet further complicated because IT progress has undermined conventional communications law.[54] Resolving legal questions relating to FISA-derived information from traditional telephone wiretapping was already complex—now we face more layers, such as responses to the encryption of internet communications, the inability to determine the geographic origin of communications, and tedious legal distinctions between communications content and metadata.[55]

Some efforts have been made to adapt old communications laws to new technology, but there may be fundamental limits to applying, for example, the Communications Act of 1934, the Electronic Communications Privacy Act of 1986 (ECPA), and the Communications Assistance for Law Enforcement Act of 1994 (CALEA) to present technology.[56] Perhaps in partial contrast to these examples, lawmakers have worked tirelessly to repeatedly update FISA.[57] Proponents of FISA draw strength from an oft-noted, unpublished memo named for the best-known champion of FISA, the

---

[51] *Id.* at 270-71.

[52] *Id.* at 78-79.

[53] *See* HENRY A. CRUMPTON, THE ART OF INTELLIGENCE: LESSONS FROM A LIFE IN THE CIA'S CLANDESTINE SERVICE 309-10 (1st ed. 2012).

[54] *See* Harvey Rishikof & Bernard Horowitz, *Shattered Boundaries: Whither the Cyber Future?*, 14 J. MIL. & STRATEGIC STUD. 1, 1 (2012).

[55] *Id.*

[56] *See* Tony Rutkowski & Susan Landau, *CALEA: What's Next?*, *in* PATRIOTS DEBATE: CONTEMPORARY ISSUES IN NATIONAL SECURITY LAW (Stewart Baker et al. eds., 2012).

[57] *See, e.g.*, FISA Amendments Act of 2008 (FAA), Pub. L. No. 110-261, 122 Stat. 2436 (2008).

intelligence lawyer Mary Lawton—the "Lawton Memo" decrees that FISA is not perfect, but that it works sufficiently to serve the purposes for which it was created.[58]

In addition to the layers of complexity and nuance added to track technological developments, there are two principal reasons FISA is inaccessible to public understanding. First, while the statute and its aim and use were relatively straightforward during the Cold War, changes in the geopolitical environment, namely the War on Terror, have necessitated additions to the statute beyond basic surveillance authority, such as National Security Letters and metadata gathering.[59] Second, and perhaps more significantly, FISA is a surveillance-authorization mechanism that strongly deviates from popular notions of judicial review. When citizens imagine the FISC, they base their understanding on a conventional court-authorized warrant. Critics of FISA are quick to point out annual statistics indicating that almost no FISA warrants are rejected by the FISC, but these assertions are often misplaced—FISA "rejections" customarily occur internally within DOJ *before* warrant applications reach the FISC.[60]

Throughout FISA's history, a significant, if not preponderant, portion of warrant application review has been conducted outside the court by bureaucratic processes and actors empowered to block FISA warrants before they reach the FISC. The degree to which the FISC exerts meaningful review of FISA applications has always been an open question to practitioners, who maintain that FISA judges "don't actually know what to look for" when they scrutinize applications.[61] That FISA judges "rubber stamp," as suggested by some critics, goes too far.[62] Rather than being confined to the FISC, the FISA framework's system of checks and balances is executed at many levels

[58] *See* ABA FISA Task Force Report, Jan. 2012, *supra* note 9.
[59] *See* Harvey Rishikof & Bernard Horowitz, *Shattered Boundaries: Whither the Cyber Future?*, 14 J. MIL. & STRATEGIC STUD. 1, 1 (2012).
[60] Joel Brenner, *The Data on FISA Warrants*, LAWFARE (Oct. 17, 2013, 6:08 PM), http://www.lawfareblog.com/2013/10/the-data-on-fisa-warrants/; Steve Vladeck, *Two FISA Data Questions for Joel Brenner*, LAWFARE (Oct. 18, 2013, 7:35 PM), http://www.lawfareblog.com/2013/10/two-fisa-data-questions-for-joel-brenner/.
[61] ABA FISA Task Force Report, Jan. 2012, *supra* note 9.
[62] *See id.*

within the DOJ.[63] These internal FISA review mechanisms, which have been a longstanding subject of internal contention, have remained generally unknown to the public, at least until the DOJ IG Crossfire Hurricane Report in December 2019.[64] However much the Crossfire Hurricane IG Report has illuminated FISA, adequately grasping the FISA framework in its current state requires tracing the history of the statute back to its inception.

A. *National Security Wiretapping Before FISA*

In 1928, federal agents used primitive wiretaps to investigate a case of alleged bootlegging, recording telephone conversations without actually entering the suspects' property.[65] In the case that followed, *Olmstead v. United States*, the Supreme Court upheld the suspects' conviction in a 5-4 decision: the Court drew an analogy between the wiretaps and the plain sense of hearing, holding that no search had occurred under the Fourth Amendment because there had been no physical trespass on the suspects' property.[66]

The *Olmstead* decision was overturned by *Katz v. United States*, where the Supreme Court held that government wiretapping without physical trespass is not distinct from a physical search—hence, from that point onwards, electronic communications would be subject to the same Fourth Amendment unreasonable search and seizure protections.[67] Subsequently, the 1968 Omnibus Crime Control Act established a paradigm for law enforcement wiretapping under Title III.[68]

Notably, however, the progressions from *Olmstead* to *Katz* to the Crime Control Act of 1968 neglected to tackle the question of

---

[63] *See, e.g.*, FISA IG REPORT., *supra* note 4, at 36-45.
[64] *See, e.g.*, David Johnston & William K. Rashbaum, *New York Police Fight with U.S. on Surveillance*, N.Y. TIMES (Nov. 19, 2008), https://www.nytimes.com/2008/11/20/washington/20terror.html?pagewanted=1&_r=2.
[65] Olmstead v. United States, 277 U.S. 438, 456-57 (1928).
[66] *Id.* at 464-65.
[67] Katz v. United States, 389 U.S. 347, 351-52 (1967).
[68] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968).

national security-predicated wiretapping. Justice White's concurrence in *Katz* observed:

> Wiretapping to protect the security of the Nation has been authorized by successive Presidents. . . . We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.[69]

White's commentary directly anticipated the post-*Katz* framework for national security wiretapping, which was called the "Mitchell doctrine" after former Attorney General John Mitchell.[70] Wiretaps under the Mitchell doctrine, distinct from law enforcement under Title III, required the approval and signature of the Attorney General (i.e., an executive certification that the warrant was necessary for the purposes of national security) but not a court-issued warrant.[71]

In 1972, the Mitchell doctrine was partially overturned by *United States v. United States District Court*, commonly known as the *Keith* case (named for the presiding judge).[72] *Keith* concerned a case of domestic terrorism and therefore did not necessarily address the question of wiretapping of "foreign" threats.[73] *Keith* held that even though the case involved terrorism, a judicially-authorized warrant was necessary, beyond mere executive certification under the Mitchell doctrine.[74] However, the holding also recognized that terrorism cases did not necessarily fall neatly under the Title III criminal framework:

> We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime." The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information.

---

[69] *Katz*, 389 U.S. at 364 (White, J., concurring).
[70] ABA FISA Task Force Report, Jan. 6, 2012, *supra* note 9.
[71] *Id.*
[72] United States v. United States Dist. Court, 407 U.S. 297, 309 (1972).
[73] *Id.* at 308.
[74] *Id.* at 320-21.

> The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance maybe less precise than that directed against more conventional types of crime.[75]

Here, the *Keith* court directly foreshadowed the emergence of FISA, suggesting that "Congress may wish to consider protective standards . . . which differ from those already prescribed for specified crimes in Title III."[76]

The last major case relevant to the creation and subsequent interpretation of FISA through 9/11 is *United States v. Truong Dinh Hung*.[77] David Truong, a South Vietnamese national, was alleged to have conspired with Ronald Humphrey, a United States Information Agency (USIA) official, to pass classified information to Vietnam during negotiations to end the Vietnam War held in Paris.[78] Since the wiretapping against Humphrey and Truong had been conducted abroad, it technically required only executive authorization.[79] Evidence from such intelligence intercepts had not frequently appeared in federal prosecutions.[80] Truong and Humphrey were convicted of espionage in 1978, and their conviction was upheld by the Fourth Circuit in 1980.[81]

During the prosecution of Truong and Humphrey, the intelligence wiretaps became a source of legal dispute: Could the information gathered through executive-authorized intelligence surveillance be used in a prosecution? In summary, the *Truong* district court ruling held that if the surveillance had been legitimately

[75] *Id.* at 322.
[76] *Id.*
[77] United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980).
[78] *Id.* at 911-12.
[79] *Id.* at 912-13.
[80] *Id.* at 915-16.
[81] *Id.* at 931.

intended for the purpose of intelligence gathering, then the evidence was admissible for prosecution.[82] However, the district court judge, Albert Bryan, restricted admissibility based on a certain juncture in the investigation: Citing memoranda that circulated between DOJ and the intelligence agencies, it had become clear that the suspects were committing espionage, and therefore intelligence investigators had notified DOJ prosecutors that a federal case could be constructed—the prosecutors became involved in the surveillance.[83] Judge Bryan ruled that at this point, the "primary purpose" of the surveillance had switched from intelligence-gathering to gathering evidence for prosecuting a federal crime, and thus should have required a warrant.[84] Therefore, he ruled all evidence from the intelligence-framework authorized wiretaps *preceding* this switch was admissible, and that the intercepts following the switch—which had prosecutorial involvement—were inadmissible.[85]

Judge Bryan's "primary purpose" test is a point of pivotal interest over the course of the history of FISA through the 9/11 intelligence failures. Some analysts familiar with the original case maintain that the phrase "primary purpose" was not intended to set a standard or hold great emphasis, but this occurred anyway.[86] Despite the fact that the *Truong* ruling was expressly not intended to bear on FISA, which was still under deliberation at the time of the decision, the primary purpose test became a prominent, unwieldy legal construct within the FISA framework.[87] Practically, based on the handling of the DOJ memoranda in the *Truong* case, the primary purpose test represents an assessment of surveillance to be used in a prosecution. The test purports to check that the primary purpose of the surveillance is indeed foreign intelligence gathering, rather than prosecution.[88]

While Judge Bryan's "primary purpose" standard may certainly be viewed as a potential framework for national security

[82] United States v. Humphrey, 456 F. Supp. 51, 57-58 (E.D. Va. 1978).
[83] *Id.* at 59.
[84] *Id.* at 58-59.
[85] *Id.* at 59.
[86] Interview with a retired senior FISA practitioner (Nov. 12, 2012).
[87] United States v. Truong Dinh Hung, 629 F.2d 908, 914 n.4 (4th Cir. 1980).
[88] The Bellows Report, *supra* note 35, at 709-10.

wiretapping, *Truong* is a pre-FISA case, expressly held not to apply to FISA—the wiretapping of Truong and Humphrey was authorized under an entirely different set of rules.[89] The standard for issuing a national security warrant in *Truong* was mere relevance to national defense as determined by the executive branch—distinct from the FISA framework, which requires probable cause that a suspect is an agent of a foreign power (and includes additional conditions).[90]

Therefore, today *Truong* may be viewed as constitutionally relevant to FISA, supporting the notion that to comply with the Fourth Amendment, FISA warrants must target "foreign intelligence." However, the *Truong* primary purpose test for surveillance authorization cannot govern FISA surveillance because of (1) the clear difference between the pre- and post-FISA wiretapping frameworks, and also (2) the FISA-related reforms of the USA PATRIOT Act (USAPA), which reiterated this *Truong*-FISA distinction after it became blurred in the 1990s.[91] The basis of this USAPA adjustment was that roughly between 1995 and 2001, the *Truong* precedent was used, albeit incorrectly,[92] to heavily regulate FISA policy from top to bottom.[93]

Drawing on *Katz*, *Keith*, and *Truong*, the lifetime of FISA has witnessed an assortment of attempts by policymakers to sort surveillance intercepts into foreign (intelligence) and domestic (law enforcement) categories ("purposes"). At the same time, these two categories have grown increasingly inextricable both because of technological developments since 1978 and because of the fluid character of threats in the War on Terror.[94] This massive "purpose" entanglement, at the very heart of FISA, has been addressed through legislation, but mainly through powerful internal policies corresponding to interagency and inter-bureau turf battles of such

[89] *See generally* United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980); United States v. Humphrey, 456 F. Supp. 51, 57-58 (E.D. Va. 1978).
[90] *See Truong Dinh Hung*, 629 F.2d at 914 n.4.
[91] In re Sealed Case No. 02-001, 310 F.3d 717, 732-33 (FISA Ct. Rev. 2002).
[92] *See* THE BELLOWS REPORT, *supra* note 35, at 721-35; 9/11 COMMISSION REPORT, *supra* note 39, at 78-79.
[93] THE BELLOWS REPORT, *supra* note 35, at 727-28.
[94] *See* BAKER, *supra* note 35, at 40-43.

intractability that they would be worthy of high satire were the stakes not so serious.[95] This Article will explore these entanglements, because of their strong relevance to any future FISA reform proposals.

B. *FISA Basics*

The era following the death of J. Edgar Hoover in 1972, *Keith*, Watergate, and the initial decision by the district court in *Truong*, was a period of national reflection. Congress contemplated a new framework for national defense-related wiretapping warrants.[96] Three new regimes were mainly considered: (1) executive-power-based warrant authorization (with minimal judicial oversight), (2) a legal exception under Title III for national security and intelligence cases and finally, (3) a special court authorizing national security wiretaps.[97] In the end, a politically diverse coalition of proponents of the third option prevailed, and the Foreign Intelligence Surveillance Act of 1978 (FISA) was created.[98]

Sketched roughly, the FISA framework is as follows:

- To qualify for FISA surveillance, an individual must be suspected, with probable cause, of being an "agent of a foreign power," i.e., serving the interests of a foreign government or organization, beyond activities protected by the First Amendment.[99]
- FISA applications must certify that procuring "foreign intelligence" information is "the purpose" of the surveillance.[100]
- The FISC comprises eleven judges appointed by the Chief Justice of the United States.[101]

---

[95] *See* THE BELLOWS REPORT, *supra* note 35, at 721-35.
[96] ABA FISA Task Force Report, Jan. 2012, *supra* note 9, at 2.
[97] *Id.*
[98] *Id.* at 3.
[99] *See* 50 U.S.C. § 1805(a) (2012).
[100] 50 U.S.C. § 1801 (2012). The USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), adjusted this language slightly for reasons reviewed in this Article. "The purpose" was changed to "a significant purpose."
[101] *About the Foreign Intelligence Surveillance Court*, FOREIGN INTELLIGENCE SURVEILLANCE COURT, http://www.fisc.uscourts.gov/about-foreign-intelligence-surveillance-court (last visited May 11, 2020).

- FISA warrant applications must be certified by a high-ranking executive branch official such as the FBI Director or Attorney General.[102]
- FISA applications require a "full and accurate presentation of the facts to make its probable cause determinations," and a case agent has responsibility to ensure that statements in the applications are "scrupulously accurate."[103]
- Also, to meet the probable cause standard, for FISA authority, the government must provide information about the facilities to be monitored, or the places at which the surveillance would be directed. The words "if known" were added to this condition by the USA PATRIOT Act in 2001.[104]
- FISA judges must review the certifications presented by the government on a "clearly erroneous" standard—to make this finding they are empowered to request more information from the government if not satisfied with the information presented in the initial warrant application.[105]
- With each FISA warrant application, the United States Government is required to submit and follow "minimization procedures" – little-known but critical policies which regulate and circumscribe the dissemination and use of information gathered through FISA. These procedures must be "reasonably designed to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of

[102] *See* 50 U.S.C. § 1802 (2012).
[103] FISA IG REPORT, *supra* note 4, at 43 (citing Foreign Intelligence Surveillance Act and Standard Minimization Procedures, 0828PG, Aug. 11, 2016; Matthew G. Olsen, NSD Acting Assistant Attorney General and Valerie Caproni, FBI General Counsel, Memorandum for All Office of Intelligence Attorneys, All National Security Law Branch Attorneys, and All Chief Division Counsels, Guidance to Ensure the Accuracy of Federal Bureau of Investigation Applications under the Foreign Intelligence Surveillance Act, Feb. 11, 2009).
[104] *See* 50 U.S.C. § 1805(c) (2012).
[105] *See* 50 U.S.C. § 1805(a)(4) (2012).

> the United States to obtain produce, and disseminate foreign intelligence information."[106]

This FISA regime has been widely regarded as ensuring that FISA withstands Fourth Amendment scrutiny. At least initially, it was relatively straightforward. As mentioned above, confusion arises when two categories of detail are added. One is that the FISA framework today authorizes many different information acquisition mechanisms rather than just standard phone wiretapping.[107] The other, which comprises critical background information and therefore must be explained fully, is that FISA deviates from conventional notions of judicial review: FISA warrant applications are submitted before the FISC, but vital aspects of FISA oversight and policy are conducted elsewhere.[108] An innocent might envision a process wherein an FBI Special Agent in Charge (SAC), confronted with a case of suspected espionage, consults FBI lawyers, approaches the FISC, attains a warrant, and then uses the gleaned information identically to a warrant obtained under Title III.[109]

In fact, FISA policy imposes detailed processes for the preparation of warrants, execution of surveillance, and handling of information that has been gathered, all of which is part of the FISA-Fourth Amendment calculus.[110] Hence, FISA is not just a straightforward surveillance authorization mechanism, but an intricate legal framework designed to enable national security surveillance in harmony with the Fourth Amendment.

---

[106] *See* 50 U.S.C. § 1801(h) (2012); Brief for the United States at 3-8, In re Sealed Case No. 02-001, 310 F.3d 717 (FISA Ct. Rev. 2002).

[107] *See, e.g.*, Andrew C. McCarthy, *Rewriting FISA History*, NAT'L REV. (June 22, 2013), https://www.nationalreview.com/2013/06/rewriting-fisa-history-andrew-c-mccarthy/.

[108] FISA IG REPORT, *supra* note 4, at 36-45.

[109] The process for seeking FISA authorization is rigid and only open through certain FBI and DOJ officials. For example, the New York Police Department sought access to FISA in 2008 but was refused by the Justice Department. David Johnston & William K. Rashbaum, *New York Police Fight with U.S. on Surveillance*, N.Y. TIMES (Nov. 19, 2008), https://www.nytimes.com/2008/11/20/washington/20terror.html?pagewanted=1&_r=2.

[110] *See* FISA IG REPORT, *supra* note 4, at 31-45.

For illustration, one example of how FISA oversight is conducted outside the FISC relates to the statute's requirement that orders target "foreign intelligence information."[111] Stemming partly from adherence to this condition, there have been longstanding DOJ sensitivities about federal prosecutors' knowledge of FISA surveillance while it is ongoing; if prosecutors know about a FISA warrant, this might suggest that the warrants are not necessarily seeking "*foreign* intelligence information" but may instead foremost seek to arrange domestic prosecution.[112] Hence, the FISA statute can be viewed as bearing significantly on the relationship between DOJ federal prosecutors and the FBI. Correspondingly, efforts by prosecutors attempting to gain access to FISA information have been documented as causing concern that the statute was not being used in compliance with the Fourth Amendment; it was these concerns that led to the Wall policies from 1993-2001.[113]

Partially distinct from the prosecutorial knowledge issue, other FISA-adherence processes do not exist directly in relation to statutory language like the "foreign intelligence" caveat, but rather to generally ensure Fourth Amendment compliance: The FBI and NSA do not have direct access to the FISC and do not submit FISA applications themselves.[114] Rather, working through specific legal bureaus in their own agencies, they may only submit FISA applications through DOJ's Office of Intelligence (OI), a vital bureau of lawyers serving as the exclusive intermediary between those seeking FISA coverage and the FISC, and which actually submits the orders to the FISC.[115] The FISA judge may approve the warrant or request that further information be submitted before the surveillance can be authorized.[116]

---

[111] 50 U.S.C. § 1804(a)(6)(A) (2012).
[112] *See, e.g.*, THE BELLOWS REPORT, *supra* note 35, at 737-40.
[113] *See generally* BAKER, *supra* note 35, at 39-69.
[114] FISA IG REPORT, *supra* note 4, at 39-42.
[115] *Id.*
[116] While one might characterize this as a FISA warrant "rejection," the "rejections" indicated in the annual Attorney General FISA Reports reflect a final, formal rejection by the FISC itself. The FISC's provisional "rejections" of warrants where FISA judges request more information are not included, nor are internal, pre-promulgation rejections by OI.

As for the deliberations of the judges themselves, one can readily make the case that the FISA statute's protections surpass those of Title III warrants. Citing the Congressional record from 1978, a government report observes:

> [T]he drafters "adopt[ed] . . . certain safeguards which are more stringent than conventional criminal procedures." One of these safeguards was that the statute "requires the judge to review the certification that surveillance of a U.S. person is necessary for foreign counterintelligence purposes. Because the probable cause standards are more flexible under the bill, the judge must also determine that the executive branch certification of necessity is not 'clearly erroneous.'" The [SSCI] report likened the "clearly erroneous" standard to that applicable in administrative law, where "[t]he judge is required to review an administrative determination that, in pursuit of a particular type of investigation, surveillance is justified to acquire necessary information. The judge may request additional information in order to understand fully how and why the surveillance is expected to contribute to the investigation."[117]

Accordingly, FISA judges are known to regularly send back, or provisionally reject, FISA warrants, requesting adjustments.[118] And, correspondingly, statistics presented to Congress by former NSA General Counsel Stewart Baker show that even though these rejections are not "counted," on average, FISA warrants are already more commonly rejected than Title III warrants.[119]

C. *FISA Information—Minimization, Circulation, and Use in Prosecutions*

Though many political science professors would be unable to explain "minimization procedures," let alone those pertaining to FISA,

---

[117] THE BELLOWS REPORT, *supra* note 35, at 737-38 (internal citations omitted).
[118] Brenner, *supra* note 60.
[119] *See, e.g.*, *Oversight Hearing on the Administration's use of FISA Authorities: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Stewart Baker).

these policies are commonly dramatized in popular culture: in the film *Casino* or the television drama *The Sopranos*, the mafia time their phone calls, knowing that after recording, e.g., forty seconds of idle banter, the FBI must turn off their equipment.[120]

Those unfamiliar with FISA may view it according to their notions of an ordinary criminal warrant under Title III. Hence, they may incorrectly presume that FISA's protections against abuse are most robust at the direct point of authorization, imagining a judge scrutinizing a warrant as they might on a television show. While a FISA judge's review of a surveillance order is a critical step of the FISA process, minimization procedures are also central to the framework. The procedures are submitted by DOJ, vetted and approved by the FISC, and enacted at the agency level.[121]

Minimization policy is usually classified, but open sources show that they are utilized ubiquitously in the intelligence community for all intelligence information. For example, the National Counterterrorism Center (NCTC) of the Office of the Director of National Intelligence (ODNI), which is tasked with synthesizing terrorist threat information from all intelligence agencies, retains a separate set of minimization procedures for every other individual intelligence agency respectively.[122]

Because the FBI falls within the DOJ, there is more information in the public domain about the FBI's minimization policies than about those of the intelligence agencies. In short, the FISA minimization process is conducted as follows:

1. Information is reduced to an intelligible form: transcribed, translated, decrypted, and printed.
2. Once the information is readily comprehensible, an official, e.g., an FBI case agent, makes an informed judgment as to whether the information is or might be "foreign intelligence information" related to clandestine intelligence activities or international terrorism. Whether

[120] CASINO (Univ. Pictures 1995); *The Sopranos* (HBO 1999-2007).
[121] *See* 50 U.S.C. § 1801(h) (2012), 50 U.S.C. §1821(4) (2012).
[122] ABA FISA Task Force Report, Oct. 2012, *supra* note 9, at 3.

or not information is "tagged" as "foreign intelligence information" is a key judgment because it bears on the legal ability to retain and use the information.

3. If the information is determined to be, or might be, foreign intelligence, it is logged into the FBI's records and filed in a variety of storage systems which can be retrieved for analysis, for counterintelligence investigations or operations, or for use at a criminal trial.
4. If found not to be foreign intelligence information, it must be minimized (destroyed or erased), which is done in a number of ways depending on the format of the information. These principles apply to physical or electronic information.
5. Dissemination is considered part of "minimization."[123]

When Edward Snowden leaked information about the use of FISA in 2013, *The Washington Post* and *The Guardian* elected to publish the details of the NSA's "PRISM" program two weeks before they published the corresponding minimization procedures, which showed how circulation and use of the PRISM information was restricted.[124] Intermittently, knowing that one PRISM case had resulted in the acquisition of an enormous stockpile of Verizon subscriber metadata, divorce lawyers who did not know "minimization" existed, or at least hoped it somehow would not apply, attempted to obtain PRISM-gathered information from the NSA which might be relevant to their clients' cases.[125] Of course, they and

[123] *See* In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 617-18 (FISA Ct. 2002). This summary paraphrases the language in the case and adds some additional context.

[124] *See* Barton Gellman, *U.S. Surveillance Architecture Includes Collection of Revealing Internet, Phone Metadata,* WASH. POST (June 15, 2013), https://www.washingtonpost.com/investigations/us-surveillance-architecture-includes-collection-of-revealing-internet-phone-metadata/2013/06/15/e9bf004a-d511-11e2-b05f-3ea3f0e7bb5a_story.html; *see also* DIR. OF NAT'L INTELLIGENCE, FACTS ON THE COLLECTION OF INTELLIGENCE PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (June 2013), *available at* https://www.dni.gov/files/documents/Facts%20on%20the%20Collection%20of%20Intelligence%20Pursuant%20to%20Section%20702.pdf.

[125] Bob Sullivan, *Lawyers Eye NSA Data as Treasure Trove in Evidence, Divorce Cases,* NBC NEWS (June 20, 2013), http://www.nbcnews.com/technology/lawyers-

the rest of the public then discovered that information gathered through FISA, under which PRISM operated, cannot be freely circulated or utilized.[126] The story of the divorce lawyers and the newspapers' delay in publication of the PRISM minimization procedures touches on one of the major FISA policy issues: the use of FISA information in prosecutions.

D. *FISA and Prosecutions*

In addition to its post-Watergate era lineage, FISA was also a distinct product of the Cold War policy landscape. Conventional wisdom was that while some few cases would arise where it would be necessary to quickly apprehend foreign intelligence operatives (i.e., terrorists), much of the time they could be left in place and exploited for counterintelligence purposes.[127] Spies would be relatively easy to monitor if located within the United States but more difficult to track abroad.[128]

Though the deterioration and eventual "paralysis" of FISA during the mid and late-1990s makes it difficult to imagine, the pre-1993 FISA framework apparently accounted for all of these considerations.[129] While there were legal questions about sorting intelligence into "foreign" and "domestic" categories, when FISA information was used in criminal prosecutions, the FISA framework ran smoothly and even-handedly, both for intelligence purposes and on occasion in prosecutions.[130]

The record of Congress's original FISA deliberations shows how the drafters anticipated that FISA surveillance, as well as the

---

eye-nsa-data-treasure-trove-evidence-murder-divorce-cases-6C10398754?franchiseSlug=technolog.

[126] *See* DIR. OF NAT'L INTELLIGENCE, *supra* note 124.

[127] *See* BAKER, *supra* note 35, at 43.

[128] *Id.*

[129] *See* THE BELLOWS REPORT, *supra* note 35, at 711-12; see also BAKER, *supra* note 35, at 46.

[130] *See generally* BAKER, *supra* note 35; THE BELLOWS REPORT, *supra* note 35, at 714-15.

corresponding FBI investigations,[131] could not be sorted into clear foreign and domestic or intelligence and criminal categories. For example, what if surveillance of a suspected Soviet agent revealed a plot to rob a bank? Who was to say whether the robbery was in any way related to foreign intelligence considerations? A Senate Select Committee on Intelligence (SSCI) Report from 1978 explained:

> U.S. persons may be authorized targets, and the surveillance is part of an investigative process often designed to protect against the commission of serious crimes such as espionage, sabotage, assassination, kidnapping, and terrorist acts committed by or on behalf of foreign powers. Intelligence and criminal law enforcement tend to merge in this area.[132]

The issue at hand, obviously, was what standards would have to be met for using FISA-derived information in a federal prosecution such as that of the defendants in *Truong*. How much could federal prosecutors be involved in FISA surveillance while it was ongoing?

It is abundantly clear that in passing FISA in 1978, Congress anticipated that there would be at least some cases where, to protect against terrorism and espionage, prosecution would be an optimal response.[133] By the same token, the main use of FISA was for intelligence information gathering rather than as a prosecutorial tool.[134] The Senate Select Committee on Intelligence (SSCI) explained: "[a]lthough the primary purpose of electronic surveillance conducted pursuant to [FISA] will not be the gathering of criminal evidence, it is

---

[131] THE BELLOWS REPORT, *supra* note 35, at 737-38 ("[T]he focus of the [FISA] certification, and the FISA Court's review of it, is upon the purpose of the surveillance. To the extent that the underlying investigation is considered at all, according to the [Senate Select Committee on Intelligence], it is only to assess whether the surveillance will 'contribute' to it. This in no way suggests that 'the purpose' or the 'primary purpose' of the investigation as a whole is at issue. On the contrary, as the [SSCI Report] makes clear, the surveillance may be 'part of an investigative process . . . designed to protect against the commission of serious crimes' and the investigation may have both intelligence and criminal law enforcement interests that 'tend to merge.'").

[132] S. REP. NO. 95-701, at 10-11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3973, 3979.

[133] See The Bellows Report, *supra* note 35, at 737-40.

[134] *Id.*

contemplated that such evidence will be acquired and these subsections establish the procedural mechanisms by which such information may be used in formal proceedings."[135] The House Permanent Select Committee on Intelligence (HPSCI) added that, "[p]rosecution is one way, but only one way and not always the best way, to combat such activities,"[136] and further commented:

> With respect to information concerning U.S. persons, foreign intelligence information includes information necessary to protect against clandestine intelligence activities of foreign powers or their agents. Information about a spy's espionage activities obviously is within this definition, and it is most likely at the same time evidence of criminal activities. How this information may be used "to protect" against clandestine intelligence activities is not prescribed by the definition of foreign intelligence information... Obviously, use of "foreign intelligence information" as evidence in a criminal trial is one way the Government can lawfully protect against clandestine intelligence activities, sabotage, and international terrorism. The bill, therefore, explicitly recognizes that *information which is evidence of crimes involving clandestine intelligence activities, sabotage, and international terrorism can be sought, retained, and used pursuant to this bill*.[137]

Hence, in summary, Congress intended (1) that FISA information would be available for use in prosecutions, and significantly that (2), as was not the case in *Truong*, potential prosecution or prosecutorial involvement (arising due to evidence of a crime uncovered by FISA wiretaps) was not usually supposed to hinder ongoing investigations where FISA coverage was being applied.

The SSCI Report therefore commented that "surveillance conducted under [FISA] need not stop once conclusive evidence of a crime is obtained, but instead may be extended longer where

---

[135] S. REP. NO. 95-701, at 62, 1978 U.S.C.C.A.N. 4031.
[136] The Bellows Report, *supra* note 35, at 739-740 (quoting H.R. Rep. No. 95-1283, pt. 1, at 49 (1978)).
[137] *Id.* (emphasis added).

protective measures other than arrest and prosecution are more appropriate."[138] Hence, it is clear that if the FISA framework had been active in *Truong*, instead of a mere executive authorization to wiretap for intelligence purposes under the old Mitchell doctrine, the juncture at which prosecutors became substantially involved in the surveillance in *Truong* probably would not have changed the circumstances so that later intercepts were inadmissible—the whole matter would have been assessed on the basis of whether the underlying FISA surveillance had been conducted so that, as the statute plainly stated, "the purpose" of the surveillance was to obtain "foreign intelligence information."[139]

On top of being legally questionable for reasons already reviewed, comprehensively applying the *Truong* primary purpose test to the FISA statute is further problematic. The statute itself stipulated that obtaining foreign intelligence must be "the purpose" and did not include the word "primary."[140] Assessing FISA surveillance orders based on the primary purpose test—which, as implemented, raised alarms at the slightest suggestion of a partial domestic purpose[141]—would shift the main oversight focus from the nature of the information being targeted to the "criminal" or "foreign intelligence" bureaucratic affiliations of the U.S. government officials involved in the case, as well as the degree and nature of their involvement.[142] A pivotal FISA Court of Review ruling striking down this legal construct in 2002 commented that the arrangement was "unstable because it generates dangerous confusion and creates perverse organizational incentives."[143]

The above summary of the original parameters of the FISA statute roughly traces DOJ FISA policy from 1978 to 1993. However, for the purposes of clarity, it bears remarking at this point that beginning in 1993, following the Aldrich Ames case, FISA policy was upended: What if the *Truong* "primary purpose" approach—vigorous scrutiny based on putative prosecutorial involvement in FISA

---

[138] S. REP. NO. 95-701, at 11 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 3980.
[139] 50 U.S.C. § 1802 (1978); *see also* THE BELLOWS REPORT, *supra* note 35, at 751-52.
[140] 50 U.S.C. § 1802 (1978).
[141] *See, e.g.*, THE BELLOWS REPORT, *supra* note 35, at 730.
[142] *Id.*
[143] In re Sealed Case No. 02-001, 310 F.3d 717, 743 (FISA Ct. Rev. 2002).

surveillance—*was* used to govern FISA policy? Later, in the 1990s, the standards from *Truong* were applied full force.[144] The DOJ changed its position as if to anticipate a situation akin to *Truong*; the theory was that if a judge decided that intelligence-based surveillance was gathered contiguously with prosecutorial involvement or even knowledge of FISA surveillance, those intercepts would be inadmissible, like in *Truong*, ostensibly violating the Fourth Amendment.[145]

From approximately 1995 to 2001, the *Truong* primary purpose test for prosecutorial involvement became a linchpin of all intelligence investigations where FISA surveillance was utilized or even "contemplated," causing a bureaucratic breakdown within the Justice Department.[146] In fact, "primary purpose" was functionally constructed as "sole purpose," even though this idea was emphatically rejected by both the trial and appeals courts in *Truong*.[147] Ultimately, it was the USAPA that removed the construct, essentially restoring the original congressional parameters that had been in place until 1993.[148]

E. *FISA Policy and Prosecutions in the 1980s and Early 1990s*

With his book *Skating on Stilts*, former NSA General Counsel Stewart Baker became one of the first highly-placed national security officials to write about the history of DOJ internal policy with respect

[144] *See, e.g.*, THE BELLOWS REPORT, *supra* note 35, at 751-52.
[145] BAKER, *supra* note 35, at 41-43.
[146] *See, e.g.*, 9/11 COMMISSION REPORT, *supra* note 39, at 78-79; THE BELLOWS REPORT, *supra* note 35, at 710-21.
[147] United States v. Truong Dinh Hung, 629 F.2d 908, 915-16 (4th Cir. 1980) (citing *Humphrey*, 456 F. Supp. at 57-58) ("The proposed 'solely' test is unacceptable . . . because almost all foreign intelligence investigations are in part criminal investigations. Although espionage prosecutions are rare, there is always the possibility that the targets of the investigation will be prosecuted for criminal violations. Thus, if the defendants' 'solely' test were adopted, the executive would be required to obtain a warrant almost every time it undertakes foreign intelligence surveillance, and, as indicated above, such a requirement would fail to give adequate consideration to the needs and responsibilities of the executive in the foreign intelligence area.").
[148] *See* 50 U.S.C. § 1804(a)(6)(B) (2012).

to FISA.[149] Baker's sketch of the FISA regime from its inception through 1993 deserves to be cited at length:

> Intelligence wiretaps are different [from ordinary criminal "Title III" wiretaps]. 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

[149] *See generally* Baker, *supra* note 35.

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. . . .

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.[150]

Baker's commentary portends the end of the Cold War; naturally, in the era of the War on Terror, it makes no sense to release foreign intelligence agents caught in the United States or elsewhere.

The potential "shell game" defense and rise in intelligence prosecutions in the mid-1980's wrought corresponding developments in FISA policy. As Baker notes, the DOJ prefers to avoid entangling FISA evidence in federal prosecutions.[151] Indeed, the most common practice during the 1980s was what Baker calls a "tip."[152] In substance, this meant that intelligence investigators who discovered evidence of a significant criminal offense would assist federal prosecutors in reconstructing a criminal case under Title III.[153] Today, the practice of reconstructing a case under Title III remains the preferred option if possible, but sometimes there exists no alternative but to use FISA information directly as evidence in a prosecution.

There are established procedures for the use of intelligence information in prosecutions. FISA-derived information is classified; the Classified Information Procedures Act (CIPA) may be used to enable use of sensitive information in a prosecution while restricting the exposure of certain details.[154] Specifically with respect to FISA-derived information, the government must declare its intention to use FISA information and the defendant may then challenge the

---

[150] BAKER, *supra* note 35, at 41-43.
[151] *Id.*
[152] *Id.*
[153] *See id.*
[154] 18 U.S.C. app. §§ 1-16 (1980).

admissibility of the evidence.[155] If the defense challenges, the judge conducts an *ex parte* review of the FISA evidence to consider admissibility.[156] With these challenges, defense counsels customarily contend the "shell game" or "Fourth Amendment end-around" defense as forecast by Baker, claiming that the government has targeted the defendant with FISA without a central "foreign intelligence" purpose.[157]

While emphasizing the general sensitivities inherent in the circulation and prosecutorial use of FISA information, Baker declines to address a number of significant intelligence prosecution cases in the 1980s, and some in the early 1990s—cases that directly utilized FISA-derived evidence gathered while prosecution was being planned.[158] A comprehensive government review of FISA policy from 1998-2000, the "Bellows Report," named for the leader of the study, veteran prosecutor Randy Bellows,[159] fundamentally meshes with Baker's account of FISA policy in the 1980s and early 1990s, but also contradicts him in a few spots. One of the most significant points of interest is Bellows' recognition that no judicially hazardous "nightmares" actually ensued when FISA evidence was introduced in prosecutions.[160] Rather than "nightmares," these cases establish a clear standard and framework for FISA surveillance and its use in prosecutions: courts centrally scrutinized whether the purpose of FISA surveillance was to obtain "foreign intelligence."[161] If FISA evidence

[155] *See generally* 50 U.S.C. § 1806 (2012).
[156] 50 U.S.C. § 1806(f) (2012).
[157] BAKER, *supra* note 35, at 41-42.
[158] United States v. Duggan, 743 F.2d 59, 77-78 (2d Cir. 1984), United States v. Pelton, 835 F.2d 1067, 1070-71 (4th Cir. 1987); United States v. Sarkissian, 841 F.2d 959, 961-62, 965 (9th Cir. 1988); United States v. Johnson, No. 89-221, 1990 WL 78522, at *4 (D. Mass Apr. 13, 1990).
[159] Bellows is now a Circuit Court judge in Fairfax, VA. He is not at liberty to discuss his "Report," per DOJ policy.
[160] *See* United States v. Duggan, 743 F.2d 59, 77-78 (2d Cir. 1984), United States v. Pelton, 835 F.2d 1067, 1070-71 (4th Cir. 1987); United States v. Sarkissian, 841 F.2d 959, 961-62, 965 (9th Cir. 1988); United States v. Johnson, No, 89-221, 1990 WL 78522 at *4 (D. Mass Apr. 13, 1990).
[161] *See id.*

sustains "foreign intelligence purpose" scrutiny, it may be used in a prosecution.[162]

In *United States v. Sarkissian*, where FISA had been used to apprehend terrorists plotting to bomb a Turkish consulate, prosecution of the terrorists had been planned simultaneously.[163] The 9th Circuit rejected the defense that "the FBI's primary purpose for the surveillance had shifted from an intelligence to a criminal investigation."[164] The court explained:

> We refuse to draw too fine a distinction between criminal and intelligence investigations. "International terrorism," by definition, requires the investigation of activities that constitute crimes. That the government may later choose to prosecute is irrelevant. FISA contemplates prosecution based on evidence gathered through surveillance. "[S]urveillance . . . need not stop once conclusive evidence of a crime is obtained, but instead may be extended longer where protective measures other than arrest and prosecution are more appropriate." *FISA is meant to take into account "[t]he differences between ordinary criminal investigations to gather evidence of specific crimes and foreign counterintelligence investigations to uncover and monitor clandestine activities . . . ." At no point was this case an ordinary criminal investigation.*[165]

Additionally, the Bellows Report cites *United States v. Duggan*, where again, FISA surveillance had been used to gather evidence ultimately used in a criminal prosecution.[166] The Second Circuit refused to recognize defense arguments about criminal-intelligence overlap, noting:

> [W]e emphasize that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of such surveillance may later be used . . . as

[162] *See id.*
[163] United States v. Sarkissian, 841 F.2d 959, 961-62, 965 (9th Cir. 1988).
[164] *Id.* at 961-62, 964-65.
[165] *Id.* at 965 (emphasis added).
[166] United States v. Duggan, 743 F.2d 59, 77-78 (2d Cir. 1984).

> evidence in a criminal trial. Congress recognized that in many cases the concerns of the government with respect to foreign intelligence will overlap those with respect to law enforcement . . . In sum, FISA authorizes surveillance for the purpose of obtaining foreign intelligence information; the information possessed about [the target of surveillance] involved international terrorism; and the fact that domestic law enforcement concerns may also have been implicated did not eliminate the government's ability to obtain a valid FISA order.[167]

The *Duggan* holding additionally emphasized that FISA warrants are subject to "minimal scrutiny by the courts."[168]

Another such case is *United States v. Johnson*, which mirrors *Sarkissian* and *Duggan*. In *Johnson*, FISA surveillance had continued for two months after a criminal search warrant had been issued, up until the defendants were actually arrested.[169] FISA information was also directly included in the affidavits supporting the criminal search warrants.[170] And again, the inquiry was straightforward: If the court found that the FISA surveillance had indeed sought foreign intelligence, intelligence-criminal overlap was not a problem.[171]

United States v. Pelton represented a seemingly delicate and tricky FISA case where FISA surveillance had continued even after the defendant was confronted by the FBI and discussed the possibility of facing prosecution, sentencing, and potential cooperation against other defendants.[172] But the court's reaction was consistent with *Sarkissian, Duggan* and *Johnson*—irrespective of prosecutorial involvement in the case, the purpose "throughout" had been gathering foreign intelligence.[173]

---

[167] *Id.* at 78.
[168] *Id.* at 77.
[169] United States v. Johnson, No. 89-221, 1990 WL 78522, at *4 (D. Mass Apr. 13, 1990).
[170] *Id.* at *6.
[171] THE BELLOWS REPORT, *supra* note 35, at 740-42.
[172] United States v. Pelton, 835 F.2d 1067, 1070-71 (4th Cir. 1987).
[173] *Id.* at 1076.

From examining FISA prosecutions in the 1980s and early 1990s, the Bellows Report comments:

> Cases involving espionage, sabotage, and international terrorism are not "ordinary" criminal investigations. The legislative history of FISA . . . as well as cases such as *Sarkissian, Duggan,* and *Johnson*, suggest that in assessing the FBI's use of FISA to uncover, monitor, and "protect against" *such* crimes, courts should never draw "too fine a distinction" between criminal and intelligence investigations.[174]

The holdings of these cases and their tone seem to functionally reflect the FISA framework used today: If the government can demonstrate significant foreign intelligence concerns, FISA evidence withstands Fourth Amendment scrutiny in a prosecution.[175] As recognized by the Office of Legal Counsel (OLC) in 1994, these cases appear to cast doubt on the probability of the 1980s FISA prosecution (foreign-domestic purpose) "nightmare" scenarios envisioned by the FBI and Justice Department, according to Baker.[176]

Ultimately, Baker and Bellows converge in agreement to account for the functionality of the FISA regime between 1978 and the Ames case in 1993. Readers may wonder how Baker's "tips" by intelligence investigators to federal prosecutors avoided trouble, i.e., how was it determined *which* FISA intercepts could be safely forwarded to prosecutors and under what circumstances? When prosecutors did become involved, how did this impact ongoing FISA coverage in investigations, such as those in *Johnson* and *Pelton*? The

---

[174] THE BELLOWS REPORT, *supra* note 35, at 742.

[175] *See* United States v. Duggan, 743 F.2d 59, 77-78 (2d Cir. 1984); United States v. Pelton, 835 F.2d 1067, 1070-71 (4th Cir. 1987); United States v. Sarkissian, 841 F.2d 959, 961-62, 965 (9th Cir. 1988); United States v. Johnson, No, 89-221, 1990 WL 78522 at *4 (D. Mass Apr. 13, 1990).

[176] *See* Memorandum from John Yoo, Deputy Assistant Att'y Gen., Off. of Legal Couns., to David S. Kris, Associate Deputy Att'y Gen., Off. of the Deputy Assistant Att'y Gen., on Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the "Purpose" Standard for Searches 1 (Sept. 25, 2001) (citing Memorandum from Walter Dellinger, Assistant Att'y Gen., Off. of Legal Couns., to Michael Vatis, Deputy Dir., Exec. Off. for Nat'l Sec., on Standards for Searches Under Foreign Intelligence Surveillance Act 1 (Feb. 14, 1995)).

answer lies with the Department of Justice's Office of Intelligence (OI), the bureau charged with submitting FISA applications to the FISC, as well as with supervising the circulation of FISA-derived information.[177]

In conjunction with citing the successful FISA prosecutions through 1993, the Bellows Report comments:

> From 1984 until her death in October 1993, Mary C. Lawton was the head of OI[]. As Counsel for Intelligence Policy, Lawton was regarded as a "guru" in any intelligence matter, and OI[] was seen as a "mini Office of Legal Counsel" with respect to any issue concerning intelligence policy. . . .
>
> [The FISA] system appears to have worked quite satisfactorily while Mary Lawton was the head of OI[], both from the perspective of the Criminal Division and from that of the FBI.[178]

Baker explains:

> When I was at NSA, I had worked with Justice's [Office of Intelligence Policy and Review]. 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

[177] *Office of Intelligence*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/nsd/office-intelligence (last visited May 11, 2020).
[178] THE BELLOWS REPORT, *supra* note 35, at 711-12 (internal citations omitted).

> 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 [sic] 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.[179]

Hence, presumably, it was Mary Lawton, leading OI, who had managed the FISA prosecutions cited by Bellows.

Lawton's pivotal role as a FISA policymaker from 1978 to1993 illustrates one of the quirks of legally examining FISA. While conventional legal analysis relies on case law and not the jurisprudence of individual practitioners, there are no published guidelines or policy documents that represent Lawton's longtime FISA-OI practices.[180] At the same time, the management of FISA by OI is a critical component of weighing FISA against the Fourth Amendment—the orders withstand constitutional scrutiny partially because of OI's safeguards. Hence, the Lawton-era FISA policies amount to a critical precedent for FISA jurisprudence and more widely illustrate how FISA, at least before 2001, hinged on the policy practices of leading OI officials.

---

[179] BAKER, *supra* note 35, at 46-47.

[180] *See* THE BELLOWS REPORT, *supra* note 35, at 712.

1993 was a significant year for FISA policy because of several major cases involving FISA, including the prosecution of the "Blind Sheikh," Omar Abdel Rahman, for the plot to bomb the World Trade Center in New York City, and also the Aldrich Ames espionage case.[181] However, the biggest FISA development of 1993 was a small obituary in *The New York Times*.[182] Lawton, who administered DOJ FISA policy at OI, was gone; aside from mere convention, no apparent guidelines or policies ensured that Lawton's FISA jurisprudence would remain in place.

The Bellows Report shows that shortly after Lawton's death, her policies were overturned, and the efficiency FISA mechanism gradually deteriorated through the year 2000, when the Bellows Report was submitted.[183] Taken together, the Baker and Bellows accounts strongly suggest that internal FISA policy changes after Lawton's death—divergent from the FISA policies which the DOJ sought to establish—directly played a role in the 9/11 intelligence failures.[184]

[181] *See* BAKER, *supra* note 35, at 43-47.

[182] Ronald Sullivan, *Mary C. Lawton, 58; U.S. Official Shaped Intelligence Policies*, N.Y. TIMES (Oct. 30, 1993), http://www.nytimes.com/1993/10/30/obituaries/mary-c-lawton-58-us-official-shaped-intelligence-policies.html.

[183] *See* BAKER, *supra* note 35, at 39-69; THE BELLOWS REPORT, *supra* note 35, at 721-35.

[184] *See, e.g.,* THE BELLOWS REPORT, *supra* note 35, at 708 (Bellows quoting FBI Supervisory Agent Timothy Bereznay, who stated that the FBI has been "lucky" that problems with FISA had not caused damage. Bellows, writing c. 2000, comments that this "luck" ran out with the Wen Ho Lee case, where the Wall practices prevented the FBI from getting a wiretap on Lee); *In re Sealed Case*, 310 F.3d 717 at 743-44 ("Recent testimony before the Joint Intelligence Committee amply demonstrates that the *Truong* line is a very difficult one to administer. Indeed, it was suggested that the FISA court requirements based on *Truong* may well have contributed, whether correctly understood or not, to the FBI missing opportunities to anticipate the September 11, 2001 attacks.").

II. FISA AND THE "WALL": 1993-2002

> *[T]he FISA court requirements based on* Truong *may well have contributed, whether correctly understood or not, to the FBI missing opportunities to anticipate the September 11, 2001 attacks.*
>
> —*In re Sealed Case* No. 02-001[185]

Following Lawton's death and the Aldrich Ames case, both of which occurred in 1993, OI Director Richard Scruggs and Deputy Counsel for Operations Allan Kornblum, who wielded overwhelming influence within the office,[186] replaced the Lawton regime with a new internal FISA-OI framework which progressively complicated the use of FISA in the years approaching 9/11.[187] These FISA difficulties included the failure to intercept or prosecute alleged Chinese spy Wen Ho Lee for the theft of large quantities of data from the Los Alamos nuclear laboratory, as well as the loss of FISA wiretap coverage on as many as twenty high-value Al Qaeda suspects in the year preceding the 9/11 attacks.[188]

In the aftermath of the Ames case, Scruggs was determined to protect Reno by avoiding FISA overreach. Partly because of a purported close call in the Ames prosecution, and partly based on Kornblum's strong views about constructing FISA, Scruggs's approach to using FISA as head of OI was "unnecessarily timid" compared to that of previous OI Director Lawton.[189] With Ames, Kornblum convinced Scruggs that the FISA statute had been violated because prosecutors knew about the Ames FISA taps (of which there were at least nine) while they were still ongoing, echoing the problems raised in *Truong*.[190] Scruggs advised Reno that if called to take the stand, she would have to testify that FISA had been violated by prosecutorial knowledge of the Ames surveillance because this purportedly polluted

---

[185] *In re Sealed Case*, 310 F.3d 717 at 743-44.
[186] *See e.g.*, THE BELLOWS REPORT, *supra* note 35, at 733 n.975.
[187] *See* BAKER, *supra* note 35, at 39-69; THE BELLOWS REPORT, *supra* note 35, at 721-34.
[188] *Id.*
[189] THE BELLOWS REPORT, *supra* note 35, at 710.
[190] *Id.* at 712-13.

the statute's "foreign intelligence" purpose requirement.[191] This seems to contradict the history of FISA case law,[192] which shows that courts readily accepted at least some prosecutorial involvement with FISA surveillance, especially when the surveillance revealed evidence of a significant terrorism or espionage-related crime. Many high-level legal officials at the FBI and DOJ felt that while the Ames case featured more overlap between law enforcement and intelligence than usual, the FISA statute had not been violated by the prosecutors' involvement.[193]

Ultimately, the legal concerns about FISA surveillance of Ames must be regarded with extra suspicion. Author Ronald Kessler interviewed OI Director Scruggs for his book, *The Secrets of the FBI*.[194] Scruggs told Kessler he had been under the misimpression that *Truong had* actually been a FISA case.[195] Under this misconception, the primary purpose test would not only be valid, but binding with respect to FISA surveillance.[196] One might reasonably speculate that such a misunderstanding of *Truong* merely suggests that Scruggs was deferring to Kornblum, who was perceived as a special authority on FISA policy.[197]

---

[191] *Id.* at 712-14; *see also* BAKER, *supra* note 35, at 44.

[192] *See supra* Part I.

[193] *See* THE BELLOWS REPORT, *supra* note 35, at 712-13, ("Although the position of [Deputy Assistant Attorney General Mark M.] Richard and [FBI General Counsel Howard] Shapiro was that there was no problem with the contacts between the FBI and [FBI's Internal Security Section], the Attorney General was 'very upset' by what Scruggs had told her."); *id.* at 713 n.946 ("[John] Dion [(Chief of the DoJ Criminal Division's Internal Security Section)], believes that there was no critical event which occurred in the investigation that had not previously occurred in other espionage investigations. What changed, according to Dion, were the individuals who handled these issues after the death of Lawton.").

[194] KESSLER, *supra* note 34, at 162-65.

[195] *Id.*.

[196] *Id.* (citing interview with former OI Director Richard Scruggs and misperceiving that *Truong* as a FISA case in theory could justify a much stricter interpretation of FISA based on the "primary purpose" of acquiring foreign intelligence standard for surveillance).

[197] *See* THE BELLOWS REPORT, *supra* note 35, at 548, 733 n.975; Memorandum from Barbara A. Grewe, Senior Counsel, Nat'l Comm'n on Terrorist Attacks upon the United States, on the Telephone Interview of Commissioner Jamie Gorelick 2-3 (Jan. 9, 2004).

Ultimately, as a safety measure, Ames was offered a plea bargain which spared him the death penalty. The Ames-FISA "close call" led to the first incarnation of the Wall between federal prosecutors and intelligence investigators, which was erected to block contacts between the FBI and federal prosecutors and avoid the ostensible problems in the Ames investigation. This initial version of the Wall became known as the "Wall in Time."[198] It was elegantly simple in theory: as long as FISA wiretaps were in use, federal prosecutors could not have contact with an intelligence investigation utilizing FISA coverage.[199] Once the FISA intercepts were complete, if relevant to a prosecution, FISA information could be turned over to the prosecutors, who could proceed with their cases.[200] Due to the lack of prosecutorial involvement or knowledge of the FISA wiretaps, there was no conceivable doubt that the "primary purpose" of FISA surveillance had not been to obtain foreign intelligence.[201] Again, this arrangement relies on the notion—inconsistent with *Sarkissian, Duggan, Johnson, Pelton*, etc.—that prosecutorial knowledge of FISA wiretaps violated the statute or came dangerously close to doing so.

The "Wall in Time" soon proved unworkable, as exemplified by the prosecution of Sheikh Omar Abdel Rahman and his co-defendants, who were convicted for their involvement in the 1993 plot to bomb the World Trade Center.[202] With prosecution underway, Islamist loyalists to the defendants allegedly leveled hundreds of death threats against the prosecuting team and their families.[203] Head prosecutor Mary Jo White requested FISA warrants investigating the threats.[204] OI responded that, adherent to the "Wall in Time," this would be impossible unless she suspended the prosecution.[205]

White protested to DOJ that such an arrangement was unreasonable: Suspending the prosecution to investigate death threats

[198] BAKER, *supra* note 35, at 47-51.
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.* at 48-52.
[203] *Id.* at 49.
[204] BAKER, *supra* note 35, at 49-50.
[205] *Id.*

was not a solution—FISA warrants had to coincide with the prosecution.[206] DOJ sided with White; a special arrangement was concocted so that FISA warrants relevant to the *Rahman* prosecution would proceed while the case was ongoing, and White and her team could know about these wiretaps provided that they didn't coordinate the FISA surveillance for the purpose of strengthening their criminal case.[207]

Hence, *Rahman* established that the "Wall in Time" was impracticable because there were occasions when federal prosecutors *had* to be involved with ongoing FISA surveillance. Additionally, there had been cases in which intelligence investigators heaped intelligence information onto prosecutors (adhering to the "Wall in Time") on extremely short notice, where the prosecutors did not have time to process the information to present their cases following a sudden arrest (after an intelligence investigation that had lasted as long as three to four years).[208] There had also been instances where FBI intelligence investigators needed to coordinate with prosecutors on their cases because the manner in which the intelligence cases were being investigated would strongly impact the circumstances of a future terrorism or espionage prosecution.[209]

To certify the decision to side with White over OI, DOJ directed the OLC and Assistant Attorney General Walter Dellinger to prepare a memorandum of law examining the prospect of prosecutorial knowledge of FISA surveillance. Dellinger's memo vitally stated that as reviewed above, "the courts have been exceedingly deferential to the government and have almost invariably declined to suppress [FISA] evidence, whether they applied the 'primary purpose' test or left open the possibility of a less demanding standard."[210] Hence, the memo stipulated that *Truong* should stand for the proposition that at some undefined point, *major* prosecutorial involvement in FISA approached a threshold whereby the "foreign intelligence" purpose requirement might be compromised. Reflecting

[206] *Id.* at 49-52.
[207] *Id.*
[208] THE BELLOWS REPORT, *supra* note 35, at 725.
[209] *Id.* at 723, 744.
[210] Memorandum from John Yoo to David S. Kris, *supra* note 176, at 1.

the Dellinger memo, DOJ moved to systematize the Mary Jo White regime utilized in *Rahman*: Federal prosecutors would be privy to information about ongoing FISA information under certain conditions and restrictions,[211] theoretically mirroring the practice under Lawton.

This development did not sit well with Scruggs and Kornblum at OI, which still interpreted FISA's "the purpose" language as forbidding prosecutorial access to FISA intercepts under any circumstances while they were active.[212] In response to *Rahman*, Scruggs and Kornblum proposed to DOJ that for prosecutors to have access to FISA intercepts on an ongoing basis, primary purpose scrutiny should be applied to entire intelligence cases, i.e., not just to surveillance (as in *Truong*), but to all the components of an investigation.[213] This primary purpose-investigation proposal suggested "courts are going to look at the overall scope and direction of the case to determine the actual purpose of the surveillance or search . . ."[214] The hypothesis seems questionable when compared with the caselaw and Congressional Record cited above. Scruggs and Kornblum believed that because the FISA statute specified that foreign intelligence must be "*the purpose*" of FISA surveillance, whole investigations would have to reflect a foreign intelligence purpose.[215] This OI proposal, submitted in 1994, was rejected by DOJ.[216] In response, OI "kick[ed] and scream[ed]" over a perceived "turf" invasion.[217] It was presumed that OI had no choice but to cooperate with the OLC construction of the FISA statute – but this would prove

[211] *See, e.g.*, Memorandum from Barbara A. Grewe, Senior Couns., Nat'l Comm'n on Terrorist Attacks upon the United States, on the Telephone Interview of Michael Vatis 2 (Jan. 21, 2004) [hereinafter Michael Vatis Interview].
[212] *See* THE BELLOWS REPORT, *supra* note 35, at 710-20, 730 ("[A]ccording to John F. Lewis, FBI Assistant Director, Scruggs told him that OI would not even look at a FISA application if Scruggs discovered that the FBI had contacted the Criminal Division for advice in the investigation.").
[213] THE BELLOWS REPORT, *supra* note 35,. at 714-15.
[214] *Id.*
[215] *See id.*
[216] *See id.* at 716-17.
[217] *See* Michael Vatis Interview, *supra* note 211, at 2.

false, and determined the trajectory of FISA policy for the next few years.

A. *The 1995 Guidelines: Contacts Between Prosecutors and FBI Intelligence Investigators Using FISA*

Following up on the Dellinger OLC memorandum and the decision to authorize prosecutorial knowledge of FISA intercepts, Deputy Attorney General Jamie Gorelick selected attorney Michael Vatis to draft DOJ guidelines codifying the practice.[218] In foreign intelligence cases where a criminal component (violation of federal law) was discovered, federal prosecutors *could be* briefed on relevant FISA wiretaps so long as they did not instruct the FBI on how to conduct FISA surveillance. This arrangement would uphold FISA's basic stipulation that the warrants were purposed to seek "foreign intelligence," but repudiated strict "primary purpose" scrutiny.

Vatis's task, drafting the Guidelines, involved meeting with Dellinger, as well as representatives from the FBI, federal prosecutors and OI. The line-drawing that resulted was that prosecutors would be allowed to access the FISA intercepts, but should not "*direct or control*" the surveillance, a plausible reading of the statute and caselaw.[219] Accordingly, the 1995 FISA Guidelines were drafted to set a "no direction and control" standard for prosecutors' involvement in FISA surveillance.[220]

Regrettably, the Guidelines as drafted actually applied a drastically stricter standard than specified by Dellinger, OLC, and the DOJ. According to the 1995 Guidelines, contacts between FBI and federal prosecutors could not even "inadvertently" give the "appearance" that federal prosecutors might be "directing or controlling" a foreign intelligence "investigation" where FISA was

---

[218] THE BELLOWS REPORT, *supra* note 35, at 717.

[219] *See id.* at 720-21.

[220] Memorandum from the Att'y Gen. to the Assistant Att'y Gen., Crim. Div., on Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations (July 19, 1995) [hereinafter 1995 Guidelines], http://www.fas.org/irp/agency/doj/fisa/1995procs.html.

being applied or even "contemplated."[221] All of this language seems to forecast an extreme degree of FISA "foreign intelligence purpose" scrutiny, which does not reflect the intentions of Congress, caselaw before 1993, and the official DOJ policy drafted based on Dellinger and OLC, as reviewed above.

The Bellows Report documents how in the following years, OI relied on the "inadvertent" and "appearance" caveats in the Guidelines to prevent prosecutors from asking questions at FISA briefings, on the grounds that this might violate the primary purpose test by hinting to the FBI how FISA surveillance should be directed, or even *appear* to give such direction; accordingly, in such meetings, prosecutors had to act like a "potted plant."[222] Hence, due to the wording of the 1995 Guidelines, FISA briefings were rendered fruitless.

According to Vatis, the language of the Guidelines was supposed to be instructive and descriptive rather than rigidly prescriptive, as they were ultimately used by OI to regulate FISA policy.[223] Reflecting the White framework, the Guidelines were intended to be interpreted with a "low threshold": The FBI and prosecutors were supposed to self-regulate rather than being policed.[224]

Beyond the Guidelines' potential for undermining FBI-prosecutor FISA briefings by unexpected enforcement of the "inadvertent" and "appearance" conditions, there was a further, critical problem: Even though the Guidelines were supposed to establish the White regime and certify the Dellinger OLC standard, the Guidelines inexplicably applied FISA "purpose" scrutiny to *investigations* as a whole (rather than just to individual surveillance orders).[225] As reflected in Dellinger's OLC opinion, adherence to the

---

[221] 1995 Guidelines, *supra* note 220. The "contemplated" caveat was also part of the "rejected" 1994 OI proposal. *See* THE BELLOWS REPORT, *supra* note 35, at 714, 715 n.949.

[222] 1995 Guidelines, *supra* note 220; The Bellows Report, *supra* note 35, at 732.

[223] *See* Michael Vatis Interview, *supra* note 211, at 2.

[224] *See id.*; THE BELLOWS REPORT, *supra* note 35, at 723.

[225] This actually reflected the DOJ-"rejected" 1994 provision. THE BELLOWS REPORT, *supra* note 35, at 714 n. 948.

FISA standard had always been assessed based on the purpose of the *surveillance*, not the purpose of an investigation, generally.[226]

In summary, in contradiction to the clear DOJ intention to systematize the White regime, the 1995 Guidelines were composed so that they could be readily interpreted as severely constraining FBI agents' interactions with federal prosecutors, and even foreclosing interactions in the first place. OI had the capacity to rebel from DOJ with respect to FISA policy—this was possible for two main reasons. First, as the intermediary between the FBI and the FISC, including by exercising exclusive control over the submission of FISA warrants, OI enjoyed de facto discretionary authority over the Guidelines. Second, as reviewed above, there existed phrasing in the Guidelines which supported OI's policies, even though these represented a dramatic break with FISA jurisprudence from 1978 through 1993.[227]

Accordingly, contacts between prosecutors and FBI investigators using FISA became risky for retaining access to FISA coverage, and even for individual professional careers:

> "[W]ord" went out from FBI HQ . . . that there were to be no further contacts with prosecutors in [foreign intelligence] investigations without the permission of OI[], due to the issues raised about these certifications. Given what the FBI was being told by OI[], this reaction was understandable. According to Robert M. Bryant, Deputy Director of the FBI, Scruggs gave the impression that he believed the FBI had violated FISA by using the surveillance for criminal investigations. . . . Because of the perceived threat to obtaining FISA coverage, Deputy Director Bryant made it clear to the agents that this was a "career stopper" if they violated this rule.
>
> On one occasion, according to John F. Lewis, FBI Assistant Director, Scruggs told him that OI[] would not even look at a FISA application if Scruggs discovered that the FBI had

[226] *See* THE BELLOWS REPORT, *supra* note 35, at 720.
[227] *See* 1995 Guidelines, *supra* note 220.

> contacted the Criminal Division for advice in the investigation.[228]

Further:

> According to Timothy D. Bereznay, Section Chief in the FBI's National Security Division, the FBI has only limited contact with [federal prosecutors] out of fear that doing so will result in the loss of FISA coverage. Similarly, according to Bowman, the FBI believes that contacts with the Criminal Division can jeopardize the FBI's ability to ever get FISA coverage in an investigation where it has not yet been obtained.[229]

In short, the language of the 1995 guidelines culminated in a FISA mechanism where OI under Kornblum and Scruggs acted as a FISA "referee" or "gatekeeper."[230] This was not what DOJ had intended when it was decided that the Mary Jo White regime should be adopted.[231]

The *9/11 Commission Report* found no formal basis for this practice: "The Office of Intelligence Policy and Review became the sole gatekeeper for passing information to the Criminal Division [of the Department of Justice]. Though Attorney General Reno's procedures did not include such a provision, the Office assumed the role anyway…"[232] Vatis's 9/11 Commission interview summary explains his view, which is that the "referee" or "gatekeeper" interpretation of the Guidelines had no basis:

> Vatis discussed how he believed that OI[] misinterpreted the Guidelines to make itself the designated gatekeeper for all of the information. He argued that there was no way anyone could conceivably interpret the Guidelines to make

[228] THE BELLOWS REPORT, *supra* note 35, at 713-14, 730.
[229] *Id.* at 724.
[230] 9/11 COMMISSION REPORT, *supra* note 39, at 78-79; THE BELLOWS REPORT, *supra* note 35, at 733, 756.
[231] BAKER, *supra* note 35, at 51-52.
[232] 9/11 COMMISSION REPORT, *supra* note 39, at 79.

> OI[] the gatekeeper but OI[] nonetheless "flat out ignored" the Guidelines.[233]

OI's responsibilities, as approved under the intended White framework, required notification of contacts between the FBI and prosecutors for submission to the FISC for FISA surveillance deliberations.[234] Therefore, the Guidelines included a "notification" requirement, wherein the FBI and federal prosecutors were required to apprise OI of their meetings.[235]

A mere notification requirement does not logically give rise to the "referee" or "gatekeeper" role which OI soon assumed. Unfortunately, the language of the 1995 Guidelines appears to stipulate that the FBI requires OI's permission in order to contact federal prosecutors, and vice versa:

> [T]he FBI and OIPR each shall independently notify the Criminal Division. Notice to the Criminal Division shall include the facts and circumstances developed during the investigation that support the indication of a significant criminal activity. The FBI shall inform OIPR when it initiates contact with Criminal Division. *After this initial notification, the Criminal Division shall notify OIPR before engaging in substantive consultations with the FBI …*
>
> *The FBI shall not contact a U.S. Attorney's Office concerning such an investigation without the approval of the Criminal Division and OIPR.* In exigent circumstances, where immediate contact with a U.S. Attorney's Office is appropriate because of potential danger to life or property, FBIHQ or an FBI field office may make such notification.[236]

How the Guidelines came to contain such provisions in spite of the DOJ decision to systematize the White regime for contact between

[233] Michael Vatis Interview, *supra* note 211, at 2.
[234] *See* 1995 Guidelines, *supra* note 220.
[235] *Id.*
[236] 1995 Guidelines, *supra* note 220, at 1 (emphasis added).

prosecutors and intelligence investigators remains mysterious.[237] While Vatis explained that "OI did not need to be present when the contact took place—it just needed to know that it occurred," the Bellows Report notes a report from September 1997 that OI was indeed preventing the FBI from contacting prosecutors "despite the July 1995 [Guidelines]."[238] The FBI had no choice but to comply since OI promulgated the warrants and could elect to refuse unless it was obeyed.[239]

While the 1995 Guidelines did direct the FBI to notify prosecutors of "significant federal criminal activity," the Bellows Report diagnoses a "super hyper reluctance" on the part of OI to admit that the conditions requiring prosecutor notification had been met.[240] Under the circumstances, at risk of losing access to FISA if it contacted federal prosecutors, the FBI couldn't possibly follow the Guidelines' reporting requirement.[241] This is presumably the reason that the unissued 1996 Memorandum from Attorney General Reno observed that the 1995 Guidelines were simply "not being followed."[242] Commenting that the Guidelines were "almost immediately misapplied and misunderstood," the *9/11 Commission Report* basically split the difference between rival interpretations,[243] but the

---

[237] *See* THE BELLOWS REPORT, *supra* note 35, at 714-15 ("In June 1994, Scruggs proposed an amendment to the Attorney General's Guidelines . . . The proposed amendment would have provided that 'questions which arise relating to potential criminal prosecution shall be referred first to' OI, with OI 'coordinating any response necessary with the Criminal Division.' It also proposed that 'neither FBI HQ nor any FBI filed office should contact the Criminal Division of the Department of Justice or any United States Attorney's office without prior consultation with OI.' In Scruggs' view, to ensure the accuracy of the Director's certification as to the purpose of the FISA surveillance, 'it is imperative that contacts between FBI Agents with prosecutors during ongoing foreign intelligence cases be carefully proscribed and monitored.' Because Scruggs believed that the 'courts are going to look at the overall scope and direction of the case to determine the actual purpose of the surveillance or search,' he proposed that the amendment apply not only to investigations where FISA surveillance was actually in use, but also in those where FISA usage was contemplated.").

[238] *Id.* at 722.

[239] *See id.* at 722-24.

[240] *Id.* at 724.

[241] *See id.* at 722-24.

[242] *Id.* at 722; 9/11 COMMISSION REPORT, *supra* note 39, at 78-79.

[243] 9/11 COMMISSION REPORT, *supra* note 39, at 78-79.

language of the Guidelines in conjunction with the Bellows Report establishes that OI could and did rely on the Guidelines to disobey the Department of Justice.

The evidence that the 1995 Guidelines were a major source of FISA upheaval is overwhelming. The Bellows Report cites the 1995 Guidelines as a problem integral to the dysfunction of the FISA regime in the mid and late 1990s.[244] In his FBI history, Ronald Kessler reported that Arthur Cummings, a senior FBI official, stated that "a 1995 interpretation of law by Richard Scruggs . . . had essentially paralyzed [the capacity to use FISA]."[245] Attorney General Reno created the 1996 (unissued) memorandum, a year after the Guidelines were established.[246] The DOJ created a special working group in 1997 to fix the Guidelines.[247] OI fought hard against the Guidelines in theory, but then, after they were drafted, encouraged the FISC to adopt them as FISC policy.[248] In his memoir, *Decision Points*, President Bush cited a "set of procedures" relating to the Wall, which had contributed to the 9/11 intelligence failures;[249] after 9/11, the Bush Administration worked to have the 1995 Guidelines expunged from the FISC. The record suggests that in fact, despite their sensible intentions, the Guidelines were the textual locus of the FISA framework troubles between 1995 and 2001—first when they enabled OI to constrict FBI-prosecutor contacts and FBI FISA applications where there was prosecutorial involvement, and second after the Guidelines were annexed by the FISC in 1998.

B. *A Shift in Wall Enforcement—OI to the FISA Court*

In the mid and late 1990s, OI vigorously implemented the aforementioned policy of cutting off prosecutors from FISA investigations and blocking access to FISA in cases where prosecutors had been consulted by the FBI.[250] As described in Part II.A, these

---

[244] *See generally* THE BELLOWS REPORT, *supra* note 35, at 721-34.
[245] KESSLER, supra note 34, at 162.
[246] 9/11 COMMISSION REPORT, *supra* note 39, at 78-79.
[247] THE BELLOWS REPORT, *supra* note 35, at 722.
[248] BAKER, *supra* note 35, at 57.
[249] BUSH, *supra* note 1, at 160.
[250] *See, e.g.*, THE BELLOWS REPORT, *supra* note 35, at 730.

practices deviated from DOJ's intentions, relying on an unprecedented interpretation of FISA using *Truong*, a non-FISA case, and OI's self-serving interpretation of the problematic 1995 Guidelines.

While Scruggs and Kornblum-era FISA scrutiny mainly involved procedural restrictions, they additionally reinterpreted FISA as requiring substantive "currency" scrutiny to authorize surveillance: Evidence was now required showing suspicious activity within the last six months.[251] This had been the partial basis of OI preventing FBI surveillance of Wen Ho Lee, despite overwhelming suspicion that Lee was forwarding nuclear secrets to China.[252] The Bellows Report's review of the Wen Ho Lee investigation reveals that there was an agreement between the FBI and OI that the Wen Ho Lee FISA rejections would not be brought to the attention of the National Security Counsel.[253] In rejecting the Wen Ho Lee warrant applications, Kornblum presented FISA "currency" as mainstream orthodoxy which was at minimum entertained if not accepted by the Justice Department:

> The use of the present tense in the term "knowingly engages" [in the FISA statute] has given rise to what has been called the "currency" debate. That is, how current must an individual's clandestine intelligence gathering activities be in order to meet the requirements of the FISA statute? In reviewing a FISA application, Kornblum indicated that he looks for indications of activity in the last six months. We believe that is far too rigid and cramped an

[251] *See* THE BELLOWS REPORT, *supra* note 35, at 497. FISA enables surveillance of a suspect who "knowingly engages" in foreign intelligence activities. The FISA "currency" requirement was based on the language "knowingly engages" in the FISA statute. The Bellows Report noted that terrorism or espionage operatives often stay dormant for significant periods of time.

[252] *See id.* at 499, 514. While the Report characterizes not informing the National Security Counsel about the Wen Ho Lee FISA rejection as a mutual agreement between the FBI and OI, this decision must be viewed in the context of the relationship between the FBI and OI at the time. The FBI needed OI's authorization to access FISA; based on the presentation of the Bellows Report, the FBI would have many reasons not to do anything to contradict OI (or risk losing FISA access).

[253] THE BELLOWS REPORT, *supra* note 35, at 708.

> interpretation of what it means to be presently engaged in clandestine intelligence gathering activities.[254]

However, the Bellows Report suggests that the only proponent of "currency" was Kornblum himself, while it was widely rejected by others: "The FBI's criticism of OI[]'s 'currency' policy ranges from an assertion that the policy is 'too conservative' . . . to a claim that it is 'stupid.' . . . Assistant Director Lewis felt that Kornblum was too concerned about the 'currency' requirement."[255] The Bellows Report uses the Congressional Record to show that no FISA "currency" requirement was intended by the authors of the statute, and that it does not fit the realities of investigating espionage cases:

> Espionage cases are different and rules requiring activity within six months or a year or even longer are inappropriate. Hostile intelligence services may clandestinely insert an agent into the United States and not activate him for years. An agent may be instructed to take specific actions only after a long period of dormancy. Long periods of time may elapse between acts of clandestine intelligence gathering. Each of these, depending on its particular and unique facts, may or may not meet the standards of "currency."
>
> FISA's legislative history provides support for this view. According to the House Permanent Select Committee on Intelligence ("HPSCI"):
>
> > [E]vidence that a person engaged in the proscribed activities six months or longer ago might well, depending on the circumstances and other evidence, be sufficient to show probable cause that he is still engaged in the activities. For instance, evidence that a U.S. person was for years a spy for a power currently hostile to the United States, but who had dropped out of sight for a few years, would probably be sufficient to show "probable cause" that he was, having now

[254] *Id.* at 497 (internal citations omitted).
[255] *Id.* at 499 (internal citations omitted).

> reappeared, continued to engage in the clandestine intelligence activities.

H.R Rep. No, 95-1283, pt. I, at 37 (emphasis added). See also S. Rep. No. 95-701, at 23, 1978 U.S.C.C.A.N.3992:

> There does not have to be a current or imminent violation if there is probable cause that criminal acts may be committed.

> The "currency" issue represents once of the sharpest areas of dispute between those who evaluate FISA applications, OI[], and those who submit them, the FBI. The FBI's view is that OI is too conservative and too rigid in its definition of "currency." If OI's handling of the Wen Ho Lee FISA application is a reflection of the way in which OI typically handles the "currency issue," we agree.[256]

Finally, addressing FISA "currency" in its recommendations section, the Bellows Report concludes:

> DOJ needs to reevaluate OI[]'s practice concerning issues of "currency."
>
> . . . OI[]'s views as to "currency" has been a key matter of contention between it and the FBI. There are several types of cases, including those of "illegals," "sleepers," and "dormant" agents, where a FISA order may or may not be approved depending on OI[]'s view of what constitutes present engagement in clandestine intelligence gathering activity. It is clear to the [authors] that, in some cases, conduct far older than six months ought to qualify as "current" for purposes of the FISA statute. It is also clear that the FBI believes that OI[]'s views as to "currency" have cost it FISA orders in the past that the FBI believes to have been warranted. We recommend that the "currency" standard be reevaluated by the Department of Justice.[257]

Just as Lawton's FISA jurisprudence was never represented by a formal government policy document,[258] the Kornblum-Scruggs OI

[256] *Id.* at 497-99.
[257] THE BELLOWS REPORT, *supra* note 35, at 769.
[258] *Id.* at 712.

FISA regime which followed Lawton's tenure also has no formal name or representative policy document. This Article is concerned with the future success of FISA policy and not the assignment of culpability for past failures; however, it is an acknowledged historical fact that the Bellows Report strongly questioned the individual FISA jurisprudence of Allan Kornblum, which Bellows directly tied to (1) the improper blocking of the Wen Ho Lee FISA warrant applications, and (2) rigid implementation of Wall policies which were far stricter than DOJ had directed.[259]

Michael Vatis, drafter of the 1995 Guidelines, explained that the Guidelines were intended to be interpreted with a "low threshold,"[260] i.e., not to be policed by OI, or to be interpreted as empowering OI to choreograph or, especially, preventing consultations between federal prosecutors and the FBI. Under the Lawton regime, these briefings had been self-regulated: OI had to know about the formal briefings of federal prosecutors by the FBI (it was practice to submit a log of these to the FISC), but it was not supposed to act as a FISA "referee."[261]

The Bellows Report documents the struggles of many highly placed DOJ officials with respect to the FISA "referee" practices of OI:

> [Assistant Attorney General] Robinson objected to OI[] acting as a "referee" at these briefings. Also, OI[] wants to be present at every meeting, according to [Deputy Assistant Attorney General Mark] Richard, and as a result, there are substantial delays in scheduling them, a concern that AAG Robinson shared. According to [Head of DOJ's Internal Security Section John] Dion, these meetings are

[259] *See* BAKER, *supra* note 35, at 55. The "tagging" of Kornblum's individual FISA jurisprudence is acknowledged, albeit hesitantly, by Stewart Baker. It seems improper to regard the Bellows Report merely as an inter-agency polemic (prosecutors attacking Kornblum and OI); the section of the Bellows Report addressing FISA Wall jurisprudence was factored centrally in the FISA Court of Review decision that repealed the Wall policies in 2002. *See In re Sealed Case*, 310 F.3d at 728.

[260] THE BELLOWS REPORT, *supra* note 35, at 723.

[261] *See id.* at 733.

> unusual, and when they do occur, the FBI agents are scared to ask questions of the ISS prosecutors.
>
> According to Kornblum, on the other hand, OI[] attends the meetings between the FBI and the Criminal Division precisely because it should act as "referee." Scruggs, however, believed that a representative of OI[] should be present at meetings between the FBI and the Criminal Division, acting in a "passive" role that would not inhibit conversation.[262]

These quotations did not go unnoticed, and it was indeed Kornblum who took the fall for the Wen Ho Lee failures.[263]

The Bellows Report registered sufficient concern with the FISA mechanism to garner the full attention of the Justice Department, even while it was ongoing. A memorandum addressed to then-Deputy Attorney General Eric Holder from January 18, 2000, shows that, despite not yet having finished his report, Bellows was sufficiently concerned by the state of FISA policy that he submitted a series of internal recommendations in October 1999.[264] The memo records Bellows' three recommendations as: (1) "significant alterations to the 1995 [Guidelines] . . ."; (2) "that the FBI begin providing to CRM automatically all Letterhead Memoranda (LHMs) regarding full FCI investigations of U.S. persons, at or before the time the LHMs are provided to OI[]"; and (3) "that the FBI immediately begin providing critical case briefings to [federal prosecutors] about [Foreign Counterintelligence] investigations." [265]

Considering that the United States was already focused on Al-Qaeda, and that this exchange transpired less than two years before the 9/11 attacks, there is a troubling detail concerning DOJ's response to "interim recommendation" number two:

---

[262] *Id.* at 733. "[OI Director James] McAdams, however, did not believe that OI[] should act as a 'hall monitor' for contacts between the Criminal Division and the FBI." *Id.* at 733 n.976.

[263] BAKER, *supra* note 35, at 55-56.

[264] Interim Guidelines, *supra* note 41.

[265] *Id.*

> A critical issue in this regard is the uncertainty regarding what ultimately will be Bellows' final recommendation regarding the permissible "advice" that [federal prosecutors] may provide the FBI. It is critical because, as the working group members agree, the mass production to [federal prosecutors] of all LHMs on U.S. persons—many of which are written at a fairly general level—inevitably will lead to significant increased dialogue between [federal prosecutors] and FBI about intelligence matters.
>
> In this context, some at FBI have recommended that, at this point, you take no action regarding LHMs until Bellows issues his final report. To the extent Bellows' final report is, in fact, forthcoming in a matter of weeks, we might be inclined to follow this suggestion. Nonetheless, because Bellows could not provide a firm assurance that his final report will issue by the end of March, and because the second interim recommendation is an important prophylactic measure for the reasons offered by Bellows, *we recommend at this time that espionage-related LHMs that fall within the seventh category of activities in the Attorney General's FCI Guidelines be provided as a matter of course to [federal prosecutors].*
>
> We make this recommendation for three reasons. First, the seventh category of activities is limited to persons, groups, or organizations that are "engaged in activities that violate the espionage statutes." By its terms, this seventh category necessarily involves violations of federal criminal law. *The other six categories, by contrast, are not specifically tied to activities that "violate" other criminal statutes, although it should be pointed out that terrorist activity within the United States presumably would violate U.S. statutes.*[266]

The DOJ had effectively decided to exempt all espionage cases from the misinterpreted 1995 Guidelines. But "terrorism"—a distinct investigative category from espionage—technically also met the

[266] *Id.* (emphasis added).

standard for sharing in the 1995 Guidelines because it involves violations of federal law.

Bellows issued his report in May 2000.[267] The Bush Administration responded on August 6, 2001, 36 days before the 9/11 attacks.[268] The corresponding memorandum reiterates the 1995 Guidelines' notification requirement: If FISA warrants uncover evidence of a significant federal crime, here defined as "any federal felony," federal prosecutors must be notified.[269] More notably, however, the Bush Justice Department followed up on the espionage-terrorism distinction and exemption in the memorandum from January 2000:

> All Letterhead Memoranda (LHMs) in FI or FCI cases, and all FBI memoranda requesting initiation or renewal of FISA authority, shall contain a section devoted explicitly to identifying any possible federal criminal violation meeting the 1995 Procedures' notification standards . . .
>
> The FBI will provide to OI[] two copies of all LHMs in FI or FCI cases involving U.S. persons or presumed U.S. persons. *This requirement includes LHMs in both espionage and terrorism cases, and is therefore an expansion of the Interim Measures.* OI[] will make one copy of these LHMs available for pickup by the Criminal Division. The Criminal Division shall adhere to any reasonable conditions on the disclosure of the LHMs that the FBI or OI[] may require.[270]

Readers may question what took the Bush Administration so long to react to the Bellows Report and the fractured FISA framework. The answer is that the Bush Justice Department responded quickly, but the dispute had shifted from within the DOJ to the FISC itself.

By bureaucratic arrangement, OI and the FISC have always worked together closely to ensure that FISA policy withstood Fourth

---

[267] *See* THE BELLOWS REPORT, *supra* note 35 (cover and cover letter).
[268] Memorandum from Larry D. Thompson to Michael Chertoff, James Baker & Thomas Pickard et al., on Intelligence Sharing (Aug. 6, 2001).
[269] *Id.*
[270] *Id.* (emphasis added).

Amendment scrutiny. As explained by Kornblum's OI successor, Frances Townsend, head FISA Judge Royce Lamberth and Allan Kornblum had agreed on FISA Wall policy for years.[271] In her 9/11 Commission Interview, Gorelick, who left the DOJ in 1997, explained that when Kornblum "became Judge Lamberth's clerk on the FISA Court, [he] wielded extensive influence on Lamberth and caused the wall to be higher."[272] Lamberth and Kornblum believed that *Truong* and the primary purpose test were essential to ensuring that the FISA framework complied with the Fourth Amendment, and strongly disapproved of prosecutorial knowledge of FISA intercepts.[273] In 1998, with OI Wall policy under critique by the Bellows investigation, Kornblum suggested to Lamberth that the FISC formally annex the 1995 Guidelines.[274] Baker explains:

> 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. . . .
>
> 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

[271] *See* Memorandum from Barbara A. Grewe, Senior Couns., Nat'l Comm'n on Terrorist Attacks upon the United States, on the Interview of Larry Parkinson of the Federal Bureau of Investigation 4-5 (Feb. 24, 2004) [hereinafter Larry Parkinson Interview] ("Kornblum . . . 'persuad[ed] [Chief FISA Judge] Lamberth to impose more restrictions . . .'"); Memorandum from Barbara A. Grewe, Senior Couns., Nat'l Comm'n on Terrorist Attacks upon the United States, on the Interview of Jamie Gorelick of the Department of Justice 3 (Sept. 3, 2003) [hereinafter Gorelick Interview]; ("[Kornblum] wielded extensive influence on Lamberth and caused the wall to be higher."); Memorandum from Christine Healey, on the Interview of Frances Fragos Townsend of the Department of Justice, Nat'l Comm'n on Terrorist Attacks upon the United States (Sept. 13, 2004) (Kornblum "had a special relationship with the [FISC while at OIPR]").

[272] Gorelick Interview, *supra* note 271, at 3.

[273] BAKER, *supra* note 35, at 57.

[274] *Id.*

> condition on any antiterrorism wiretaps approved by the court.[275]

Hence, Kornblum's policies at OI (refereeing through the 1995 Guidelines) were adopted by Lamberth and the FISC directly, just before Kornblum joined the court himself.

Plainly, the 1995 Guidelines were subject to malleable interpretations. As mentioned above, Vatis told the 9/11 Commission that OI had "kick[ed] and scream[ed]" in response to the Guidelines, because they were supposed to implement the Mary Jo White regime and grant federal prosecutors access to FISA intercepts.[276] However, if the Guidelines were so unpalatable to Kornblum and OI, why would he have recommended that they be further entrenched in FISA policy and implemented directly by the FISC? Baker's narrative includes this inconsistency but does not account for it.[277] Again, as explained above, OI seemingly recognized that the 1995 Guidelines, as drafted, nonetheless facilitated an interpretation whereby OI could powerfully enforce the Wall.

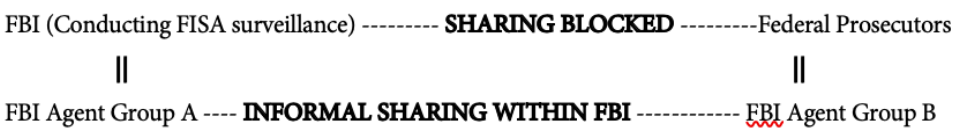
One reason that Lamberth annexed the problematic 1995 Guidelines was that the FISC had never been able to fully stem the trickle of information from FBI investigators (executing FISA surveillance) to federal prosecutors.[278] Under the Lawton regime, this had apparently not been problematic, but if one treats the *Truong* case as FISA caselaw and constructs "primary purpose" as "sole purpose," *any* prosecutorial knowledge of FISA raises serious concerns.

The "leakage" of FISA-related information from the FBI to federal prosecutors was bureaucratic; FBI agents assisted federal prosecutors with their cases.[279] Hence, the "leakage" occurred as follows:

---

[275] *Id.*
[276] *See* Michael Vatis Interview, *supra* note 211, at 2.
[277] BAKER, *supra* note 35, at 57-58.
[278] *See* BAKER, *supra* note 35, at 59-63.
[279] *See* Larry Parkinson Interview, *supra* note 271, at 4-5.

Figure 1: Diagram of FISA-related "leakage"



In his 9/11 Commission interview, FBI General Counsel Larry Parkinson explained the informal sharing:

> Parkinson was asked about the origin of the walls that were erected between FBI agents. Parkinson noted that the 1995 [Guidelines] only dealt with information sharing between the FBI and the Criminal Division and *did not mention sharing between agents working a criminal matter and a related intelligence matter. According to Parkinson this was a loophole in the Guidelines. Parkinson said he wrote some pieces discussing why the exchange between fellow agents was different than agent to prosecutor.* . . . Lamberth became upset about how the FBI was handling FISAs, including the numerous inaccuracies regarding pending cases and other examples of sloppiness. Lamberth began to insist that every single contact with someone working a criminal matter and every piece of information that went over the wall had to be reported to him. But as he became more adamant about reporting incidental contact, the likelihood that something might fall through the cracks became higher and there was a higher likelihood, there would be an error that would upset Lamberth. Beginning sometime in 2000 Lamberth began requiring anyone receiving FISA information to sign a certification that they understood the restrictions on sharing the information. . . .
>
> As Lamberth created higher walls and placed more restrictions, he managed to bring the other judges along with his views. . . . *By this time Alan [sic] Kornblum had left OI[] and was on the staff of the Court and he had been persuading Lamberth to impose more restrictions.* This became an escalating cycle. Parkinson said that OI[] started going along with Lamberth's orders regarding the walls. Parkinson said OI[] shared Lamberth's view regarding the

> "primary purpose" test so it was willing to go along on the walls. Parkinson said then at the annual meeting of the whole Court, which he attended, one of the judges wanted to know why the Court could not just be informed of everything a prosecutor did on the criminal case, such as a daily log of everyone the prosecutor had on the case. Parkinson said the judge just did not understand how prosecutors work and why this was totally unfeasible, as well as inappropriate.[280]

Restrictive Wall policies at OI had not stopped the internal FBI leaks. As Chief Judge of the FISC, Lamberth had more levers at his disposal than did OI. In the Bellows Report, Deputy Director Robert Bryant warned FBI agents about the dangers posed by circulating FISA information:

> "[W]ord" went out from FBI [HQ] . . . that there were to be no further contacts with prosecutors in [foreign intelligence] investigations without the permission of OI[], due to the issues raised about these certifications. Given what the FBI was being told by OI[], this reaction was understandable. According to Robert M. Bryant, Deputy Director of the FBI, Scruggs gave the impression that he believed the FBI had violated FISA by using the surveillance for criminal investigation. . . . Because of the perceived threat to obtaining FISA coverage, Deputy Director Bryant made it clear to the agents that this was a "career stopper" if they violated this rule.[281]

OI's "punishments" had been bureaucratic delays of FISA warrant applications and rejections—problems which, according to FBI testimony in the Bellows Report, could usually be managed.

However, with the 1995 Guidelines FISA "referee" framework adopted by the FISC, the "career stopper" threat became even more serious because the FISC became the "referee."[282] Stewart Baker recounts that by early 2001, the FBI "sat unknowingly in a civil

---

[280] *Id.* (emphasis added).
[281] THE BELLOWS REPORT, *supra* note 35, at 713-714.
[282] *See id.* at 733.

liberties bull's-eye," despite the fact that its FISA practices were remaining constant.[283] The FISC began requesting significantly more information in the FISA warrant applications (checking for prosecutorial knowledge), which became progressively bloated and impracticable.[284] The Court also demanded more extensive factual reporting, including "supporting facts" to buttress the FISA applications, and then more levels of secondary "supporting facts" behind the primary supporting facts.[285]

The prosecutors, who wished to avoid FISA warrant mistakes and the incumbent consequences for their cases, shifted position, joining OI and the FISC in a power play against the FBI.[286] FISA affidavits require assurances about the accuracy of the voluminous information submitted to the Court.[287] Perhaps misleadingly, sections of the affidavits included what looked like boilerplate language, but they were deadly serious.[288]

In early 2001, OI informed Lamberth that it had discovered a group of investigations where the FBI had violated the Wall policies.[289] Apparently, affidavits had been submitted to the FISC which made claims that the circulation of FISA intercept information had been circumscribed, while that information had apparently circulated more widely (*see supra* Figure 1), contravening the Wall policies.[290] More than a dozen applications had been compromised.[291] According to Baker's account, Lamberth's term was about to expire, and he was determined to enforce the procedures immediately, while he was still in place.[292] Lamberth convened a full meeting of all seven FISA judges, one of whom suggested, "If I discovered that an affiant in my court had made false statements, I wouldn't spend too much time worrying

[283] BAKER, *supra* note 35, at 62-66.
[284] Interview with a retired senior FISA official (Mar. 28, 2014).
[285] *Id,*
[286] BAKER, *supra* note 35, at 62-66.
[287] *Id.*
[288] *Id.*
[289] *Id.*
[290] *Id.*
[291] *Id.*
[292] BAKER, *supra* note 35, at 63.

about whether the false statement was negligent or deliberate. I'd bar him from the courtroom immediately. Why don't we do that?"[293]

Accordingly, on March 9, 2001, Lamberth sent a letter to the Attorney General about FBI affidavits containing incorrect information: Michael Resnick, a rising star and FBI agent, signed the affidavits.[294] In response, the FISC subsequently banned Resnick, effective immediately.[295] An OI investigation followed to determine if Resnick had acted negligently or deliberately—the potential consequences ranged from sanctions to criminal prosecution.[296] Everybody involved was certain that the ordeal would end Resnick's career.[297]

The order banning Resnick from the FISC post-dates the Bellows Report's account of the chill that had already descended on the FBI in the face of the Wall constraints.[298] The Attorney General, FBI Director Freeh, and other high-ranking FBI officials "begged" Lamberth to reverse the order banning Resnick—not only because of the repercussions for Resnick, but because there was resulting turmoil at the FBI.[299] But Lamberth doubled down—he wanted to "sen[d] a message to the FBI," and felt that whether the mistakes were negligent or intentional "didn't really matter."[300]

The Bellows Report depicts a dangerously gridlocked FISA bureaucracy prior to the Resnick episode, which occurred several months later. Reading the Bellows Report in a vacuum, it is easy to imagine how such gridlock might have contributed to the 9/11 intelligence failures. However, because the Report was researched and published beforehand, one can make no such definitive pronouncements solely based on the report. A decade later, Stewart Baker answered this question, leaving no doubt that the FBI's inability

---

[293] *Id.*
[294] *Id.*
[295] BAKER, *supra* note 35, at 63.
[296] *Id.* at 64.
[297] *Id.*
[298] THE BELLOWS REPORT, *supra* note 35, at 721-35.
[299] BAKER, *supra* note 35, at 64-66.
[300] *Id.*

to enact FISA surveillance—as narrated by Bellows—contributed to the 9/11 intelligence failures:

> With the lesson of [Resnick's ban] still reverberating through the [FBI], the new requirement was a reminder. What the FISA court had done to [Resnick] 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. 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 [OI] and the FISA court." 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.[301]

C. *The Woods Procedures*

The "Woods Procedures," a FISA application verification mechanism for the FBI, were issued on April 5, 2001, one month after the Resnick ban.[302] The backdrop to the procedures requires close attention because of their central pertinence to DOJ Inspector General Michael Horowitz's 2019 investigation of alleged FISA misuse, which will be addressed in Part III of this Article.

The Wall policy battles mainly concerned *procedural*, rather than substantive, review of FISA submissions. Bellows highlighted just one issue relating to OI substantive scrutiny of FISA warrant applications: FISA currency, which was widely rejected by other national security lawyers.[303] Instead, the major documented FISA disputes from the Wall era were procedural and concerned purportedly transgressive prosecutorial knowledge of FISA

---

[301] BAKER, *supra* note 35, at 64.

[302] Memorandum from the Fed. Bureau of Investigation, Off. of Gen. Couns., Nat'l Sec. L. Unit to All Field Offices, on Foreign Intelligence Surveillance Act Procedures to Ensure Accuracy (Apr. 5, 2001) [hereinafter The Woods Procedures].

[303] *See* THE BELLOWS REPORT, *supra* note 35, at 483, 497-99.

surveillance which might be seen as corroding a "foreign intelligence" purpose.[304] Resnick's ban specifically stemmed from misstatements in affidavits about prosecutorial knowledge of the surveillance or investigations for which he was requesting FISA surveillance, not mischaracterization of substantive evidence from a case.[305]

The Woods Procedures emerged directly following the Resnick ban, and centrally responded to foreign-criminal purpose and prosecutorial knowledge sensitivities:

> The heart of [FISA] applications is the declaration, signed by a supervisory special agent at FBIHQ, which sets out the factual basis supporting probable cause for the requested authority and which conveys to the FISC any other facts relevant to the Court's findings. *In particular, the declaration recites the details of any connection between the proposed FISA subject and any ongoing or contemplated criminal investigation/prosecution*. . . .
>
> 3b) The headquarters supervisor shall, upon receiving his/her copy of the draft FISA application, review the application and determine whether any field offices, other than the originating field office, need to review the declaration to ensure factual accuracy. *The most common situation giving rise to this need will be declarations that contain descriptions of related criminal investigations or prosecutions in other field offices.* The headquarters supervisor will ensure that those field offices receive a copy of the appropriate portions of the draft declaration . . .
>
> i) In some cases, where the description of the related criminal investigation is brief and self-contained, it may only be necessary to transmit a small portion of the declaration that specifically addresses the criminal investigation and any "wall" procedures governing passage of FISA information to criminal

[304] *See, e.g.*, THE BELLOWS REPORT, *supra* note 35, at 721-35.
[305] BAKER, *supra* note 35, at 65-66.

> investigators. In other cases, the supervisor may need to transmit a larger block of the declaration to provide the necessary context. In making this determination, supervisors should bear in mind the security of the information contained in the declaration, the need to know of the recipients, and the *possibility of dissemination to prosecutors*.[306]

FBI General Counsel Larry Parkinson, who was copied on the original memo instituting the Woods Procedures, explained the background of the Woods Procedures to 9/11 Commission interviewers:

> According to Parkinson . . . Lamberth became upset about how the FBI was handling FISAs, including the numerous inaccuracies regarding pending cases and other examples of sloppiness. Lamberth began to insist that every single contact with someone working a criminal matter and every piece of information that went over the wall had to be reported to him. But as he became more adamant about reporting incidental contact, the likelihood that something might fall through the cracks became higher and there was a higher likelihood, there would be an error that would upset Lamberth. Beginning sometime in 2000 Lamberth began requiring anyone receiving FISA information to sign a certification that they understood the restrictions on sharing the information. . . . Eventually Michael Woods in the FBI's National Security Law Unit drafted some internal procedures intended to ensure that agents confirmed information in the FISA applications. These became known as the "Woods procedures." Parkinson said Lamberth loved the Woods procedures. . . .
>
> Parkinson said . . . at the annual meeting of the whole Court, which he attended, one of the judges wanted to know why the Court could not just be informed of everything a prosecutor did on the criminal case, such as a daily log of everyone the prosecutor had on the case.

[306] The Woods Procedures, *supra* note 302, at 1-2, 7-8 (emphasis added); *see also* FISA IG REPORT, *supra* note 4, at 42-43.

> Parkinson said the judge just did not understand how prosecutors work and why this was totally unfeasible, as well as inappropriate.[307]

Thus, while the Woods Procedures somewhat encouraged substantive review of FISA applications by the FBI before submission to the Office of Intelligence, especially after internal FBI modifications years later, the Procedures were overwhelmingly designed to ensure that FISA applications sustained *procedural* scrutiny. OI was preoccupied with whether the foreign intelligence purpose standard had been upheld, calibrated by prosecutorial knowledge. Following the 9/11 attacks, Congress recognized that if the severity of the primary purpose test was legally ameliorated, so would the tension surrounding prosecutorial knowledge of FISA surveillance.

D. *Post-9/11 FISA Reform: The USA PATRIOT Act*

The USA Patriot Act (USAPA) amended FISA in a number of ways,[308] but viewed in context, it is easy to see that Congress's central aim with respect to FISA policy was to dismantle the FISA referee Wall policies animated by the 1995 Guidelines (again, distinct from the DOJ's intended Wall policies that were supposed to reflect the OLC). Before the USAPA, the FISA statute stipulated that acquiring "foreign intelligence" must be "the purpose" of the surveillance.[309] This language had been acrobatically read to incorporate the *Truong* case as though "the purpose" was functionally "the sole purpose," even though this had been rejected in *Truong*.[310]

---

[307] Larry Parkinson Interview, *supra* note 271, at 4-5.

[308] *See generally* USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[309] 50 U.S.C. § 1802 (1978).

[310] United States v. Truong Dinh Hung, 629 F.2d 908, 915-16 (4th Cir. 1980) ("The proposed 'solely' test is unacceptable . . . because almost all foreign intelligence investigations are in part criminal investigations. Although espionage prosecutions are rare, there is always the possibility that the targets of the investigation will be prosecuted for criminal violations. Thus, if the defendants' 'solely' test were adopted, the executive would be required to obtain a warrant almost every time it undertakes foreign intelligence surveillance, and, as indicated above, such a requirement would fail to give adequate consideration to the needs and responsibilities of the executive in the foreign intelligence area.").

Accordingly, Section 218 of the USAPA amended FISA so that acquiring "foreign intelligence" must be "*a significant* purpose" of FISA surveillance, preempting the *Truong*-tinged reading of the old "the purpose" formulation.[311] Additionally, Section 504(a) of the USAPA generally removed information-sharing restrictions between intelligence and law enforcement, directly overriding the 1995 Guidelines' de facto restrictions on the flow of FISA information to federal prosecutors.[312]

Why change the FISA "foreign intelligence" standard from "the purpose" to "a significant purpose"? Without comprehensive knowledge of the history of FISA, including the Wall and the Bellows Report, it is difficult to imagine how "the purpose" could have given rise to the *Truong* primary ("sole") purpose test, and how, when constructed, this "paralyzed" the FISA mechanism. Similarly, only from reading a document such as the Bellows Report can one glean the true background of Section 504's alleviation of FISA information flow to federal prosecutors, a direct and decisive remedy to problems stemming from the 1995 Guidelines.

With respect to the Wall, the FISA reforms of the USAPA enabled a return to the spirit of FISA: suspects monitored through FISA for "foreign intelligence" purposes could be prosecuted using FISA information, provided the "foreign intelligence" purpose of the surveillance was valid.[313] This paradigm had been aborted under the post-1995 Wall regime, and it was restored with the "significant purpose" reform.[314]

The post-Lawton FISA framework which emerged in practice, distinct from the framework intended by the DOJ, ultimately served neither civil liberties nor efficiency. Because the framework fixated on prosecutorial knowledge, DOJ lawyers faced hazardous guesswork about which personnel knew what and when about FISA wiretaps.[315]

---

[311] USA PATRIOT Act § 218, 115 Stat. at 291.
[312] USA PATRIOT Act § 504(a), 115 Stat. at 364.
[313] *See* USA PATRIOT Act §§ 218, 504(a), 115 Stat. at 291, 364.
[314] *See* 50 U.S.C. § 1804(a)(6)(B) (2012); THE BELLOWS REPORT, *supra* note 35, at 738-40.
[315] *See* The Woods Procedures, *supra* note 302, at 1-2, 7-8.

From a civil libertarian perspective, the framework may be seen as having de-prioritized substantive review of probable cause findings supporting surveillance. From a security and efficiency perspective, the framework had reflected an understanding which "just did not understand how prosecutors work… [and] was totally unfeasible, as well as inappropriate."[316]

The FISC's response to the 9/11 attacks and the USAPA was twofold: On the one hand, the FISC waived the Wall restrictions on pending terrorism cases as of September 15, 2001, and "authorized [federal prosecutors] to review all FBI international terrorism case files."[317] Again, this was a Bellows "interim" recommendation—"as soon as possible"—submitted in October 1999 and cited but rejected by DOJ in January 2000.[318] On the other hand, in November 2001, Lamberth reaffirmed the 1995 Guidelines, aiming to continue imposing the old FISA referee-Wall policies on every FISA warrant from the bench, in spite of legislation (the USAPA) to the contrary.[319]

All previous attempts to ameliorate the Wall turmoil had failed in large part because OI's "refereeing" of the FBI was not widely known—one might even call it a hostage problem. Bureaucratically, the FBI had to work through OI to access FISA, so FBI appeals for outside help would have been counterproductive. As noted previously, this is reflected in the apparent view from the outside that OI was cooperating effectively with the FBI.[320] Arrangements had even been made to prevent the rejection of the Wen Ho Lee FISA warrant from reaching the National Security Counsel, and if this happened unexpectedly, the rejection would have been presented as falling short despite harmonious cooperation rather than due to disagreement between the FBI and OI.[321]

---

[316] Larry Parkinson Interview, *supra* note 271, at 5.
[317] *See* In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 621 (FISA Ct. 2002).
[318] Interim Guidelines, *supra* note 41.
[319] *See* In re Sealed Case No. 02-001, 310 F.3d 717, 732 (FISA Ct. Rev. 2002).
[320] THE BELLOWS REPORT, *supra* note 35, at 708.
[321] *Id.*

However, following 9/11, the problematic FISA framework of the late 1990s faced full Justice Department and bipartisan Congressional awareness of the degree to which the FISA mechanism was impaired. The Bush Justice Department commenced a remedial effort which would not cease until the post-1995 Wall policies had been refuted and repealed.[322] The first attempt by the Bush Justice Department to repair the FISA regime, on March 6, 2002, comprised new "Intelligence Sharing Procedures" (i.e., FISA "Guidelines").[323] Facilitated by the USAPA reforms, these DOJ instructions were expressly intended to finally "supersede" the 1995 Guidelines and their two pre-9/11 amendments.[324] The 2002 Procedures effectively implemented the "significant purpose" standard from the USAPA, directly aimed at finally alleviating the *Truong* "primary [(sole)] purpose" framework.[325] The 2002 Procedures stipulated that under the new USAPA framework, consultation between prosecutors and intelligence investigators "'shall not' preclude the government's certification of a significant intelligence purpose or the issuance of a FISA warrant,"[326] as depicted by the Bellows Report to have occurred in the Wen Ho Lee case and others between 1993 and 2001.

Judge Lamberth objected: In a partially redacted opinion (responding to a group of FISA surveillance requests) submitted on May 17, 2002, he rejected use of the "Intelligence Sharing Procedures" and refused to vacate the 1995 Guidelines.[327] Lamberth contended that the only time the Wall had been enforced by OI was in "unusual cases such as where attorney-client intercepts occurred."[328] He presented the Wall as necessary "to preserve both the appearance and the fact that FISA surveillances and searches were not being used sub rosa for criminal investigations."[329] Finally, in spite of the USAPA, Lamberth

[322] See Memorandum from the Att'y Gen. to Dir., FBI et al., on Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI 1 (Mar. 6, 2002).
[323] *Id.*
[324] *Id.*
[325] *Id.*
[326] *Id.* at 2.
[327] In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 625 (FISA Ct. 2002).
[328] *Id.* at 620.
[329] *Id.*

further argued that the new 2002 Intelligence Sharing Procedures "cannot be used by the government to amend [FISA] in ways Congress has not."[330]

Lamberth's analysis invited an appeal to the FISA Court of Review. An effective appeal would cite the USAPA, showing specifically that Congress had intended to support the March 17, 2002 "Intelligence Sharing Procedures" (and generally sought to repeal the Wall and related policies). It would also cite the Bellows Report and the FISA statute.[331] Perhaps the only nettlesome aspect would be addressing the strict application of the primary purpose test from *Truong*; FISA prosecution holdings had at least recognized the test, though their standards for "primary" had been dramatically more lenient than OI, which effectively defined "primary" as "sole".[332] If these arguments were insufficient, there would still be the fallback position that the primary purpose test had been simply replaced by Congress's "significant purpose" amendment to FISA via the USAPA.

To summarize, Judge Lamberth's post-9/11 FISA ruling had partially granted and partially denied a number of FISA applications filed in the months following the 9/11 attacks.[333] He granted the certifications, but rejected the 2002 Procedures, instead re-imposing the 1995 Guidelines and the old Wall framework.[334]

The appeal brief had two main points. First, it recited the same analysis as the Bellows Report: the FISA statute and Congressional Record from the period fundamentally contradicted the framework presented in Lamberth's holding. The brief paraphrased Lamberth's position as asserting that "prosecution of spies and terrorists is . . . merely an incidental byproduct of a FISA search or surveillance."[335] The brief then noted that this is simply false, both based on the FISA statute itself and the Congressional record.[336] Hence, use of the *Truong*

[330] *Id.* at 623.
[331] *See* 50 U.S.C. § 1804 (2012).
[332] *See, e.g.*, THE BELLOWS REPORT, *supra* note 35, at 713-14, 724, 730.
[333] *See* In re Sealed Case No. 02-001, 310 F.3d 717, 720-21 (FISA Ct. Rev. 2002).
[334] *Id.*
[335] Brief for the United States, *supra* note 106, at 38.
[336] *Id.* at 39.

FISA framework, where the degree of prosecutorial involvement becomes at issue, contradicted the basis of the statute.[337]

The second major argument of the appeal was that even if the *Truong* "primary purpose" framework had been a sound interpretation of the statute, notwithstanding Judge Lamberth, Congress had clearly opted to amend the FISA statute.[338] The brief cited Congressional debate of specifically Wall and FISA-related topics, noting testimony from Senators Feingold, Wellstone, Feinstein, Leahy and Cantwell from sessions on October 11 and 25, 2001.[339] The brief also noted that in maintaining the 1995 Guidelines, "the FISC imposed a 'chaperone' requirement, holding that prosecutors may not consult with the intelligence agents unless they first invite OI to participate in the consultation."[340] Therefore, the 2002 Guidelines had been designed as a reformative measure, to "explicitly permit consultations directly between prosecutors and the FBI without OI present,"[341] a policy that DOJ had ostensibly chosen but failed to implement following the *Rahman* prosecution seven years earlier.

E. *The Wall Comes Down*

The FISA Court of Review (FISCR) ruling on November 18, 2002 removed the post-1995 Wall FISA jurisprudence.[342] FISCR stated what the 9/11 Commission did not: that based on the evidence (e.g., from the Intelligence Committees), "the FISA court requirements based on *Truong* may well have contributed, whether correctly understood or not, to the FBI missing opportunities to anticipate the September 11, 2001, attacks."[343]

---

[337] *Id.* at 59.
[338] *See* In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 623 (FISA Ct. 2002).
[339] Brief for the United States, *supra* note 106, at 41-52.
[340] *Id.* at 19.
[341] *Id.* at 16.
[342] *See generally* In re Sealed Case No. 02-001, 310 F.3d 717 (FISA Ct. Rev. 2002).
[343] *Id.* at 744.

USAPA or no USAPA, application of a rigid primary purpose test based on *Truong* was not legally sound. *Truong* is not a FISA case and the framework had "rested on a false premise and the line the court sought to draw was inherently unstable, unrealistic, and confusing."[344] The FISC had "misconstrued the main statutory provision on which it had relied."[345] Finally, in its holding, the FISCR relied critically on the Bellows Report,[346] arguably lending more credence to Bellows, strongly suggesting that regarding the Report as a mere legal polemic is a mistake.[347] The FISCR vacated the 1995 Guidelines, finally dissolving OI's role as a FISA "referee" and terminating the Wall policies.[348] Judge Lamberth's term with the FISC ended. Kornblum became a judge in Florida.[349]

The FISA reforms in the USAPA registered immediate benefits. One of the best-known terrorism prosecutions early in the post-9/11 era was that of the "Portland Seven," a cell of American born jihadists.[350] One member of the group scouted targets in the United States for a domestic terrorist attack.[351] Six others attempted to travel to fight alongside the Taliban against the United States—they reached China but were unable to cross into Afghanistan.[352] The FBI only had enough evidence to arrest one member of the cell, Jeffrey Battle, who was the suspect planning the domestic attack.[353]

Under the pre-USAPA FISA regime, this would have created a quandary for federal prosecutors: they could either arrest Battle

[344] *Id.* at 743.
[345] *Id.* at 730.
[346] *Id.* at 728.
[347] *See* BAKER, *supra* note 35, at 55-56.
[348] Again, note that the restrictiveness of Wall policies in practice dramatically exceeded the intentions of DOJ when it sought to systematize the 1994 Dellinger OLC FISA memorandum. The FISCR was not vacating the Wall as planned by DOJ, but rather what had grown in its place.
[349] William Grimes, *Allan Kornblum, Counsel to F.B.I., Is Dead at 71*, N.Y. TIMES (Feb. 10, 2010), https://www.nytimes.com/2010/02/21/us/21kornblum.html.
[350] U.S. DEP'T OF JUSTICE, REPORT FROM THE FIELD: THE USA PATRIOT ACT AT WORK 5 (2004), https://www.justice.gov/archive/olp/pdf/patriot_report_from_the_field0704.pdf.
[351] *Id.* at 5-6.
[352] *Id.*
[353] *Id.*

immediately (alerting his co-conspirators) or allow him to remain free while they built their case against the other suspects. If they chose the latter, surveillance would be critical—Battle could be monitored preceding his arrest to ensure he did not attempt an attack. Under the 1993-2001 FISA framework, prosecutors would have faced a legal problem: Title III surveillance of Battle would signify a "domestic" investigative purpose, in opposition to the FISA "primary purpose" standard, rendering FISA off-limits in the entire investigation.[354] Alternatively, FISA surveillance would be problematic because prosecutors sought to gather evidence from Battle about his co-conspirators before arresting him, but after their case against Battle himself was underway—the ultimate FISA "no-no" in the mid-to-late 1990s.[355]

However, because of the new FISA framework facilitated by Sections 218 and 504 of the USAPA, the FBI was able to conduct FISA surveillance on Battle in conjunction with prosecutorial involvement and access to FISA intercepts without fear of OI or the FISC.[356] The prosecutors used FISA wiretaps to gather evidence against Battle's co-conspirators.[357] The new framework had neatly accounted for the dual foreign and criminal purposes of the Battle case.[358] Charles Gorder, an Assistant U.S. Attorney involved with the prosecution, noted that previously this approach would have been "forbidden," and would have hampered investigation of Battle's co-conspirators.[359] In the end, six of the plotters went to jail, while the seventh was killed in Pakistan by Pakistani troops in October 2003.[360]

---

[354] *Id.*
[355] *Id.*
[356] U.S. DEP'T OF JUSTICE, *supra* note 350, at 5-6.
[357] *Id.*
[358] *Id.*
[359] Terrence P. Jeffrey, *Terrorist Blamed his Failure on Bush*, HUMAN EVENTS (Feb. 10, 2006), https://humanevents.com/2006/02/10/terrorist-blamed-his-failure-on-bush/.
[360] U.S. DEP'T OF JUSTICE, *supra* note 350, at 5-6.

Since its inception, the public reputation of the USA PATRIOT Act has fluctuated proportionally to terrorism concerns.[361] With respect to FISA after the 9/11 attacks, a critical and neglected gap in the national security law framework was repaired after six years of progressive deterioration. Today, this remains unknown to the general public at a time when FISA policy is both more crucial and more contentious than ever.

III. CROSSFIRE HURRICANE

> *"In the intelligence business if you look hard enough for something, you'll find it, whether it's really there or not."*
> —Hon. Arthur Moore, *The Hunt for Red October*[362]

In the aftermath of 9/11 and the USAPA, concerns about FISA surfaced on several occasions, but ostensible problems were resolved with relative smoothness. In 2005, the "NSA Wiretapping Program" became public.[363] The NSA had been intercepting overseas-to-overseas communications routed through United States servers without seeking FISA approval.[364] Instead the Bush administration relied on the 2001 Authorization for Use of Military Force (AUMF) for Al-Qaeda and "associated forces" as legal authority.[365] In response, Congress stipulated that FISA must be the exclusive authorization mechanism for foreign intelligence surveillance collection in the United States, requiring that overseas (but U.S.-intercepted) cases be

---

[361] *See, e.g.*, Melodie Bouchaud, *Is France About to Get its Own Patriot Act?*, VICE NEWS (Jan. 14, 2015), https://www.vice.com/en_us/article/qvaqeq/is-france-about-to-get-its-own-patriot-act.

[362] TOM CLANCY, THE HUNT FOR RED OCTOBER 398 (1984).

[363] *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html.

[364] American Bar Association Standing Committee on Law and National Security: Report from FISA Task Force Meeting at Morgan Lewis, Jan. 6, 2012 (discussion of the President's Terrorism Surveillance Program "TSP" not included in final report from meeting).

[365] NAMES REDACTED, CONG. RES. SERV., R40888, PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE INFORMATION 1-2 (2006); Authorization for Use of Military Force Against Those Responsible for Attacks Launched Against the United States on Sept. 11, 2001, Pub. L. No. 107-40, 115 Stat. 224 (2001).

routed through FISA.[366] Due to the increasing technological difficulty establishing the national location of a surveillance target, the FISA Amendments Act of 2008 (FAA) accounts for a variety of related contingencies, including when national location is unknown and when foreign surveillance incidentally intercepts the communications of U.S. persons, who were not the intended targets of surveillance.[367]

Additional FISA-related controversies emerged towards the end of the George W. Bush Presidency, and also under President Obama, but these disputes related to peripheral FISA mechanisms rather than conventional FISA surveillance orders. Under President Bush, the DOJ Inspector General, Glenn Fine, released several reports documenting problematic tracking of National Security Letters, which are administrative subpoenas authorized under FISA.[368] In response, the FBI definitively resolved the problem by establishing a computer logging system for the Letters.[369] Under President Obama, information surfaced concerning Section 215 of the USAPA (seizures of business records or tangible items authorized under FISA), which was one of only two remaining USAPA statutes that remained temporary after the 2005 USAPA Reauthorization.[370] Congress remedied the perceived excessive breadth of Section 215 in the USA Freedom Act of 2015.[371]

---

[366] 18 U.S.C. § 2712(b)(4) (2012) (designating FISA Section 1806(f) as "the exclusive means by which materials [designated as sensitive by the government] shall be reviewed."); Jewel v. NSA, 965 F.Supp. 2d. 1090, 1104-05 (N.D. Cal. 2013).

[367] *See* FISA Amendments Act of 2008 (FAA), Pub. L. No. 110-261, 122 Stat. 2436 (2008).

[368] *See generally* U.S. DEP'T OF JUSTICE, OFF. OF THE INSPECTOR GEN., A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS: ASSESSMENT OF PROGRESS IN IMPLEMENTING RECOMMENDATIONS AND EXAMINATION OF USE IN 2007 THROUGH 2009 (2014).

[369] *See The FBI's Use of National Security Letters: Hearing Before the H. Comm. on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties,* 110th Cong. (2008) (statement of Valerie Caproni, FBI General Counsel), https://archives.fbi.gov/archives/news/testimony/the-fbis-use-of-national-security-letters.

[370] *See, e.g.*, Bobby Chesney, *Three FISA Authorities Sunset in December: Here's What You Need to Know* LAWFARE (Jan. 16, 2019, 12:50 PM), https://www.lawfareblog.com/three-fisa-authorities-sunset-december-heres-what-you-need-know.

[371] *See* 50 U.S.C. § 1861 (2012).

However, in 2019, under President Donald Trump, FISA policy has burst into public discourse more prominently than at any other time in the history of the statute. President Trump and his associates maintained that the "Russia probe," headed by independent counsel Robert Mueller, as well as Crossfire Hurricane, the investigation which led to the Mueller investigation, had been initiated and conducted under false pretenses and reflecting political motivations.[372] President Trump directly contended that his campaign had been wrongfully subjected to government surveillance.[373] Subsequently, information emerged suggesting that Trump campaign aide Carter Page was indeed subject to FISA surveillance over a sustained period, purportedly under questionable pretenses.[374] The DOJ opened two investigations, one criminal and the other through the DOJ Office of the Inspector General, to confront the rumors and leaks about Crossfire Hurricane and the gestation of the Mueller investigation.[375] DOJ Inspector General Michael Horowitz released his public report on December 9, 2019,[376] followed by a Senate Judiciary Committee hearing two days later.[377] The 434-page IG Report narrated a series of events of sufficient gravity that FISA's fundamental survival has been cast into doubt.

In summary, the Democratic National Committee (DNC) and the Hillary Clinton presidential campaign had hired Fusion GPS, a strategic research firm, to undertake political opposition research on

---

[372] *See, e.g.*, Caitlyn Oprysko, *Trump Claims Victory in Mixed Bag of Findings from DOJ Watchdog*, POLITICO (Dec. 9, 2019), https://www.politico.com/news/2019/12/09/trump-claims-victory-justice-department-079210.

[373] Alan Yuhas, *Fact Check: What Did Trump's Tweets About Obama's 'Wiretaps' Mean?*, THE GUARDIAN (Mar. 4, 2017), https://www.theguardian.com/us-news/2017/mar/04/fact-check-trump-obama-wiretap-tweets-rumors.

[374] *See generally* FISA IG REPORT, *supra* note 4.

[375] *See generally* FISA IG REPORT, *supra* note 4; *see* Tobias Hoonhout, *Barr on Durham Investigation: "Evidence Shows that We're Not Dealing with Just Mistakes or Sloppiness"*, NAT'L REV. (Apr. 10, 2020), https://www.nationalreview.com/news/barr-on-durham-investigation-evidence-shows-that-were-not-dealing-with-just-mistakes-or-sloppiness/.

[376] FISA IG REPORT, *supra* note 4.

[377] *Examining the Inspector General's Report on Alleged Abuses of the Foreign Intelligence Surveillance Act: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2019).

candidate Donald Trump.[378] Fusion GPS then hired Christopher Steele, a former British intelligence officer, to conduct the research.[379] Relying on Russian sub-sources (i.e., a sub-source reporting to another source, who reported to Steele), Steele compiled a dossier concerning Trump which ultimately leaked; the dossier included salacious sexual allegations which IG Horowitz later found were actually based on mere "rumor and speculation."[380]

Steele had a prior relationship with the FBI stemming from an independent investigation of Russian organized crime, and related alleged corruption in the soccer organization FIFA.[381] Despite his ongoing employment with Fusion GPS and connection with the DNC, Steele became a key source for the FBI.[382] As was only later discovered by the FBI, Steele's contract with Fusion GPS included a provision committing him to speak to the media about his research.[383] The FBI recognized the apparent conflict of interest: Steele had been contracted to produce political opposition research.[384] They therefore requested that Steele provide the information on an exclusive basis (and not to Fusion GPS), but Steele would not agree.[385] Instead, Steele would continue developing political opposition research for Fusion GPS and then forward some of this information to the FBI.[386] The FBI moved forward and opened "Crossfire Hurricane," an investigation of Trump's connections to Russia based mainly on Steele's information and also on an alleged statement by a 29-year old Trump campaign surrogate, George Papadapoulos, implying that there was some type of coordination between the Trump campaign and the Kremlin.[387]

While Crossfire Hurricane investigators later maintained that they had simply baked the indications of Steele's political interests into the investigation, it later surfaced that Steele was personally

[378] FISA IG REPORT, *supra* note 4, at 381.
[379] *Id.* at v.
[380] *Id.* at 187.
[381] *Id.* at 85-86, 367.
[382] *Id.* at 94, 381.
[383] *Id.* at 53, 117.
[384] FISA IG REPORT, *supra* note 4, at 136.
[385] *Id.* at 108, 111-14, 388-89.
[386] *Id.* at 108, 111-14, 388-89.
[387] *Id.* at 126-27, 232.

"desperate" to prevent Trump from being elected.[388] Also, in accordance with his contract with Fusion GPS, Steele leaked his information to the media. When *Yahoo News* published a story about Trump's alleged ties to Russia, citing a "well-placed Western intelligence" source, the FBI presented the story to the FISC as though it was independent corroboration of Steele's information despite declining to inquire whether Steele was in fact the source (which he was).[389] Finally, after Steele spoke to *Mother Jones* about Trump's purported links to the Kremlin and leaked the existence of the FBI's investigation, the FBI technically "closed" Steele as a source.[390] Steele regarded his leak to Mother Jones as a "Hail Mary" attempt to inflict political damage on Trump to benefit Hillary Clinton's candidacy.[391] He was, however, not yet finished sending information to the FBI about Trump.

Steele next fed information to Bruce Ohr, the Associate Deputy Attorney General, with whom he had a friendly relationship and whose wife worked for Fusion GPS.[392] Ohr in turn met with the FBI thirteen times to transmit and discuss this additional input from Steele.[393] Despite Steele's "closure" as an active source and obviously questionable credibility, the FBI continued to independently rely on the information he had provided before closure, and also on information transmitted by Ohr as a conduit.[394]

Critically, Steele alleged that Carter Page, a Trump campaign foreign policy advisor, was engaged in a "well-developed conspiracy" in tandem with Paul Manafort linking the Trump campaign directly with Kremlin associates.[395] But Page had never had a conversation with Manafort.[396] And, he had stated to an FBI source that he had never been in contact with the Russians in question.[397] Also, while Page had

[388] *Id.* at 280, 369, 393.
[389] *Id.* at 106-07, 142, 144-45, 387.
[390] *Id.* at 172-75.
[391] *Id.* 172-75, 234, 282.
[392] *See id.* at 270-72.
[393] FISA IG REPORT, *supra* note 4, at 286.
[394] *Id.* at 278-91.
[395] *Id.* at 100, 126, 167, 169, 241, 377.
[396] *Id.* 223, 317, 364, 366.
[397] *Id.* at 322.

traveled to Russia many times, between 2008 and 2013 he had acted as a source for a U.S. intelligence agency.[398] Despite this, as well as additional glaring flaws in Steele's dossier, the FBI decisively relied on the dossier to engage FISA to monitor Page, submitting the evidence to OI and securing a FISA warrant on October 21, 2016.[399] This was followed by three renewals on January 12, April 7, and June 29, 2017.[400]

As reflected in the Senate Judiciary Committee hearing following the release of the IG report, the missteps in engaging FISA authority to conduct surveillance of Page seemingly amounted to the most serious error in the history of the FISA statute—easily greater than Resnick's (explicable) affidavit misstatements in 2001.[401] Noting the bipartisan reaction of the Committee to the IG Report, Senator Mike Lee told IG Horowitz, "The behavior outlined in your report is at a minimum so negligent, I actually would say so reckless, that it calls into question the legitimacy of the entire FISA program. I don't say that lightly. I say this as someone who has long questioned the FISA program and how it could be abused. This really pushes us over the edge."[402]

A. *Pertinent Details of the October 2016 Carter Page FISA Warrant*

Before the IG investigation, a key point of controversy amidst leaks and rumors was the extent to which FISA surveillance was approved on the basis of Steele's dossier alone. Congressman Devin Nunes, apparently with some advanced knowledge of the FISA application for Page several years before the IG report, had incredulously maintained on television that the only reliable facts stemming from the Steele Dossier were "that Russia is a country and Carter Page is a person."[403] While Congressman Nunes was at the time

---

[398] *Id.* at 247-249.
[399] FISA IG REPORT, *supra* note 4, at 7.
[400] *Id.*
[401] *Hearing Before the S. Comm. on the Judiciary*, *supra* note 377.
[402] *Id.*
[403] Tim Hains, *Full Replay: Devin Nunes Explosive Interview with Bret Baier*, REALCLEARPOLITICS (Feb. 2, 2018), https://www.realclearpolitics.com/video/2018/02/02/full_replay_devin_nunes_explosive_interview_with_bret_baier.html.

denounced as a partisan alarmist,[404] the IG Report reveals that according to the DOJ OI, still the key steward of FISA warrant promulgation, Steele's information "kind of pushed [the FISA application] over the line"; and without the Steele reporting, OI "would not have thought they could establish probable cause based on the other information the FBI presented at the time."[405] The IG Report further explained:

> The FISA request form drew almost entirely from Steele's reporting in describing the factual basis to establish probable cause to believe that Page was an agent of a foreign power, including the secret meeting between Carter Page and [a Kremlin official] alleged in Steele's [reporting] and the role of Page as an intermediary between Russia and the Trump campaign's then manager, Paul Manafort, in the "well-developed conspiracy" alleged in Steele's [reporting]. The only additional information cited in the FISA request form to support a probable cause finding as to Page was (1) a statement that Page was a senior foreign policy advisor for the Trump campaign and had extensive ties to various state-owned or affiliated entities of the Russian Federation, (2) Papadopoulos's statement to [a Friendly Foreign Government] in May 2016, and (3) open source articles discussing Trump campaign policy positions sympathetic to Russia, including that the campaign's tone changed after it began to receive advice from, among others, Manafort and Page.[406]

Hence, Congressman Nunes's critique had at least some merit, and the Steele Dossier had been pivotal, or "central and essential," according to the IG, to the FISA surveillance of Carter Page.[407] Accordingly, because Steele's dossier was critical to securing FISA surveillance, and additionally because the information—stemming from Russian human sources inaccessible to the FBI—could not be easily

[404] *See, e.g.*, David Kris, *The Irony of the Nunes Memo*, LAWFARE (Mar. 1, 2019, 12:52 PM), https://www.lawfareblog.com/irony-nunes-memo.
[405] FISA IG REPORT, *supra* note 4, at 126.
[406] *Id.* at 126-27.
[407] *Id.* at 359.

corroborated, the FISA certification of Steele's personal credibility was vital to securing approval from OI and the FISC.[408]

As established by the IG Report, the Crossfire Hurricane FISA order for Page reflected three types of misstatements to OI and by connection to the FISC.[409] Additionally, all of the misstatements artificially supported probable cause that Page was an agent of a foreign power.[410] The Crossfire Hurricane team's representations (1) presented Steele and his contractual obligations so that he appeared more credible, (2) minimized the apparent unreliability of Steele's information itself, and (3) omitted key information which cast doubt on the only independent basis for surveillance aside from the information provided by Steele.[411]

Taking each of these points in turn: First, with respect to Steele's credibility, the Crossfire Hurricane team stipulated that Steele's past information about Russian organized crime and FIFA corruption had been used in criminal proceedings, but this was not true.[412] Also, while the Crossfire Hurricane team purported to weigh Steele's potential political bias because of his affiliation with Fusion GPS, they did not fully establish his contractual links to the DNC, his contractual obligation to share information he developed with the media, and his apparent personal opposition to President Trump.[413]

In addition, the IG Report suggests that someone within the Crossfire Hurricane investigation actually did realize that Steele was speaking to the press, even if this was not a known condition of his contract with Fusion GPS.[414] On September 23, 2016, *Yahoo News* presented the same Trump campaign-Russia allegations as those made by Steele.[415] An OI Attorney explained to the IG that "at some point during the drafting process, the FBI assured [OI] that Steele had not

[408] *Id.* at 359-61.
[409] *Id.* at 125.
[410] *Id.* at 125.
[411] FISA IG REPORT, *supra* note 4, at 126-27.
[412] *Id.* at 85-86, 367.
[413] *Id.* at 117.
[414] *Id.* at 107.
[415] *Id.*

spoken with Yahoo News because [Steele] was 'a professional.'"[416] But until October 14, 2016, the draft FISA application stated that Steele had indeed been the source for the *Yahoo News* article, and had been "acting on his . . . own volition and has since been admonished by the FBI."[417] However, the FISA Application as submitted to the OI instead stated:

> The FBI . . . assesses that whoever gave the information to the press stated that the information was provided by a 'well-placed Western intelligence source.' The FBI does not believe that [Steele] directly provided this information to the Press.[418]

Hence, the *Yahoo News* article appeared to OI and the FISC as independent corroboration of Steele's information.[419]

Second, in making the case for probable cause, the Crossfire Hurricane team minimized or omitted the manifest unreliability and danger of the Steele information.[420] As early as July 2016, the FBI had known that Russian intelligence operatives were aware of Steele's election research, which pre-dated both the opening of Crossfire Hurricane as well as the Steele FISA applications.[421] In addition, the FBI had received specific, repeated warnings that Steele was a potential disinformation liability.[422] However, the disinformation concerns about Steele and the counter-intelligence investigation into his sourcing were omitted from the Page FISA applications.[423] Beyond the

---

[416] *Id.*
[417] FISA IG REPORT, *supra* note 4, at 107.
[418] *Id.* at 145.
[419] *Id.* at 107. If the FBI's submission about the independent sourcing was sincere in spite of the "drafting" issue, the circular "corroboration" of Steele's information through the Yahoo News article nonetheless disturbingly typifies the behavior of the victim of a successful disinformation campaign. This will be addressed further, *infra.*
[420] *Id.* at 163, 364-65; John Solomon, *FBI Repeatedly Warned Steele Dossier Fed by Russian Misinformation, Clinton Supporter*, JUST THE NEWS (Apr. 15, 2020), https://justthenews.com/accountability/russia-and-ukraine-scandals/fbi-received-repeated-warnings-about-steele-informant.
[421] FISA IG REPORT, *supra* note 4, at 189 n. 342 (initially redacted, then declassified); Solomon, *supra* note 420.
[422] Solomon, *supra* note 420.
[423] FISA IG REPORT, *supra* note 4, at 364.

disinformation concerns, Steele told the Crossfire Hurricane team that his key sub-source was "a 'boaster' and an 'egoist' who 'may engage in some embellishment.'"[424] The Crossfire Hurricane team apparently recognized this, but information about the apparent volatility of Steele's sub-source was not included in the FISA application.[425]

Additionally, the FISA application filing with OI omitted key statements by Carter Page made directly to FBI sources: In August 2016, Page told an FBI source that "he had 'literally never met' or 'said one word' to Manafort, and that Manafort had never responded to Page's emails."[426] Also, in October 2016, directly before the FISA application was filed, Page told an FBI source that he had never met with the two Kremlin associates with whom Steele alleged were Page's co-conspirators.[427] The alleged co-conspirators were Igor Sechin, President of a state-run Russian oil conglomerate, and Igor Divyekin, a Kremlin official.[428] Page's ostensible work with Manafort and meetings with Sechin and Divyekin were central to Steele's allegations.[429]

On top of information already in its possession which degraded probable cause that Page was a foreign agent, the Crossfire Hurricane team also independently failed to confront "obvious errors in . . . [Steele's] reporting," such as a reference to a Russian consulate in Miami which did not exist.[430] The Crossfire Hurricane team additionally did not inquire about whether Carter Page had acted as a U.S. intelligence source—the affirmative answer to this question would also have significantly weighed against probable cause.[431]

Third and finally, the main basis for FISA surveillance independent of Steele's information was a statement by Papadopoulos suggesting a link between the Trump campaign and Russia.[432]

---

[424] *Id.*
[425] *Id.* at 364.
[426] *Id.* at 168, 223, 317, 364.
[427] *Id.* at 322.
[428] FISA IG REPORT, *supra* note 4, at 322.
[429] *Id.* at 98, 100.
[430] *Id.* at 94 n.216.
[431] *Id.* at 364-65, 368, 413.
[432] *Id.* at 126-27.

However, the FISA warrant application omitted the fact that in September 2016, one month before the FISA order, Papadopoulos had spoken to an FBI informant and denied any links between the Trump campaign and Russia, or to pertinent outside entities tied to Russian election interference such as Wikileaks.[433]

In sum, the Crossfire Hurricane team submitted a FISA application to the OI which overstated Christopher Steele's credibility as an intelligence source and also misstated and omitted information, strengthening the case for probable cause that Carter Page was an agent to a foreign power. [434] Acting in reliance on the Crossfire Hurricane team's submissions, the OI promulgated the FISA warrant, which was then approved by the FISC.[435]

B. *Three Renewals of the Carter Page FISA Warrant*

As mentioned above, following the initial FISA order targeting Carter Page, which was approved on October 21, 2016, the Crossfire Hurricane team sought and secured renewals respectively on January 12, April 7, and June 29, 2017.[436] The renewals were requested and granted even though the Crossfire Hurricane team continued to accumulate information repudiating the basis for probable cause that Page was an agent of a foreign power.[437]

First, the Crossfire Hurricane team finally reached Steele's key sub-source (the source of the source reporting to Steele), who in January 2017 denied reporting that Page had met with Sechin.[438] The source also denied knowledge of any problematic communications between the Kremlin and the Trump campaign.[439] The source also "made statements that were inconsistent with multiple sections of the Steele reports, including the allegations relied upon in the [three

[433] *Id.* at 127, 232.
[434] FISA IG REPORT, *supra* note 4, at 107, 117, 163, 359, 364.
[435] *Id.* at 7, 359.
[436] *Id.* at 7.
[437] *Id.* at 186, 240-43, 368.
[438] *Id.* at 186-87, 241-43, 368.
[439] FISA IG REPORT, *supra* note 4, at 191, 242, 368, 370.

granted] FISA applications."[440] The Crossfire Hurricane team then successfully renewed the FISA surveillance order (following January 2017), reporting that the sub-source was "credible"[441] and had not contradicted his/her story.[442] The IG Report noted that according to the OI lawyer who filed the application, had the OI been aware of Steele's main source denying these vital details, the renewals could not have proceeded without "reconcil[ing]" the inconsistencies between Steele's account and that of his sub-source.[443]

Second, the FISA renewals were filed in spite of the disclosures from Bruce Ohr, who was acting as a conduit to Steele. The Crossfire Hurricane team's conversations with Ohr confirmed that (1) Steele's reporting was linked directly to the Hillary Clinton presidential campaign, (2) Steele was being paid by Fusion GPS to discuss his reporting with the media, and (3) Steele was "desperate" to prevent Trump's election.[444] But the FISA renewals were never edited in response to this information.[445] The Crossfire Hurricane team maintained to the IG that the FISA applications had accounted for Steele's potential bias; however, as noted by the IG (and the OI, once aware), the representations to the FISC did not reasonably convey the

[440] *Id.* at 370.
[441] *Examining the Inspector General's Report on Alleged Abuses of the Foreign Intelligence Surveillance Act: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 1:29:00 (2019) (statement of Michael Horowitz, Inspector Gen., U.S. Dep't of Justice), https://www.youtube.com/watch?v=bi8V-9EQfec&t=16949s.
[442] FISA IG REPORT, *supra* note 4, at 243 ("Despite the inconsistencies between Steele's reporting and the information his Primary Sub-source provided to the FBI, the subsequent FISA renewal applications continued to rely on the Steele information, without any revisions or notice to the court that the Primary Sub-source had contradicted the Steele reporting on key issues described in the renewal applications. Instead, as described previously, FISA Renewal Application Nos. 2 and 3 advised the court: 'In an effort to further corroborate [Steele's] reporting, the FBI has met with [Steele's] . . . sub-source [Primary Sub-source] described immediately above. During these interviews, the FBI found the . . . sub-source to be truthful and cooperative.'").
[443] *Id.* at 370.
[444] *Id.* at 279-81.
[445] *Id.* at 238, 393.

degree to which Steele was apparently compromised by his contractual and personal political commitments.[446]

Third and finally, the last renewal was promulgated and approved on June 29, 2017, and included two especially serious flaws. In mid-June, at last, the FBI formally asked the Intelligence Community if Carter Page had acted as a source and received an affirmative response.[447] However, the attorney who received this email doctored it to state instead that Page was "not a source."[448] The attorney also sent text messages to other FBI agents about his opposition to President Trump and suggesting that he would take action on this basis.[449] The FBI agent who had requested the Page inquiry (and was forwarded the doctored email) confirmed to the IG that the email, as altered, was critical because "if they say [Page is] not a source, then you know we're good [with respect to the FISA renewal]"; the agent pointed out that had the email instead confirmed Page as a source, this would have raised questions about the FISA renewal.[450] In addition, the June 2017 FISA renewal again seemingly suggested that the *Yahoo News* article corroborated the Steele dossier because it stemmed, ostensibly, from an independent "well-placed Western intelligence source."[451] By June 2017, however, the FBI had confirmed that the source for the information in the *Yahoo News* article was actually Steele himself.[452] The FISA renewal, however, was not edited accordingly.[453]

C. *The Prospect of FISA Politicization; FISA and Disinformation*

With respect to allegations of political bias, DOJ IG Horowitz's Report and testimony drew a pronounced distinction between the initiation of the Crossfire Hurricane investigation and the Carter Page FISA applications. The reality that Crossfire Hurricane

[446] FISA IG REPORT, *supra* note 4, at 238, 369.
[447] *Id.* at 254-55.
[448] *Id.* at 254-55.
[449] *Id.* at 256 n.400.
[450] *Id.*
[451] FISA IG Report, *supra* note 4, at 106-07, 142, 144-45, 387.
[452] *Id.* at 238-39.
[453] *Id.*

was predicated mainly on Steele's Fusion GPS-directed political opposition research, coupled with the fact that it led to the onerous three-year Mueller investigation, is a source of concern on its face. However, as noted by the IG Report, the legal threshold for initiating an investigation is low, requiring merely an "articulable factual basis" that "reasonably indicates" a crime or threat to national security.[454] Also, the decision to open the Crossfire Hurricane investigation was made by William Priestap, a senior FBI official whose communications, according to the IG investigation, did not raise any "political bias" concerns.[455] After the IG Report was released, Attorney General Barr and federal prosecutor John Durham, appointed to head the parallel criminal investigation, both issued statements clashing with the IG's findings on the initiation of Crossfire Hurricane, and it remains to be seen whether Durham's investigation discloses new information.[456]

Hence, while the discourse of senators from both parties indicates at least tentative, if not adamant, agreement about the necessity of FISA reform,[457] the ongoing controversy concerning the initiation of Crossfire Hurricane appears potentially prone to devolving the entire dialogue into partisan political turmoil.[458] During the Senate Judiciary Committee hearing, IG Horowitz walked a fine line with respect to distinguishing between the initiation of Crossfire Hurricane and the potential politicization of FISA:

---

[454] *Id.* at ii, 19, 53-54.
[455] *Id.* at 349.
[456] *See* Mikhaila Fogel, *Notable Statements on Inspector General's Report*, LAWFARE (Dec. 9, 2019, 12:52 PM), https://www.lawfareblog.com/notable-statements-inspector-generals-report.
[457] *See S. Comm. on the Judiciary*, *supra* note 441, at 3:23:45, 4:26:00, 5:20:40 (statements of Senator Richard Durbin, Ben Sasse and Senator Richard Blumenthal).
[458] For example, the current Wikipedia entry for "Crossfire Hurricane" melds the initiation of the investigation and the FISA applications and misrepresents the Report as affirmatively dismissing politicization on both counts. *Crossfire Hurricane (FBI Investigation)*, WIKIPEDIA, http://en.wikipedia.org/wiki/Crossfire_Hurricane_(FBI_Investigation) (last accessed Jan. 13, 2020).

> [Sen. Coons:] Did you find that the FBI took any investigative step based on political bias against now-President Trump?
>
> [IG Horowitz:] Um, I'm going to be careful on that because of the referral we made per the IG Act on the altered email and some to the other issues we found on the FISA.
>
> [Sen. Coons:] But did you find any substantive investigative step that was influenced by political bias?
>
> [IG Horowitz:] Again I'm going to be careful because we have a situation where we have the altered email by the individual who, as we know in the footnotes, had text messages that were concerning that were identified last year. So, I'm going to defer on what the rationale might have been.
>
> [Sen. Coons:] What that one step rationale might have been. But overarching your conclusion was that the initiation of this investigation was well-predicated and was for lawful purposes.
>
> [IG Horowitz:] Correct. In terms of the opening.
>
> [Sen. Graham:] But as to everything that followed, there's a lot of concern.
>
> [IG Horowitz:] I have a lot of concerns about the FISA process and how that occurred.[459]

Indeed, both the OGC lawyer who altered the Intelligence Community email and Peter Strzok, the FBI's Chief of Counter-Espionage and Deputy Assistant Director, transmitted text messages over the course of the Crossfire Hurricane investigation suggesting strident political opposition to then-candidate Trump and also, subsequently, to President Trump.[460] An inference might be potentially drawn between the email doctored by the OGC lawyer and his text anti-Trump messages.[461] Likewise, as noted by Senator Lindsey Graham in his statement opening the Senate Judiciary Committee

[459] *S. Comm. on the Judiciary*, *supra* note 444, at 4:46:00 (statements of Senator Chris Coons and DOJ IG Michael Horowitz).
[460] FISA IG REPORT, *supra* note 4, at 256 n.400.
[461] *Id.* at 254-55, 256 n.400.

hearing, Strzok's text messages can be read to align uncomfortably with the timeline of the FISA applications for surveillance of Carter Page.[462] When some Senators pointed to evidence of other FBI officials expressing pro-Trump opinions in text messages uncovered by the IG investigation, IG Horowitz pointedly noted that certain messages—from the OGC lawyer and Strzok—were distinct because they implied action on the basis of political sentiments.[463] The IG suggested that this might help account for the FBI's FISA errors, which otherwise have no evident satisfactory explanation:

> Although we did not find documentary or testimonial evidence of intentional misconduct on the part of the case agents who assisted [OI] in preparing the applications . . . *we also did not receive satisfactory explanations for the errors or missing information.* We found that the offered explanations for these serious errors did not excuse them, or the repeated failures to ensure the accuracy of information presented to the FISC.[464]

The Carter Page FISA debacle also reveals the potential vulnerability of the FISA framework to disinformation. One way of interpreting Steele's conduct is that he strategically solicited the concern of the FBI, and then politically weaponized the FBI's investigation of the Trump campaign. Obviously, the engagement of FISA surveillance immediately signifies maximal national security concerns and registers reputational damage.

In 2013, General Ion Mihai Pacepa and Professor Ronald Rychlak published *Disinformation*, a study of information warfare in the context of Pacepa's distinguished Cold War career.[465] Pacepa, the former head of the Securitate (Romanian KGB), describes his pre-defection leadership of disinformation campaigns against the West, including one-on-one planning consultations with KGB Chairman

---

[462] *S. Comm. on the Judiciary*, *supra* note 441, at 27:00 (statement of Senator Lindsey Graham).

[463] *S. Comm. on the Judiciary*, *supra* note 441, at 1:57:30 (statement of DoJ IG Michael Horowitz).

[464] FISA IG REPORT, *supra* note 4, at 413-14 (emphasis added).

[465] *See generally* RONALD J. RYCHLAK & LT. GEN. ION MIHAI PACEPA, DISINFORMATION (2013).

Yuri Andropov.[466] The account convincingly suggests continuity of Russian disinformation operations from the mid-Cold War through the present.[467] Nobody familiar with *Disinformation* could have been completely surprised by the design and scope of Russian operations on social media leading up to the 2016 Presidential elections.[468]

Pacepa and Rychlak specifically recount Andropov's personal disinformation philosophy; the KGB Chairman compared disinformation to growing bacteria in a "petri dish," relying critically (and merely) on an initial "kernel of truth."[469] It is not difficult to imagine a foreign or domestic political disinformation campaign designed to solicit FBI interest giving rise to an investigation and perhaps FISA surveillance, the existence of which can be leaked, inflicting reputational damage on the target. Also, based on their work, Pacepa and Rychlak would probably observe that the FBI's behavior as it pursued FISA surveillance of Page typified disinformation victimization: Because Steele's (dis)information aligned with the interests of FBI personnel, whether political or not, the FBI seemingly anticipated corroboration of information. Rather than ask Steele if he was the source of the *Yahoo News* article alleging links between the Trump campaign and Russia, the FBI apparently expected independent sourcing, and declined to trace the article to its original, questionable source.[470]

As noted above, the IG Report confirms that the FBI did open a counterintelligence investigation of Steele's sub-source and did consider the possibility that the source was supplying Russian disinformation. Strikingly, on April 15, 2020, several initially-redacted footnotes of the IG Report were declassified, showing that (1) the FBI had known that Russian intelligence operatives were aware of Steele's election research as early as July 2016, before Crossfire Hurricane had

[466] *See id.*
[467] *See id.*
[468] *See, e.g.*, Indictment, United States v. Internet Res. Agency LLC, No. 18-32, 2018 WL 914777 (D.D.C. Feb. 16, 2018).
[469] RYCHLAK & PACEPA, *supra* note 465.
[470] *See id.*

been initiated,[471] and (2) that the FBI had received specific, repeated warnings that Steele was a potential disinformation liability.[472] The Steele FISA applications did not include these disinformation concerns or acknowledge the counterintelligence investigation of Steele's sourcing—mistakes which the IG Report directly criticized.[473] As initially released to the public, the IG Report declined to directly grapple with the possibility Steele's dossier might reflect a domestic political or foreign disinformation ploy, but diligently documented all the evidence suggesting the extent of Steele's personal or professional affiliations. However, the subsequent footnote declassifications significantly amplify the disinformation aspect of Crossfire Hurricane.

Either way, even before the footnote declassifications of April 2020, politicians themselves quickly recognized that Crossfire Hurricane raised significant policy concerns relating to disinformation: Senator Hawley directly suggested that the easiest way to understand the entire Steele-Page FISA episode was as a political disinformation campaign using the presence of FISA surveillance to inflict damage.[474]

Many of today's major political figures, their relatives, or organizations with which they are affiliated operate in a global economy. The DNC sought information about Trump and Russia, and members of the Republican Party sought information about Joe and Hunter Biden with respect to Ukraine and other countries. Pacepa and Rychlak vividly document the already-significant capacity for political disinformation gamesmanship *before* the information technology era.[475] As widely recognized by the Senate following release of the IG Report, after the 2016 election and the Crossfire Hurricane investigation, we can now anticipate an escalation, especially with the

[471] FISA IG REPORT, *supra* note 4, at 189 n. 342 (initially redacted, then declassified); Solomon, *supra* note 423.
[472] Solomon, *supra* note 420.
[473] FISA IG REPORT, *supra* note 4, at 364.
[474] *S. Comm. on the Judiciary*, *supra* note 441, at 4:44:20 (statement of Senator Josh Hawley).
[475] *See generally* RYCHLAK & PACEPA, *supra* note 465.

rise of "deep fake" technology.[476] And this phenomenon evidently has the capacity to spill into the FISA framework.

A strong indicator of the degree to which the Crossfire Hurricane FISA episode, and more generally the potential politicization of FISA, has discomfited national security lawyers is the pre-IG Report statements of FBI Director James Comey and David Kris, a former DOJ lawyer widely regarded in the national security law community as the most authoritative living FISA practitioner. In 2018, Comey asserted, "I have total confidence that the FISA process was followed, that the entire case was handled in a thoughtful, responsible way by DOJ and the FBI, and I think the notion that FISA was abused here is nonsense."[477] Kris insisted that the FBI was being "falsely accused of deceiving the FISA Court" and even suggested that officials who propagated this idea might reasonably face legal consequences.[478]

Following the release of the IG Report, Kris seemed surprised and also conflicted. He described how he had not anticipated that many of Congressman Nunes's allegations about mis-use of FISA turned out to be accurate.[479] While Kris emphasized that he did not believe that the FISA mis-steps reflected political bias, and that the IG Investigation had not found evidence directly establishing politically-biased FISA decisionmaking, he also stated with authority that "the errors in the FISA applications on Carter Page were significant and serious. They were not, in my experience, the kind of errors you would expect to find in every case."[480] Kris then went into some detail noting how the errors dramatically clashed with FISA jurisprudence as he had practiced it.[481] Despite maintaining a belief, based on the IG evidence,

---

[476] *See, e.g.*, *S. Comm. on the Judiciary*, *supra* note 441, at 4:29:00 (statement of Senator Ben Sasse).

[477] Ian Schwartz, *Comey: Notion That FISA Process Was Abused is "Nonsense"*, REALCLEARPOLITICS (Dec. 7, 2018), https://www.realclearpolitics.com/video/2018/12/07/comey_notion_that_fisa_process_was_abused_is_nonsense.html.

[478] *Id.*

[479] David Kris, *Further Thoughts on the Crossfire Hurricane Report*, LAWFARE (Dec. 23, 2019, 4:19 PM), https://www.lawfareblog.com/further-thoughts-crossfire-hurricane-report.

[480] *Id.*

[481] *Id.*

that political bias had not spilled into the FISA process, Kris then also appeared to partially reverse course, suggesting a binary choice for denominating the FISA mis-steps which so clashed with his own longstanding experience:

> I will offer some informed speculation about the two main possibilities. I emphasize that this is only speculation; there is no substitute for seeing the facts.
>
> First, if the inspector general finds that Crossfire Hurricane is an outlier, and that other audited cases had materially fewer or less serious failures, I can think of a few possible explanations that will be offered. As discussed above, strong claims have been made, and there is at least the theoretical possibility, that the investigation was motivated by political bias and/or was part of a witch hunt or deep-state coup attempt to undermine President Trump. Such motivations presumably being absent from other investigations involving FISA, it could explain why Crossfire Hurricane experienced special failures. As discussed above, however, the inspector general's findings—including his search for, and failure to find, evidence of political bias affecting the investigation—makes this unlikely. Regardless, if the inspector general's broader audit of FISA comes back relatively clean, it will surely be used to support claims that Crossfire Hurricane must have been infected by political bias. . . .
>
> What about the other side of the coin—if the inspector general's audit finds a widespread pattern of significant errors in FISA applications, not limited to Crossfire Hurricane? That may further undercut any claims of political bias against President Trump—by showing that the FBI commits FISA failures on an equal-opportunity basis—but it will obviously raise other significant questions. What will it mean if, some 20 years after the FISA Court hammered the issue of important factual errors in multiple FISA applications, and the FBI adopted stringent new procedures, we are back to something that resembles where we started?[482]

[482] *Id.*

Having emphasized that the Page FISA warrant errors are highly unusual, Kris suggests on the one hand that if other FISA applications do *not* contain similar errors, this signals narrowly unusual activity with respect to Page and thus points towards politicization. On the other hand, if other FISA applications do contain similar errors, which points away from politicization, it would signal widespread problems with FISA practice. Either of Kris's two contingencies apparently suggests the necessity of FISA reform.

Because of the DOJ OIG's findings in its Crossfire Hurricane report, the OIG is further investigating the FBI's FISA practices. In March 2020, the IG released a preliminary report indicating that the FISA missteps uncovered from investigating Crossfire Hurricane appear to be widespread.[483]

D. *Procedural vs. Substantive FISA Scrutiny: Why the "Pendulum" Analogy Does Not Apply*

If the Crossfire Hurricane fact pattern seems misaligned with the FISA narrative in Parts I and II of this Article, it should. As observed in those earlier sections, judicial review of FISA applications has leaned towards procedural rather than substantive review. FISA was widely regarded as sustaining Fourth Amendment scrutiny not because FISA judges strictly examined warrant submissions, but because of internal safeguards including the FBI's initial review. This includes the exclusive submission and independent scrutiny role of OI and the imposition of minimization procedures on FISA surveillance, as well as on post-surveillance FISA-derived information.

Over the course of the Wall period, hundreds of national security lawyers clashed over FISA policy and whether individual FISA orders could be authorized. But they were all fighting towards a common goal: FISA had to be used in accordance with the Fourth

[483] WOODS PROCEDURES MEMO, *supra* note 4, at 2-3 (2020) ("As a result of our audit work to date and as described below, we do not have confidence that the FBI has executed its Woods Procedures in compliance with FBI policy . . . . We believe that a deficiency in the FBI's efforts to support the factual statements in FISA applications through its Woods Procedures undermines the FBI's ability to achieve its "scrupulously accurate" standard for FISA applications.").

Amendment. While one can pay lip service to "upholding civil liberties," there was a stronger natural incentive: As a critical national security mechanism, FISA had to be protected, and overreaching could risk Fourth Amendment challenges. Even the most serious ostensible FISA misstep during the Wall period, the Resnick episode, could never have been described as "[immune from] satisfactory explanation,"[484] and thus potentially reflecting intentional misconduct. At worst, Resnick's errors might be couched as "negligent," but more realistically, he unfortunately suffered the consequences of the extraordinary practical difficulty of complying with an unreasonable certification requirement of discerning and certifying exactly which individual DOJ and FBI officials knew about an investigation which included FISA surveillance.[485]

Hence, the Crossfire Hurricane missteps easily exceeded the seriousness of the Resnick affair, and far more closely represents the FISA doomsday scenario which the DOJ has always sought to avoid. In the immediate aftermath of the release of the DOJ IG Report on Crossfire Hurricane, Carter Page publicly announced a constitutional challenge to the FISA statute, proclaiming he was taking his case to the Supreme Court.[486]

In the aftermath of the Crossfire Hurricane IG Report, some analysts have suggested a pendulum analogy for FISA policy: The threshold for securing FISA surveillance swings back and forth between permissiveness and restrictiveness.[487] Lawyers and policymakers may generally appreciate that during the 1990s, FISA policy swung towards restrictiveness.[488] Then, after 9/11, it swung towards permissiveness.[489] And now they see it potentially swinging back. David Kris comments:

---

[484] FISA IG REPORT, *supra* note 4, at 362, 377-78, 414.
[485] *See generally* BAKER, *supra* note 35, at 62-66.
[486] Chuck Ross, *Carter Page: 'Going to Take This Right up to the Supreme Court'*, DAILY CALLER (Dec. 12, 2019), https://dailycaller.com/2019/12/12/carter-page-fbi-supreme-court/.
[487] *See* Kris, *supra* note 479.
[488] *Supra* Part II.B-C.
[489] *Supra* Part II.D.

> Ideally, if and when FISA reform is seriously considered, Congress will be able to approach the issue with some long-term perspective. If not, and if an unusual partisan alignment produces an extreme result, I worry that in the not-too-distant future we may find ourselves on the other end of the familiar national-security pendulum swing, reviewing a new inspector general or other report—this time criticizing the Justice Department, the FBI and/or the intelligence community for the proliferation of red tape or other restrictions, and the failure to stop an attack or other grave, hostile acts committed against our national security.[490]

Note that Kris describes a generic national security policy pendulum, and not one specific to FISA.

The pendulum analogy does not cleanly apply to FISA because for the analogy to be accurate, the Crossfire Hurricane errors could be addressed by simply re-escalating the existing FISA restriction mechanisms. But this does not work. Try applying the old FISA Wall restrictions as described in Parts I and II of this Article: Allan Kornblum has been reincarnated and reclaimed his position with OI. He reinstitutes the harshest Wall policies, citing the 1995 Guidelines. *Truong* is constructed as though it were a FISA case, "primary purpose" is read into the FISA statute and enforced as though equivalent to "sole purpose." Thus, under this fictitious pendulum swing in the aftermath of Crossfire Hurricane, the sole purpose of a FISA warrant must be for obtaining foreign intelligence. Prosecutorial knowledge of an investigation is forbidden with respect to any investigation where FISA is being used or even contemplated. It is not sufficient that FISA surveillance itself must be purposed to secure foreign intelligence, but rather, foreign intelligence purpose scrutiny is applied to an entire investigation. Therefore, if an investigation even "appear[s]" to have a criminal or partially criminal purpose or if a federal prosecutor merely knows about an investigation where FISA

[490] Kris, *supra* note 479.

could be sought, OI just says "no" to the FBI on FISA, citing the 1995 Guidelines.[491]

But, *none* of these restrictions, the main mechanism used to constrain FISA in the past, would have remotely prevented or uncovered the Crossfire Hurricane errors. As documented in the IG Report, the FBI kept the investigation quiet and mostly confined to FBI headquarters, away from field offices.[492] Both the IG and David Kris strongly opine that this was actually a weakness of the investigation, because wider FBI engagement might have prevented or caught mistakes.[493]

Hence, the Crossfire Hurricane fact pattern completely misaligns with the old FISA Wall oversight framework because the Crossfire Hurricane FISA errors were substantive, stemming from vital information held by the FBI, inaccessible to the OI and the FISC.[494] Theoretically, under the Wall FISA-restriction framework, Allan Kornblum, the most uncompromising FISA policeman in the history of the DOJ, probably would have approvingly noted the categorical avoidance of even potential prosecutorial knowledge and thus the preservation of a pure foreign intelligence purpose; he would have submitted the Page FISA order to the FISC unaware that the application was seriously flawed based on information he could not see.

The Woods Procedures emerged in April 2001, the month following the Resnick episode, and the year following the Bellows

---

[491] 1995 Guidelines, *supra* note 220.

[492] Both IG Horowitz and Kris suggest that actually, this might have been a functional weakness of the investigation, preventing the FBI from engaging helpful participants who otherwise would have been involved. *See* Kris, *supra* note 479; FISA IG REPORT, *supra* note 4, at 354.

[493] *See* FISA IG REPORT, *supra* note 4, at 354; Kris, *supra* note 479.

[494] *See* FISA IG REPORT, *supra* note 4, at 156 ("Our review revealed instances in which factual assertions relied upon in the first FISA application targeting Carter Page were inaccurate, incomplete, or unsupported by appropriate documentation, based upon information the FBI had in its possession at the time the application was filed . . . We found no evidence that the OI Attorney, NSD supervisors, ODAG officials, or Yates were made aware of these issues by the FBI before the first FISA application was submitted to the court.").

Report's review of the Wen Ho Lee case.[495] The IG Report explained the Woods Procedures in 2019:

> [T]he FBI's Woods Procedures seek to ensure the accuracy of every factual assertion in a FISA application by requiring that an agent and his or her supervisor verify, with supporting documentation, that the assertion is correct and maintain the supporting document in the Woods File.[496]

The IG Report further explained:

> When properly followed, the Woods Procedures help reduce errors in the information supporting a FISA application by requiring an agent to identify and maintain a source document for every fact asserted in the application and complete a list of database searches on the FISA target and any [confidential human sources] relied upon in the application. *We observed that the Woods process focuses on the facts actually asserted in an application and will not necessarily identify relevant facts that are missing from an application*. For this reason, performance of the Woods Procedures, alone, would have caught some but not all of the many problems we identified. We believe these problems nevertheless would have been caught, or never would have existed in the first place, had the Crossfire Hurricane team adequately performed its duty of sharing all relevant information with OI.[497]

While the IG Report heavily emphasizes the general importance of the Woods Procedures as "FISA Verification Procedures," the Bellows Report also points out that the OI's scrutiny is limited—OI responds merely to what it receives from the FBI. This is further reflected in the original environment that produced the Woods Procedures: Bellows' late 1990s to early 2000s investigation of the Wen Ho Lee FISA mistakes almost exclusively concentrated on the Wall and procedural aspects of the FISA process.[498] Bellows did

[495] The Woods Procedures, *supra* note 302.
[496] FISA IG REPORT, *supra* note 4, at 373-74.
[497] *Id.* at 374 (emphasis added).
[498] *See generally* THE BELLOWS REPORT, *supra* note 35.

address one substantive evidentiary review measure conducted by OI—Kornblum's FISA "currency" scrutiny—but national security lawyers widely agreed that currency scrutiny made no sense practically and was not supported by the text or legislative history of the FISA statute.[499] Subsequent to Bellows, and immediately predating Woods, the Resnick affair involved prosecutorial knowledge and criminal "purpose" encroachment rather than substantive evidentiary errors such as misstatements of evidence or failure to present relevant evidence.

Moreover, prominent practitioners generally maintain that FISA judges "don't know what to look for" when scrutinizing FISA applications.[500] There have been past periods where FISA judges have been out of touch, though this is no longer the case: One distinguished former FBI FISA practitioner cites an exchange in the 1990s with a FISA judge who did not understand rudimentary computer technology.[501] The judge was attempting to pose tough questions about the limits of a specific FISA order, which required that surveillance cease at a certain point, at which time a computer would be turned off.[502] "But where does the information *go*?!" demanded the judge.[503] At a loss, the FBI official tried to explain that because the computer was switched off and thus had no power, "it's the *electrons*; they're *gone* (!)."[504] While today's FISA judges are far better engaged and equipped than in this prior instance, this anecdote serves as another indicator of the extent to which judicial review of FISA applications has relied on procedural protections rather than substantive scrutiny. This long throat clearing reflects the reality that the Woods Procedures were originally developed when FISA safeguards leaned heavily towards procedural rather than substantive review. The estimated legal consequences of breaching the FISA process itself were sufficiently serious that they served as a strong self-enforcing incentive for compliance with the statute.

---

[499] THE BELLOWS REPORT, *supra* note 35, at 483, 497-99.
[500] ABA FISA Task Force Report, Jan. 2012, *supra* note 9.
[501] Interview with a retired senior FISA practitioner (Nov. 12, 2012).
[502] *Id.*
[503] *Id.*
[504] *Id.*

Notably, in the last decade or so, the FBI has expanded the Woods Procedures internally and "incorporated [them] into other policy documents."[505] But these adjustments to Woods—ostensibly increasing the FBI's internal substantive review of FISA applications—have remained confined to the FBI. With publication of the IG Report, it is widely recognized that OI could not have flagged certain key flaws in the Page FISA applications because OI had limited access. Therefore, it seems fair to now expect policymakers to contemplate expanding substantive FISA review, and possibly widening the role of OI.

CONCLUSION: LOOKING AHEAD

While the FISC and the FBI undertook internal remedial measures immediately following the Crossfire Hurricane IG Report, it seems clear that bipartisan Congressional will exists to substantially reform or even dissolve the FISA framework. In the December 11, 2019 Senate Judiciary Committee hearing, Democratic Senators Dick Durbin and Richard Blumenthal highlighted longstanding fundamental concerns about FISA, noting apparent vigorous interest from across the aisle.[506] On the Republican side, one particular exchange is worth quoting. Senators Mike Lee and Ben Sasse had long maintained a friendly FISA disagreement. Senator Sasse, a self-identified "hawk," had contended that FISA contained sufficient protections to prevent abuse.[507] Senator Sasse now stated that he was shaken by the disclosures of the IG Report, forcing him to reconsider his position.

> [Senator Sasse:] I wish [Senator] Mike Lee weren't sitting here right now. Because as a national security hawk, I have argued with Mike Lee in the four and a half or five years that I've been in the Senate that stuff like this couldn't possibly happen at the FBI and at the DOJ. So as somebody who is embarrassed on behalf of the FBI about your report . . . I [do] believe that it is critically important that we have

[505] FISA IG REPORT, *supra* note 4, at 43.
[506] *S. Comm. on the Judiciary supra* note 441, at 3:23:45 and 5:20:40 (statements of Senator Richard Durbin and Senator Richard Blumenthal).
[507] *Id.* at 4:26:00 (statement of Senator Ben Sasse).

> the FISA statute. I think the FISC is an incredibly important court. The approval ratings for the cases that come before the FISC are off the charts . . . "Why would it be that high," people would normally say. The good answer is . . . when you the American citizen who might be surveilled or be suspected of something that would open a surveillance warrant against you, the assumption would be that if you can't be there to defend yourself, it's because the department's lawyers are so super-scrupulous that if there's any information that might exonerate you . . . they would say, "the bar is so high here, we'll always err on the side of privacy unless we believe there's a good reason to pursue this investigation." And so Mike Lee has warned me for four and a half years that the potential for abuse in this space is terrible and I constantly defended the integrity and professionalism and the department that you couldn't have something like this happen . . . If this happens against a Presidential campaign, what about regular FISA warrants which have so much less scrutiny?
>
> [IG Horowitz:] That's why we just started a new review and audit.[508]

At the same time, adjusting the FISA mechanism is tedious and dangerous—the FISA bureaucracy has proven extraordinarily reactive to policy shifts. As reviewed in this Article, too much pressure or regulation can "paralyze" or undermine FISA. FBI agents should never have to risk their careers to secure surveillance on a legitimate foreign intelligence target. While this might seem apocryphal *prima facie*, accounts of the FISA disputes of the 1990s and early 2000s, such as those of Bellows and Baker, attest to real danger.

Exploring the practical challenges and dangers of FISA reform in January 2012, the ABA FISA Task Force, comprising elite national security lawyers operating under "Chatham House Rules," widely felt that if the FISA framework were reformed (a big "if"), the best option would be what they called the "Super IG" model:[509]

> [The] "Super IG" would be an appointed official, serving in an "advise and consent" position, available on a daily basis

[508] *Id.*

[509] ABA FISA Task Force Report, Jan. 2012, *supra* note 9.

> to dig into wiretaps, data mining, etc., checking for compliance . . . and given the authority to cut through red tape.
>
> Oversight [of FISA surveillance] would be retrospective rather than prospective [because] "based on the way intelligence agencies operate, federal judges don't have the time and knowledge to effectively conduct prospective oversight."[510]

In the context of discussing the merits of Super IG, two participants argued about the degree to which FISA judges exercise oversight over the applications:

> "I challenge the premise that the FISA Court utilizes part-time judges—they pay attention, they've ended careers, they care."
>
> "FISA judges do ask aggressive questions and demand information, but don't actually know what to look for, so the enterprise of oversight becomes political." This is why "Super IG" is a superior system—the Super IG appointee would understand what to look for. . . .
>
> One participant felt that the current oversight model is "political," and doesn't conduct meaningful oversight; "Political demands [for oversight] exist, but there could be a more effective regime than the FISA court for examining the conduct of [the] NSA and FBI with FISA."
>
> [Some participants felt that the] Super IG system would be [an improvement] because [the] current oversight system overloads judges with information; originally, FISA warrant information was presented "in a page or two, now ¾-inch packets are submitted to judges"— this takes too much time [and] impedes meaningful oversight.
>
> One participant suggested that in general, "Self-reporting mechanisms work . . . FISC could never get to the level of detail to [conduct truly comprehensive oversight]." "The FISC makes broad statements, and scares the FBI—that's

[510] *Id.*

> the problem with top-down intelligence policy dictated by a court."[511]

Hence, as of 2012, national security lawyers weighed the 1990s FISA troubles and felt that the Super IG model might at least potentially serve as an improvement. The Super IG model would not risk directly impairing the immediate use of FISA surveillance, but would also meaningfully supplement existing FISA review safeguards. Participants also recognized that while adopting "Super IG" might be the (only) functionally successful FISA reform option they could imagine, it might nonetheless fall short of mitigating a "corrosive" public loss of faith in the national security wiretapping framework.

Following release of the initial DOJ IG Crossfire Hurricane Report on December 9, 2019, the FBI immediately enacted remedial, internal measures responding to the IG's findings. As a result of the initial IG investigation, IG Michael Horowitz opened another, wider investigation of FISA policy practices.[512] Public discussion of FISA reform in the wake of the initial IG Report continued while this follow-up investigation was underway, suggesting new reform measures which could remedy the problems disclosed in the Crossfire Hurricane IG Report.

However, in March 2020, IG Horowitz's next IG FISA report, a preliminary finding corresponding to a wide investigation of FISA compliance, decisively suggested widespread problems with the FISA mechanism generally.[513] Hence, whatever remedial measures have been suggested or implemented in response to the original December 2019 Crossfire Hurricane IG Report may not reflect (or may not be perceived as reflecting) this new set of DOJ IG FISA findings. Looking ahead, the next DOJ IG Report (a final version of the preliminary March 2020 findings) remains to be released. On top of this, on April 9, 2020, Attorney General William Barr took the unusual step of publicly commenting on John Durham's criminal investigation concerning Crossfire Hurricane while the investigation remained

---

[511] *Id.*
[512] *See* WOODS PROCEDURES MEMO, *supra* note 4, at 2-3 (2020).
[513] *Id.*

ongoing—Barr expressed certainty that Durham's findings will be deeply troubling.[514]

The collective trajectory of these developments forecasts prolonged, intense scrutiny of the FISA mechanism and, inevitably, the public servants who administer FISA policies well into the foreseeable future. The question remains how to avoid impairing national security capacities even though many policymakers and analysts seem primed to throw up their hands and suggest scuttling the FISA framework in its entirety. However tempting, this could prove to be a serious mistake, and brings the "Lawton Memo" to mind: For decades, policymakers have contemplated the FISA framework and its flaws, with most ultimately concluding that, properly administered, the framework remains the best tool for managing national security surveillance.

[514] Tobias Hoonhout, *Barr on Durham Investigation: 'Evidence Shows That We're Not Dealing with Mistakes or Sloppiness'*, NAT'L REV. (Apr. 10, 2020), https://www.nationalreview.com/news/barr-on-durham-investigation-evidence-shows-that-were-not-dealing-with-just-mistakes-or-sloppiness/.