FISA COMMENTARY SERIES

THE WAVERING "WALL" BETWEEN INTELLIGENCE AND LAW ENFORCEMENT: A LONGER VIEW

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"*I was born in a crossfire hurricane*
And I howled at the morning driving rain
But it's all right now, in fact, it's a gas"[1]

"*We don't need no education*
We don't need no thought control . . .
All in all, you're just another brick in the wall"[2]

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[1] THE ROLLING STONES, JUMPIN' JACK FLASH (Decca Records 1968).

[2] PINK FLOYD, ANOTHER BRICK IN THE WALL (PART 2) (Columbia Records 1979).

INTRODUCTION

Bernard Horowitz's article, *FISA, the "Wall," and Crossfire Hurricane: A Contextual Legal History*,[3] will make a valuable contribution to the literature on national security law. His paper exhibits many of the best characteristics of good scholarship: He has chosen a timely and important topic; he obviously has conducted extensive research and presents meticulous documentation; he has disciplined himself to stay on his chosen topic; his positive analysis is thorough and reasonable; and his normative claim is narrow and modest—that policymakers should be cautious and balanced in what seems to be an ineluctably forthcoming reexamination of the FISA process in light of the abuses revealed in the recent Inspector General report on the Carter Page applications. The paper also is clear and well-written. I have no major criticism of it, within its own scope.

However, what are virtues in a principal author's technique may not be for a commentator, because Horowitz's article also passed my ultimate test for a good academic paper: it stimulated my interest and impelled me to look further. Accordingly, this Commentary is devoted to pulling back from Horowitz's particular topic, to place his concerns within both a longer and broader context of America's struggle with the duality implied by overlapping functions of intelligence and law enforcement. This analysis does not lead me to question any of the findings or conclusions he presents, but rather to suggest that the causes he identifies may be the product of larger forces at work, and therefore, the road to reform may be even more problematic than he predicts.

I. AMERICANS' INSECURITY ABOUT SECURITY

The origins of human warfare are lost in the mists of prehistoric time. It seems likely that wars arose with the first rudiments of social cooperation, in a pre-literate age.[4] And with

[3] Bernard Horowitz, *FISA, the "Wall," and Crossfire Hurricane: A Contextualized Legal History*, 7 NAT'L SEC. L.J. 1 (2020).

[4] To be fair to species *homo sapiens*, I should point out that we are not the only nor nearly the first animal species on this planet to engage in warfare against our own. For example, several insect species have been doing so, with scouts, generals, and all

warfare came its necessary companions—what we today know as "intelligence" and "counterintelligence." Perhaps the most famous aphorism of the ancient Chinese theorist Sun Tzu was that "[a]ll warfare is based on deception,"[5] thus showing that both intelligence and counterintelligence were well-developed arts in antiquity. Ancient Western literature is replete with similar examples, going back at least to the Trojan horse.

Americans, however, like to think of themselves as an honest, forthright, and pacifist people, with essentially no martial tradition and neither interest nor skills in the arts of war. This was the theme of Geoffrey Perret's *A Country Made by War*,[6] in which he shows quite convincingly that this self-perception is objectively untrue. What is the case with war-making in general is also true of intelligence: We perceive ourselves as always unprepared for hostility and always blind to its dangers, and thus postulate in ourselves a perpetual series of "intelligence failures"; but this also is untrue. Just as America is good at preparing for and making war, it is also good at the associated skills of intelligence and counterintelligence.

Perhaps the central example of this phenomenon is the Japanese attack on Pearl Harbor on December 7, 1941. It is simply not true that America was unprepared for war at that time; nor is it true that the failure to anticipate the location of that attack represented an "intelligence failure," whether due to lack of cooperation or anything else. In actuality, the intelligence services of

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the other trappings of war, since tens if not hundreds of millions of years before humans evolved. *See, e.g.*, Liz Langley, *Do Animals Go to War?*, NAT'L GEOGRAPHIC (Jan. 30, 2016), https://www.nationalgeographic.com/news/2016/01/160130-animals-insects-ants-war-chimpanzees-science/.

[5] SUN TZU, THE ART OF WAR 66 (Samuel B. Griffith, trans., Oxford 1963). The quoted phrase appears as the seventeenth paragraph of the first chapter of Sun Tzu's work, and variants are repeated throughout. General Griffith tells us that Mao Tse-tung's favorite variant is the one in paragraph 12 of chapter VII, on maneuver. *See id.* at 106 n.1. And Sun Tzu's concluding chapter XIII is devoted entirely to espionage. General Griffith translates the title as "employment of secret agents," but notes that the same character "also means 'spies,' spying,' or 'espionage'." *Id.* at 144 n.1.

[6] GEOFFREY PERRET, A COUNTRY MADE BY WAR: FROM THE REVOLUTION TO VIETNAM–THE STORY OF AMERICA'S RISE TO POWER (1st ed. 1989). *See also* ROBERT LECKIE, THE WARS OF AMERICA (rev. & updated ed. 1998).

the Army and Navy were in close cooperation at the time, as was the FBI, and the intelligence sources and methods were first-rate.[7] In addition to human sources, America's signals intelligence was the best in the world even then, perhaps surpassed only by the British. American cryptologists, who had been among the best since World War I,[8] had broken the Japanese "Purple" diplomatic code in 1940,[9] and were so good at intercepting and decoding those messages that they were reading them before the Japanese diplomats themselves. Ironically, it was the relative slowness of the Japanese diplomats that delayed them past the commencement of the attack to deliver their ultimatum to our Secretary of State, a delay that incensed American

[7] A classic treatment is GORDON W. PRANGE, AT DAWN WE SLEPT: THE UNTOLD STORY OF PEARL HARBOR (McGraw Hill 1981), but there is a voluminous literature on the subject.

[8] It is perhaps ironic that America's entry into that war was finally precipitated by a British signals intelligence coup, which provided access to the famous Zimmerman telegram, in which the Kaiser's Germany proposed a military alliance with Mexico against the United States. *See generally* BARBARA TUCHMAN, THE ZIMMERMAN TELEGRAM (1958). During the war, the U.S. established a signals intelligence operation populated successively by an outstanding group of cryptologists, beginning with Herbert Yardley, whose work provided U.S. negotiators with the secret instructions given to their Japanese counterparts at the Washington Naval Conference of 1921, and thus assured a favorable outcome for America and Britain in the 1922 treaty limiting warship tonnage. Instead of being rewarded, Yardley was dismissed in 1929 at the instance of Henry L. Stimson, then serving as President Hoover's Secretary of State, with the remark that "gentlemen do not read each other's mail." *See* DAVID KAHN, THE READER OF GENTLEMEN'S MAIL: HERBERT O. YARDLEY AND THE BIRTH OF AMERICAN CODEBREAKING 98 (Yale Univ. Press 2004). Two years after his dismissal, Yardley published his memoirs, entitled *The American Black Chamber*, which created a sensation, but was condemned by Yardley's successor, William Friedman, as revealing too much about sources and methods. *See generally* HERBERT O. YARDLEY, THE AMERICAN BLACK CHAMBER (1931). In another irony of history, by 1941 Stimson was serving as Secretary of War in the Roosevelt Administration. He apparently had changed his mind about the code breakers, whose products were used extensively by the War Department, both before and during the war. Or perhaps he had changed his mind about whether international relations was a "gentlemen's" game.

[9] This success was achieved by Friedman, working together with his wife Elizabeth and his assistant, Frank Rowlett, among others. Rowlett relates the history in FRANK B. ROWLETT, THE STORY OF MAGIC: MEMOIRS OF AN AMERICAN CRYPTOLOGIC PIONEER (Aegean Press 1999).

public opinion and became a powerful morale and propaganda weapon for the United States.[10]

But America's preparations were not limited to signals intelligence. After receiving, through signals intelligence, advance notice of Japan's intention to withdraw from the naval arms limitations treaties of Washington and London, the United States began a massive warship building program in the mid-1930s,[11] including whole new classes of destroyers (which enabled the "loan" of its older destroyers to Britain in 1940), submarines, cruisers, battleships, and ultimately a large class of new, fast, and powerful aircraft carriers, and new aircraft to go with them. In 1940, President Roosevelt approved the first peacetime draft in U.S. history, and participated personally in the draft lottery just days before the 1940 election.[12] Also in the pre-war period, beginning in 1940, President Roosevelt called into active duty the *entire* Army National Guard, on top of an expansion of the regular Army.[13] He also delivered impassioned speeches preaching pacifism, while stretching every legal authority to provide lethal assistance to the Allies against the Axis.

[10] PRANGE, *supra* note 7, at 502.
[11] *See* Vinson-Trammell Act of 1934, Pub. L. No. 73-135, 48 Stat. 503 (1934); Naval Act of 1938, Pub. L. No. 75-528, 52 Stat. 401 (1938).
[12] Selective Training and Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885 (1940); *see also* Andrew Glass, *FDR Signs Draft Act, Sept. 16, 1940*, POLITICO (Sept. 16, 2016), http://www.politico.com/story/2016/09/fdr-signs-draft-act-sept-16-1940-228038.
[13] An excellent reference that includes details on all U.S. Army ground force units serving in World War II is SHELBY L. STANTON, WORLD WAR II ORDER OF BATTLE: AN ENCYCLOPEDIC REFERENCE TO U.S. ARMY GROUND FORCES FROM BATTALION THROUGH DIVISION, 1939-1946 (Stackpole Books rev. ed. 2006). The endpapers of that work chart the genealogy of U.S. Army Divisions of that era, in both the regular and the reserve components. This chart shows that, between the outbreak of war in Europe on September 1, 1939 and the Pearl Harbor attack, fourteen new divisions were added to the Regular Army, to augment the pre-existing total of six. Another eighteen divisions were activated from the National Guard, so that the U.S. Army had thirty-eight active divisions in service on the day of the Pearl Harbor attack. The U.S. Army's ground forces' peak strength during the ensuing war was approximately ninety divisions.

By mid-1941, with the Army National Guard divisions already training in earnest for combat, the Navy had two new battleships, the first built by America since the early 1920s.[14] These were joined in the Atlantic by an aircraft carrier and a division of three older battleships that had been shifted from Pearl Harbor in order to participate in an undeclared war against the Axis in the Atlantic.[15] By the time of the Pearl Harbor attack, America had another new carrier in the Atlantic, built as part of the pre-war expansion program—making 4 out of the total of 7—and the warship building program continued apace.[16] But the Pacific was not ignored:

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[14] *North Carolina (BB-55)*, Naval Register, https://www.nvr.navy.mil/SHIPDETAILS/SHIPSDETAIL_BB_55.HTML; *Washington (BB-56)*, Naval Register, https://www.nvr.navy.mil/SHIPDETAILS/SHIPSDETAIL_BB_56.HTML.

[15] *Yorktown III (CV-5)*, NAVAL HIST. & HERITAGE COMMAND: DICTIONARY OF AM. NAVAL FIGHTING SHIPS, https://www.history.navy.mil/research/histories/ship-histories/danfs/y/yorktown-iii.html (last visited May 20, 2020).

[16] This excludes the first of America's carriers, the *Langley*, which had been re-classified officially as a seaplane tender, and at the outbreak of war, was serving as part of America's small Asiatic Fleet, then headquartered in Manilla Bay. By the end of the war, both the *Langley* and the Asiatic Fleet were gone. The remaining 7 carriers bear famous names that distinguished themselves in the ensuing war. In hull-number order, these were: *Lexington, Saratoga, Ranger, Yorktown, Enterprise, Wasp, and Hornet.* At the time of the Pearl Harbor attack, *Ranger, Yorktown, Wasp,* and the newly commissioned *Hornet*, were in the Atlantic. Of the three in the Pacific, *Saratoga* was in shipyard overhaul on the west coast, and the other two, *Lexington* and *Enterprise*, were at sea, transporting reinforcing aircraft to outer Pacific Islands. These ships bore the brunt of the ensuing operations: *Yorktown* was returned to the Pacific after Pearl Harbor, *Hornet* was retained in the Pacific after carrying Doolittle's raiders to their takeoff point in April 1942, *Lexington* was lost in the Batte of the Coral Sea in May, and *Yorktown,* damaged at the Coral Sea, was lost in the Battle of Midway in June. After serving in the Atlantic through the Malta campaign, *Wasp* was switched to the Pacific. Both *Wasp* and *Hornet* were lost in the furious naval battles surrounding the Guadalcanal campaign in August-November 1942. *Saratoga* and *Enterprise* also participated in those battles, and were damaged several times, but both survived the war. *Ranger* was held in the Atlantic until late in the war, and saw little action, as it was the American carrier built under the naval treaty restrictions, which limited its size and capabilities. Vessel movements and locations can be confirmed by the ships' histories that can be found at NAVAL HIST. & HERITAGE COMMAND, DICTIONARY OF AM. NAVAL FIGHTING SHIPS, https://www.history.navy.mil/research/histories/ship-histories/danfs.html. That same site also contains tables of U.S. Ship Force Levels, 1886-present, and a full listing of ships and craft in and around Pearl Harbor at the time of the attack. *US*

Active Army troops on Oahu were doubled, and reinforcements were being sent to the Philippines and other American bases in the Pacific.[17] In fact, this preparedness program actually was what deprived the Japanese of their principal targets—the main reason for attacking Pearl Harbor—which was the striking force represented by the American aircraft carriers. On the day of the Pearl Harbor attack, three American aircraft carriers were assigned to the Pacific Fleet, but none were at Pearl Harbor: One was in overhaul on the west coast, preparing for combat, and the other two, with their escorting forces of cruisers and destroyers, were dispersed on missions ferrying reinforcing planes to outlying islands, in anticipation of approaching hostilities.[18] While these facts are sometimes portrayed as an accidental fluke of history, one also could say that fortune smiles on the vigilant.

The eight battleships that remained in Pearl Harbor were aged, with the newest being over 18 years old.[19] They were all actually too slow for fleet actions during the ensuing war, and were used primarily for shore bombardment.[20] Although all eight battleships

Ship Force Levels, NAVAL HIST. & HERITAGE COMMAND, https://www.history.navy.mil/research/histories/ship-histories/danfs.html (last visited May 20, 2020). *Id.* These tables show the U.S. naval buildup beginning in the mid-1930s with new destroyer classes, and the strength of all U.S. Fleets at the outbreak of war. For a description of all classes of U.S. warships serving in World War II, including the dates of their construction and commissioning, and performance figures of speed, armor, firepower, and the like, see JOHN MOORE, JANE'S AMERICAN FIGHTING SHIPS OF THE 20TH CENTURY (Modern Publishing 1995).

[17] *The Hawaiian Department, 7 December 1941*, U.S. ARMY PAC., https://www.usarpac.army.mil/history2/dec7th.asp (last visited May 20, 2020).

[18] *Pearl Harbor Attack, 7 December 1941 Carrier Locat*ions, NAVAL HIST. & HERITAGE COMMAND, https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/c/carrier-locations.html (last visited May 20, 2020).

[19] *See Battleship Row During the Attack*, NAVAL HIST. & HERITAGE COMMAND, https://www.history.navy.mil/our-collections/photography/wars-and-events/world-war-ii/pearl-harbor-raid/battleship-row-during-the-pearl-harbor-attack.html. The history of the individual battleships can be accessed at NAVAL HIST. & HERITAGE COMMAND: DICTIONARY OF AM. NAVAL FIGHTING SHIPS, https://www.history.navy.mil/research/histories/ship-histories/danfs.html (last visited May 20. 2020).

[20] However, five of this group did have one last hurrah, by making up most of the battle line at the battle of Surigao Straits, which was part of the massively larger

were hit during the attack, six were eventually returned to combat service against the Axis, essentially because the shallow waters of the harbor allowed them to be raised and repaired.[21] Had there been sufficient warning to sortie these battleships, it is likely that all would have been sunk in deep waters by the large attacking Japanese fleet and lost irretrievably. Although the deaths and destruction wrought by the Japanese attack were terrible, the defenders were soon alerted and the attack was broken off prematurely, with little damage to Pearl Harbor's strategically important fuel dumps and shipyard facilities, which facilitated a prompt recovery by the Americans.[22]

Thus, it is simply not the case that America was unprepared for war. What the Americans did not know is exactly where and when the Japanese would strike. Although the diplomatic code was broken, it would take several more months to break the naval code, and, even if the Americans had broken that code, it is not clear that they would have been forewarned. The Japanese Navy prepared very carefully: They practiced the attack for months, in deep secrecy and away from their usual anchorage; they used all six of their big-deck

battle of Leyte Gulf in October 1944, when all of the fast new carriers (and their fast new battleship escorts) were lured away from the area by a Japanese ruse, so the old slow battleships were pressed into ship-to-ship battle service, participating in what was to be the last major engagement at sea between big-gun ships, without material participation by aircraft. Here again, the Americans were victorious, sinking most of the attacking Japanese force and driving off the remainder. This was one of several sub-engagements in an around Leyte Gulf, where the Americans fought with bravery and skill in what was, and still is, the largest naval engagement in history. For an able description of this and other operations in the Pacific (and elsewhere), a recommended reference is the Navy's own official history, for which the Navy commissioned the distinguished historian Samuel Eliot Morrison. SAMUEL ELIOT MORRISON, HISTORY OF UNITED STATES NAVAL OPERATIONS IN WORLD WAR II (Book Sales 2001). A paperback edition of the fourth volume, covering the critical period of the battles of the Coral Sea and Midway, is available as SAMUEL ELIOT MORRISON, HISTORY OF UNITED STATES NAVAL OPERATIONS IN WORLD WAR II, VOLUME 4: CORAL SEA, MIDWAY AND SUBMARINE ACTIONS, MAY 1942-AUGUST 1942 (Naval Inst. Press 2010).

[21] In fact, three of the six survivors sailed out of Pearl Harbor, under their own power, less than two weeks after the attack, on December 20. *See* DICTIONARY OF AM. NAVAL FIGHTING SHIPS, *supra* note 15 (histories of *Maryland, Pennsylvania, and Tennessee*).

[22] James R. Holmes, *Why Didn't Japan Finish the Job?*, THE DIPLOMAT (Oct. 23, 2011), https://thediplomat.com/2011/10/why-didnt-japan-finish-job/.

carriers but minimal escorts; they crossed the Pacific by a circuitous northern route little traveled and beset by bad weather; attacked from the northeast, and, most importantly, they exercised strict signals discipline until reaching their target.[23] The plain fact is that the Japanese Navy was very good at its job. It behooves us to remember that America's adversaries can be talented and resourceful.

But in achieving tactical surprise, Japan had committed a huge strategic blunder in going to war against the United States. Their brilliant naval commander-in-chief, Admiral Yamamoto, is said to have known the truth of it immediately.[24] The consequences were swift and devastating.

Within six months of the Pearl Harbor attack, without any new ships, planes, troops, or anything else, the United States essentially had turned the tide in the Pacific war, while purportedly focusing most of its effort on the Atlantic and Europe. And the primary reason for this was superior signals intelligence. The Japanese naval code finally was broken, and another talented group of American cryptologists, working out of a basement on Oahu under the leadership of Joseph Rochefort, went to work on Japanese signals and ultimately were successful in divining Japanese battle plans in detail.[25] They also showed that they could be clever as well, most famously planting a false message reporting a fresh water shortage on outlying Midway Island, which, when picked up in Japanese signals, confirmed that Midway was the target of the largest and most complex of Japanese naval operations to that date, intended to finish off the American Pacific Fleet as any obstacle to Japanese ambitions.[26] Instead, in the ensuing Battle of Midway, it was the

[23] PRANGE, *supra* note 7, devotes extensive attention to this factor.

[24] Although its provenance and authenticity are disputed, at the end of the film TORA! TORA! TORA! (20th Century Fox 1970), Yamamoto, upon hearing the battle damage reports, and of the mistiming by the diplomats in Washington, is said to have remarked, "I fear all we have done is to awaken a sleeping giant and fill him with a terrible resolve." Whether the quote is apocryphal or not, this statement did accurately reflect the strategic situation.

[25] *See The 'Codebreaker' Who Made Midway Possible*, NPR (Dec. 7, 2011), https://www.npr.org/2011/12/07/143287370/the-codebreaker-who-made-midway-victory-possible.

[26] *Id.*; *see also* GORDON W. PRANGE, MIRACLE AT MIDWAY (Penguin 1983).

Japanese Navy that was finished off as a viable offensive force.[27] Of course, the Americans fought with skill, sacrifice, and heroism, and perhaps a bit of good luck, but the signals intelligence was a key factor in the American victory. That battle ended on June 7, 1942, exactly six months after the attack on Pearl Harbor.[28] Japan never recovered. Although it took over three more years to achieve the final victory, the outcome was never in doubt after Midway.

This discussion perhaps has gone into undue detail concerning the opening months of World War II in the Pacific, but for good reason: that still today, nearly 80 years later, the attack on Pearl Harbor looms large in the national consciousness, and its mythologies have haunted us through the decades since, most notably in the echoes of Pearl Harbor that many saw in the World Trade Center and Pentagon attacks on September 11, 2001, another "day of infamy" in our history.[29] The 9/11 attacks kicked off the current Global War on Terrorism that we are still fighting today. That day also was followed by a similar questioning of national capabilities and national character, and eventually both events were reflected in an extensive legislative re-thinking of our institutions of national security.

In the context of the Second World War, while not the only influence, Pearl Harbor—or, to be more precise, the mythology of Pearl Harbor—was a major influence in creating the structure laid down in the postwar National Security Act of 1947 ("National Security Act"), which still today serves as the foundation on which our current national security institutions are built.[30] In order to address the mythological "intelligence failure" at Pearl Harbor, the

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[27] *Battle of Midway*, NAVAL HIST. & HERITAGE COMMAND, https://www.history.navy.mil/browse-by-topic/wars-conflicts-and-operations/world-war-ii/1942/midway.html (last visited May 20, 2020).

[28] *Id.*

[29] The phrase is a popular reference to Roosevelt's address to Congress on December 8, 1941, asking for a declaration of war. He actually did not use the phrase. His speech begins with, "Yesterday, December 7, 1941, a date which will live in infamy…" President's Address to a Joint Session of Congress, 87 CONG. REC. 9504 (1941).

[30] National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (1947) (codified as amended at 50 U.S.C. §§ 3001-3238 (2012)).

Act created the Central Intelligence Agency ("CIA"), and more provocatively the office of the Director of Central Intelligence ("DCI"), whose job included the coordination of other intelligence agencies' data.[31] Thus, the DCI was not only the director of the newly minted CIA, but also the watchdog of what today is called "fusion," responsible for ensuring that unlike at Pearl Harbor, we are never "caught napping" through lack of coordination or sharing of data.[32] But we were not "caught napping" at Pearl Harbor, so here we have legislation to require tearing down a "wall" that did not exist.

The Act also made many other basic changes, some of which echo the mythology of Pearl Harbor. The Act created the National Security Council and its staff, the Department of Defense with sub-Departments of the Army (re-named from War), Navy, and the newly-created Air Force, which itself was created by the same piece of legislation.[33] That Act also created the Joint Chiefs of Staff, and the new office of chairman of the Joint Chiefs, and their staff apparatus.[34] In short, the Act created all of the major institutions of national security still operating today, albeit with modifications made by subsequent amendments, and with the exception of what one could call the "N-series" agencies, such as the NSA, the NRO, and so on, which began with the formation of the NSA by administrative order in 1952, staffed initially by World War II code-breakers.[35]

There is an obvious parallel between the 1947 Act and the flurry of new legislation enacted in the wake of the 9/11 attacks. America again was "caught napping," said critics, who again ascribed

[31] National Security Act § 102, 61 Stat. at 497-99.
[32] The Act also directed that the DCI, as part of the multi-agency coordination role, "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure," National Security Act § 102(d)(3), 61 Stat. at 498 (codified as amended at 50 U.S.C. § 3024 (2018)), which might be the first time such a phrase had appeared in Congressional legislation. From such a modest beginning has grown a huge bureaucracy of "classified information" that appears to be one of the causes of today's problems.
[33] National Security Act § 208, 61 Stat. at 503.
[34] National Security Act §§ 211-212, 61 Stat. at 505.
[35] *See* JAMES BAMFORD, THE PUZZLE PALACE: A REPORT ON NSA, AMERICA'S MOST SECRET AGENCY (HM 1982).

fault to lack of adequate coordination among intelligence agencies.[36] So, another "wall" was to be torn down. The DCI was now downgraded to the mere Director of the CIA, and a new office of the Director of National Intelligence ("DNI") was created.[37] Only in Washington could it be thought that lack of coordination within a bureaucracy could be remedied by creating an entirely new layer of additional bureaucracy on top of all the others. And only Washington would assign a span of control that would flunk a freshman college student out of Management 101.

Of course, Horowitz teaches us in the *Wall* that the history is more complex than what I have described, and I will turn presently to the role of FISA in all of this. The point here is that the progression of events, and the fundamental structure of response, were parallel in these two cases, even echoes of one another, and they represent profound features of national character.

But these are not isolated events, though they do punctuate an era in American history. In between Pearl Harbor and 9/11, Americans continued to wring their hands about America's "intelligence failures." Space limitations prevent a full treatment, but a brief recital will make the point. The complete penetration of the Manhattan Project during World War II was a counterintelligence failure of monumental proportion, attributable largely to the FBI, but more fundamentally was caused by cleverness, dedication, and skill of Soviet intelligence.[38] The internment of Japanese Americans living in the west also was a counterintelligence failure, but it was not promoted by the FBI; it was ordered by President Roosevelt and championed by Earl Warren, then the Attorney General of

[36] *E.g.*, Phil Dodson, *September 11 Should Be a Day of National Reflection*, L.A. Times (Sept. 12, 2008), https://www.latimes.com/socal/daily-pilot/news/tn-dpt-xpm-2008-09-12-doc48c946e0d0f3e637323611-story.html; Gérard Chaliand & Arnaud Blin, *Zealots and Assassins*, *in* THE HISTORY OF TERRORISM 67 (Gérard Chaliand & Arnaud Blin eds., 2007).

[37] Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 104-458, 118 Stat. 3638 (2004).

[38] *See, e.g.*, William J. Broad, *Fourth Spy Unearthed in U.S. Atomic Bomb Project*, N.Y. TIMES (Nov. 23, 2019), https://www.nytimes.com/2019/11/23/science/manhattan-project-atomic-spy.html.

California, and obviously not yet then a civil libertarian.[39] The list goes on: the chaos in Greece and Turkey fomented by the Soviets as the opening salvo in their clandestine war to undermine the U.N. Charter; the establishment of the People's Republic of China in 1949; the surprise attack by the North Koreans in 1950; Communist China's entry into that war later that year, only one year after defeating U.S. ally Chaing Kai-shek; a series of ridiculous interventions in Latin America in the 1950s and after; Sputnik, Gagarin, the "Space Race," and its undertones of ICBM development; Fidel Castro's overthrow of Battista; the Bay of Pigs; the Berlin Wall; the Kennedy assassination; the Vietnam War; the achievement of nuclear weapons parity by the Soviets; the Iranian Revolution and rise of Islamist extremism; the terrorist attack on the Marine barracks in Beruit; Saddam Hussein's invasion of Kuwait; the rise of Al Qaeda and other similar groups; and so on, ad infinitum. In all of the cases named, at least some substantial portion of public opinion believed the event and its consequences were attributable in whole or in part to an American "intelligence failure." And throughout this entire series of otherwise dissimilar events walks the specter of Pearl Harbor mythology, which evokes Americans' self-doubts about intelligence capabilities.

So, is this national characteristic a good or bad thing? It could be both, and neither, depending on the objective circumstances of the case. My fear, and in this I join with concerns expressed in the *Wall*, is that, in the wake of one of these episodes, our fundamental insecurity about our security arrangements might produce too rapid and precipitous a "remedy" that will make us still less secure. We do not want to be like the old-fashioned generals that only prepare to fight the last war, and not the next one.

II. THE EVOLUTION OF INTELLIGENCE AND SURVEILLANCE

As the *Wall* points out, the nature of intelligence and counterintelligence work has evolved over time, due to technological change, as well as to developments in both domestic and foreign

[39] *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942); ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 120-23 (1997) (describing Warren's role in internment of Japanese Americans).

affairs. This leads to the positive argument that foreign intelligence over time has become more difficult to separate from domestic law enforcement, without undermining the efficacy of both. I am not certain whether that is true; or, if true, what bearing it has, if any, on our current problems.

There is no doubt that technological advance has changed the terrain. But a new and useful tool also can be misused, as a crutch, or as a weapon. Just because we can do something technologically does not mean that we should do it, nor that we may do it lawfully. Moreover, there are some properties of surveillance that are timeless. Regardless of how sophisticated the technology becomes, even Sun Tzu would recognize contemporary spying for what it is. This does not answer the questions of wisdom and legality.

One of my favorite sections[40] of the *Wall* is where Horowitz relates the evolution of ordinary wiretapping law from *Olmstead v. United States* in 1928,[41] to *Katz v. United States* in 1967,[42] to the 1968 legislation popularly known as "Title III,"[43] to *United States v. United States District Court (Keith)* in 1972.[44] He presents this material to show the background to the enactment of FISA. For my purposes, it shows the maturation of legal policy toward the emerging technology of electronic eavesdropping. However, I believe there is a material omission from the discussion of FISA's background, which is the series of Congressional investigations popularly known as the "Church Committee" hearings, which were the proximate antecedents to FISA.

In the chaotic aftermath of the Watergate scandal, after President Nixon had been driven from office in August 1974, there was open discussion of "Congressional government" in the United States. Whether part of that program or not, members of Congress took the opportunity to launch a broad investigation of American

[40] Horowitz, *supra* note 3, at 14-16.
[41] Olmstead v. United States, 277 U.S. 438 (1928).
[42] Katz v. United States, 389 U.S. 347 (1967).
[43] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified as amended at 18 U.S.C. §§ 2510-2523 (2012)).
[44] United States v. United States Dist. Court, 407 U.S. 297 (1972).

intelligence activities and institutions, which theretofore had been mostly a prerogative of the Executive Branch. In January 1975, Senator Frank Church (D-ID) was appointed chair of a Senate select committee empaneled "to conduct an investigation and study of governmental operations with respect to intelligence activities."[45] Impetus for the investigation had been given by a trickle of press reports suggesting that American intelligence agencies had been engaged in nefarious activities, both domestic and foreign.[46] Under the Church Committee's stewardship, that trickle became a torrent. The Committee held broad-ranging investigative hearings, both public and private, throughout 1975, and issued a massive six-volume report in April 1976, and published another seven volumes of hearing records.[47] Some aspects of its report and hearings still remain classified today. But the published revelations were quite enough to shock the American conscience.

Much public attention was focused on the revelations that the CIA had been engaged in covert actions aimed at assassinating foreign leaders and overthrowing foreign governments in multiple countries over many years.[48] But more disturbing still were the revelations that intelligence agencies had been engaged in spying on U.S. citizens on U.S. territory for decades. Among the many startling revelations were of "Operation Shamrock," in which the shadowy NSA had been engaged in massive secret wiretapping of telephonic communications (with the acquiescence of the telephone companies), which were then matched against its "Watch List" containing the names and biographical data on tens of thousands of American citizens, including everyone from the actress Joanne

[45] S. Res. 21, 94th Cong. (1975) (enacted).

[46] *Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/investigations/ChurchCommittee.htm#Origins (last visited May 20, 2020).

[47] The full series is available at *Church Committee Reports*, ASSASSINATION ARCHIVES & RES. CTR., http://www.aarclibrary.org/publib/contents/church/contents_church_reports.htm (last visited May 20, 2020).

[48] *See generally* ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 94-465, at 260-61 (1975).

Woodward to Senator Church himself.[49] Both the CIA and the FBI had been intercepting, opening, and photographing private mail, clandestinely during its processing by the U.S. post office, from the 1950s through 1973 (operation "HTLINGUAL").[50]

Still worse was the FBI's operation COINTELPRO, lasting from 1956 to 1971, aimed at conducting surveillance of individuals and organizations within the United States deemed to be "subversive" elements by the FBI.[51] The targets of these activities included civil rights leaders such as Martin Luther King, Jr., anti-war protesters, women's liberation groups, and the like.[52] In some cases, the activities went beyond surveillance, and included a bag of "dirty tricks" to discredit or disrupt the subject's life.[53] Much of the surveillance itself was unlawful even under the lax standards prevailing prior to Title III, and illegal surveillance continued even after the new statutory standards were enacted in 1968. The overall volume of activity was breathtaking. According to the Church Committee's final report, over 500,000 "domestic intelligence" files had been compiled in the FBI's main office alone.[54] That report summed up the main problem of legality as follows:

> While the agencies often committed excesses in response to pressure from high officials in the Executive branch and Congress, they also occasionally initiated improper activities and then concealed them from officials whom they had a duty to inform.
>
> Government officials—including those whose principal duty is to enforce the law—have violated or

[49] *See* S. REP. NO. 94-755, BOOK II, at 169; *National Security Agency Tracking of U.S. Citizens—"Questionable Practices" from 1960s & 1970s*, NAT'L SEC. ARCHIVE, https://nsarchive.gwu.edu/briefing-book/cybervault-intelligence-nuclear-vault/2017-09-25/national-security-agency-tracking-us (last visited May 20, 2020).
[50] CIA Memorandum on Mail Intercept Program (Jan. 21, 1975), *available at* https://www.cia.gov/library/readingroom/docs/DOC_0001420864.pdf.
[51] S. REP. NO. 94-755, BOOK III, at 3.
[52] BRIAN GLICK, WAR AT HOME: COVERT ACTION AGAINST U.S. ACTIVISTS AND WHAT WE CAN DO ABOUT IT 10-13 (1989).
[53] *Id.* at 10, 51 (1989).
[54] *Intelligence Activities: Hearings Before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Volume 6, Federal Bureau of Investigation*, 94th Cong. 8 (1975).

> ignored the law over long periods of time and have advocated and defended their right to break the law.[55]

The Church Committee's report had two principal outcomes. One was to set the pattern of Congressional intelligence committees that is still in place today. The other was FISA. Apparently, the proposed solution was to legalize only *foreign* intelligence surveillance, and thus by exclusion to outlaw "domestic" intelligence surveillance. Under Title III, electronic eavesdropping, without either Title III or FISA authorization is not only illegal (and potentially unconstitutional); it is a federal crime.[56]

Here, we come to another central point about America and intelligence. A free society devoted to the rule of law must never, ever, lose sight of the fact, and it is a fact, that most intelligence activity is criminal activity, nearly everywhere on earth. To the targeted nation, espionage, and its cousin sabotage, is a serious crime in all places with a functioning nation-state. And under the domestic law of the targeted nation, the methods used to carry out espionage often constitute crimes in themselves, from fraud to burglary to murder. Spies and saboteurs represent the antithesis of law enforcement, which seeks to promote tranquility and civil society.

The rise of non-state actors on the scene, though it complicates things, is not an entirely novel development. Throughout history, nation-states have had to deal with such things, like piracy, which at times has rivaled or overmatched the power or authority of the nation-state. We are living in such a time right now, but so were the ancient Romans and the 17th Century colonial powers, and the young American republic when it faced the Barbary pirates, which is a close analog to our current conditions.[57] Thus, whether acting for a nation-state or not, spies, saboteurs, and terrorists are criminals in the society they oppose. Of course, in their own mind, these actors believe that their acts are justified by a "higher duty," or a "higher good," whether it be religion, patriotism,

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[55] S. REP. NO. 94-755, BOOK II, at 5.
[56] 18 U.S.C. §2511(1), (4)(a) (2012).
[57] *E.g.*, Col. Bradley E. Smith, *America's First Response to Terrorism: The Barbary Pirates and the Tripolitan War of 1801*, MIL. REV., Nov.-Dec. 2005, at 1.

revenge, just retribution, or pure enmity. And within the span of their own control, they are heroes and patriots, or even sages and prophets.

We must never forget that these concepts apply symmetrically, so that what we think about our opponents, they think about us. We think that we have the better of the argument,[58] but that determination will be left to the judgment of future history, if any. In the meantime, we must be vigilant to avoid the seductive appeal that the methods of our opponents may exude, and this temptation can affect anyone and everyone. If we yield to the temptation, we undermine our own more fundamental values, which is what we are fighting for in the first place. This I believe is one source of the discomfiture that Americans feel about their own intelligence and counterintelligence activities and institutions. Who is proficient in the inherently criminal activity of espionage, and what kind of crafts do we train them to employ? The answers are obvious. So, even the intelligence function alone makes us a bit queasy. Yes, they are criminals, but they are *our* criminals, committing their crimes in a justified manner and for our protection, and are patriots and heroes.

But what about counterintelligence? In this instance, the risk is more subtle, but the ultimate damage can burrow much more deeply into our social foundations. Here in the United States, counterintelligence traditionally has been classified as a species of domestic law enforcement,[59] as distinguished from intelligence.[60] But

[58] As William F. Buckley noted of the same debate during the Cold War, "to say that the CIA and the KGB engage in similar practices is the equivalent of saying that the man who pushes an old lady into the path of a hurtling bus is not to be distinguished from the man who pushes an old lady out of the path of a hurtling bus: on the grounds that, after all, in both cases someone is pushing old ladies around." WILLIAM F. BUCKLEY, JR., THE RIGHT WORD (1996).

[59] It is not inherently so. In Britain, as reflected in the MI5 and MI6 structure, both foreign intelligence (MI6) and domestic counterintelligence (MI5) were each assigned their own specialized agency, separated from ordinary domestic law enforcement.

[60] At least in the case of intelligence activities of the CIA, the statutory text of the National Security Act makes the separation. In authorizing the Agency to "correlate and evaluate intelligence relating to the national security . . . using where appropriate

what does counterintelligence encounter? Yes, the same criminal world of spy-craft and deception, and there is a risk of contamination, which is why measures are taken to separate this function from ordinary law enforcement. This is somewhat analogous to the FBI's successful efforts to separate itself from enforcement of the Harrison Act, which was America's first national "war on drugs," and the Volstead Act, implementing alcohol Prohibition.[61] Apparently, J. Edgar Hoover was concerned that his clean-cut agents, mostly law school graduates, would be corrupted by the deceptive and surreptitious methods necessary to enforce such laws, and the immersion into the seedy world thus entailed. Those tasks were given to the Treasury Department, and these were the officers involved in the early leading wiretapping decision by the Supreme Court in *Olmstead*.[62]

Under the current arrangements for "foreign" intelligence surveillance, the agents involved are members of the same Bureau within the same Department whose principal mission is domestic law enforcement writ large. So, one can see the impetus for some form of "wall." But with or without a "wall," inevitably there will be some leakage, which presents the threat of contamination. As is amply documented by the *Wall*, there is pressure on both sides, which increases with the degree to which federal prosecutors and the FBI agents working with them will be proceeding on evidence derived from FISA wiretaps. The more these two functions are commingled, the more pressure there will be, creating a duality that will be difficult to sustain. As has been recognized from the inception of FISA, there will be a temptation on the part of participating prosecutors to orient the FISA surveillance toward criminal prosecution needs. But the greater risk may be the duality and moral relativism that will begin to form in the minds of both agents and prosecutors: two sets of employees working side by side, of which one is governed by a different rule of law than the other. With valid FISA authorization,

existing agencies and facilities," the Act reserved the proviso that "the Agency shall have no police, subpena, law-enforcement powers, or internal-security functions." § 102(d)(3), Pub. L. 80-253, 61 Stat. at 498.

[61] Harrison Narcotics Tax Act, Pub. L. No. 63-233, 38 Stat. 785 (1914); National Prohibition Act, Pub. L. No. 66-66, 41 Stat. 305 (1919).

[62] *See generally* Olmstead v. United States, 277 U.S. 438 (1928).

they are dutiful patriots; without that authorization, they are criminals. Law enforcement agents may begin to envy the differing standards applied to their "intelligence" brethren, and their privilege of operating in deep secrecy, and want those same powers. That effect in turn is only one aspect of a much larger trend, which is that law enforcement of all kinds is becoming more secretive and deceptive over time.

III. THE RISE OF THE SECRECY STATE AND THE DECLINE OF PROSECUTORIAL ETHICS

The last several decades have seen an increased proclivity of federal prosecutors, in all kinds of cases, to operate increasingly in the shadows, under the protection of Grand Jury secrecy, and through such things as "sting" operations and the like. As these activities approach more closely to FISA, two special "secrecy" problems arise.

First, there is the classified information bureaucracy, built on a series of Presidential orders with a jargon and a dialect all their own.[63] Here are endowed a number of Original Classification Authorities ("OCAs"), delegates of the President who decide what is to be classified, and at what level.[64] Although there are supposed to be standards for classification, these are subject to manipulation, and the procedures for challenging or correcting a mis-classification can be truly Kafkaesque, as the basis for the classification itself may be classified. There already is a substantial literature documenting the abuse of the classification system to shield bureaucracies from embarrassment or accountability,[65] and this problem has the potential to invade the Justice Department's prosecuting offices. After decades of lax discipline and declining ethical standards, federal prosecutors have lost all of their resistance to the allure of

[63] President Obama's version, Exec. Order No. 13526, 75 Fed. Reg. 707 (2009), paid more attention to limiting the duration of classifications, but otherwise is consistent with others.

[64] *See id.*

[65] *See, e.g.,* Ann Koppuzha, *Secrets and Security: Overclassification and Civil Liberty in Administrative National Security Decisions*, 80 ALB. L. REV. 501 (2017).

expediency and have become addicted to the opiate of secrecy, and its consequent shield from true accountability.

Second, there is the Classified Information Procedures Act ("CIPA"),[66] enacted in 1980 as an apparent follow-up to FISA. When coupled with the problems of over-classification, this could complicate the use of FISA-derived material. Unlike FISA itself, CIPA is not limited to "national security" cases; it applies to "any criminal case in a district court of the United States."[67] Its use so far has been relatively limited,[68] and even those uses have never been approved by the Supreme Court, and may not be, as the ultimate standard for decision is the constitutional due process rights of defendants.

These two special problems, together with a general trend toward more secretive prosecutions, making maximal use of Grand Jury secrecy to lurk in the shadows until ready to pounce, are likely to exacerbate pre-existing problems in the prosecuting offices of the Department of Justice. There has been a general decline in the quality of prosecutorial ethics that has been progressing for at least the last 30 years.[69] I have written on this subject before and will not repeat

[66] 18 U.S.C. app. 3 § § 1-16 (2012).

[67] *Id.*§ 3.

[68] Perhaps the best-known invocation of CIPA was in the prosecution of Zacarias Moussaoui, alleged to be a co-conspirator in the 9/11 attacks. *See generally* United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005). That case was technically incorrect in applying CIPA, which was inapplicable to the depositions requested. Moreover, the *Moussaoui* decision was sharply distinguished by the Fourth Circuit itself in El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007), a civil case, where the court expressed its adherence to pre-existing state secrets privilege law using a quote from *United States v. Reynolds*:

> Respondents have cited us to those cases in the criminal field, where it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum . . . .

Id. at 313 n.7 (quoting United States v. Reynolds, 345 U.S. 1, 12 (1953)).

[69] A very useful reference is James F. Holderman & Charles B. Redfern, *Preindictment Prosecutorial Conduct in the Federal System Revisited*, 96 J. CRIM. L.

that discussion here.[70] It suffices to say here that there is a growing recognition, even by former Attorneys General and other senior officials,[71] that prosecutorial transgressions of ethics rules, and the

& CRIMINOLOGY 527 (2006), which updates an earlier article by Judge Holderman, James F. Holderman, *Preindictment Prosecutorial Conduct in the Federal System*, 71 J. CRIM. L. & CRIMINOLOGY 1 (1980). The 1980 article had identified a powerful potential for abuse:

> The potential and capacity for prosecutorial abuse is heightened at the preindictment stage of the federal criminal process, which historically has been carried on largely in secret. A defendant's rights may be irreparably prejudiced at this phase of the criminal process without the defendant, his lawyer, or the court ever finding out. It is, therefore, necessary for federal prosecutors at the preindictment stage to be particularly scrupulous in their conduct.

*Id.*at 1. In the 2006 article, Judge Holderman wrote that the same premise remained true, but that, due to intervening changes in case law, what "is clear is that the federal courts now have less inherent authority to remedy alleged inappropriate prosecutorial conduct occurring at the pre-indictment stage than in 1980. It is also clear that today's defendant has a lesser chance of success on a motion to dismiss an indictment for prosecutorial misconduct than a defendant bringing the same motion in 1980." James F. Holderman & Charles B. Redfern, *Preindictment Prosecutorial Conduct in the Federal System Revisited*, 96 J. CRIM. L. & CRIMINOLOGY 527, 576 (2006). The 2006 paper recommended Congressional legislation to restore the viability of legal remedies against federal prosecutorial misconduct. Congress has not acted on that recommendation.

[70] *See* Jeffrey S. Parker, *Developing Consensus Solutions to Overcriminalization Problems: The Way Ahead,* 7 J.L. ECON. & POL'Y 725 (2011) [hereinafter *Developing Consensus Solutions*], especially the discussion of prosecutorial overreach and misconduct. *Id.* at 735-38; *see also* Jeffrey S. Parker, *Corporate Crime, Overciminalization, and the Failure of American Public Morality*, *in* THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW (F.H. Buckley ed., Yale 2013).

[71] It is particularly notable that both Dick Thornburgh, who became Attorney General in 1988, and his immediate predecessor Edwin Meese III, had by 2007 begun to call for a re-examination of the Justice Department's policies in this regard. In a symposium held that year at Georgetown, both Attorneys General Meese and Thornburgh contributed articles that stressed the need for better ethics, and better enforcement of ethics, within the Department of Justice, and identified prosecutorial overreach as a serious problem. Meese began his closing remarks at the conference by pointing to a particular prosecution—that of the accounting firm Arthur Andersen—as exemplifying the Department's problems with "heavy-handed enforcement of the criminal law." Edwin Meese III, *Closing Commentary on Corporate Criminality: Legal, Ethical, and Managerial Implications*, 44 AM. CRIM. L. REV. 1545, 1545 (2007). Thornburgh's article was even more blunt: he too focused

weakness of the internal disciplinary system, were threatening to spin out of control, long before the events surrounding the 2016 election.

on the Arthur Andersen case (where the charge alone produced the demise of a major accounting firm, even though its conviction ultimately was overturned by the Supreme Court), as the paradigm of charging practices that he termed "extortionate because the Justice Department knows it is in a far superior bargaining position, and such an imbalance can lead to abuse." Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform,* 44 AM. CRIM. L. REV. 1279, 1283-84 (2007). In an important speech given three years later in October 2010, Thornburgh was even more blunt: referring to both Arthur Andersen and the more recent prosecution of Jeffrey Skilling, by the same team of Enron task force lawyers that had prosecuted Andersen, with the same ultimate result that the prosecutors' novel theory of "honest services" fraud was unanimously rejected by the Supreme Court, Thornburgh placed the blame squarely on the prosecutors, as their theory of prosecution would have transformed the charging statute to cover "private acts in business or industry that are deemed to be criminal almost exclusively at the whim of the individual prosecutor." Richard Thornburgh, Heritage Lectures: Overcriminalization: Sacrificing the Rule of Law in Pursuit of "Justice" (Oct. 6, 2010), at 4, http://thf_media.s3.amazonaws.com/2011/pdf/hl1180.pdf.. He even proposed a program of internal reforms at the Department, including "pre-clearance by senior officials of novel or imaginative prosecutions of high-profile defendants," and "a revitalized Office of Professional Responsibility [to] help ensure that 'rogue' prosecutors are sanctioned for overreaching in bringing charges that go well beyond the clear intent of the statute involved." *Id.* at 6. In conclusion, Thornburgh wrote that "the Department of Justice must with greater vigor 'police' those empowered to prosecute. These are changes that truly merit our attention if we are to remain a government of laws and not of men." *Id.* These voices are not alone—many former senior officials have come to regret their lack of attention to prosecutorial abuse.

In my opinion, the clubbish atmosphere of the Department,[72] and the relatively indulgent federal judiciary, are major obstacles to needed reform, even aside from the travails of FISA.

[72] There is one federal prosecutor whose career has fully personified the current problems within the Department of Justice. This is Andrew Weissmann, the former head of the DOJ's Enron task force. Among his other exploits, he is the only federal prosecutor in recent memory to hold the distinction of having two of his theories of criminal liability be rejected, unanimously, 9-0, by the Supreme Court. This occurred in both Arthur Andersen LLP v. United States, 544 U.S. 696 (2005), where Weissmann was the principal architect of the prosecution theory, s*ee* J.A. 93-100, 104-09, 117-22, 131-41, 544 U.S. 696 (2005), and in Skilling v. United States, 561 U.S. 358 (2010), where Weissmann served as head of the Enron task force, *see* J.A., Part I, at 365a, 561 U.S. 358 (2010). It is clear that the critical remarks cited in the preceding footnote by former Attorneys General Thornburgh and Meese were aimed at Weissmann's actions—they could not be aimed elsewhere—and so Weissmann exemplifies the "heavy-handed" and "rogue" prosecutions that concerned these former Attorneys General. Weissmann himself actually published a paper in 2007 in which he admitted the lack of constraint on his prosecutorial actions, writing that "there is little by way of systemic checks on the overly-aggressive, misinformed, or unethical prosecutor." Andrew Weissmann with David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 427 (2007). Even aside from these episodes, Weissmann has a pattern throughout his career of operating at the edge of prosecutorial abuse and dirty tricks, and sometimes going over the edge. *See generally* David Willman, *Mueller Deputy Andrew Weissmann Has a Reputation for Hard-Charging Tactics—and Sometimes Going Too Far*, L.A. TIMES (Feb. 16, 2018), https://www.latimes.com/politics/la-na-pol-trump-weissmann-20180216-story.html; Matt Flegenheimer, *Andrew Weissmann, Mueller's Legal Pit Bull*, N.Y. TIMES (Oct. 31, 2017), https://www.nytimes.com/2017/10/31/us/politics/andrew-weissmann-mueller.html; as applied to Brady rules (requiring prosecutors to turn over exculpatory materials in their possession to the defendant), *see, e.g.*, Bill Hodes, *DOJ Defends FBI Deputy Director Andrew Weissmann Against Serious Ethics Charges Pending in NY*, SEEKING JUSTICE (Apr. 26, 2013), https://seeking-justice.org/doj-defends-fbi-deputy-director-andrew-Weissmann-against-serious-ethics-charges-pending-in-ny/; Sidney Powell, *Longtime Federal Attorney: Eric Holder Protects Corrupt Prosecutors*, OBSERVER (June 19, 2014), https://observer.com/2014/06/longtime-federal-attorney-eric-holder-protects-corrupt-prosecutors/; as applied to witness "flipping," including using charges against a witness' spouse as leverage, *see, e.g.*, Karen Freifeld, *Mueller Team Lawyer Brings Witness-Flipping Expertise to Trump Probes*, REUTERS (June 19, 2017), https://www.reuters.com/article/us-usa-trump-russia-lawyers/mueller-team-lawyer-brings-witness-flipping-expertise-to-trump-probes-idUSKBN19A1CM; as

IV. CAREERISM AND HUBRIS

It could very well be that there are members of the Justice Department's litigating offices, including fairly senior members, who do not appreciate the scope and frequency of ethical lapses within the Department, even in the years prior to 2016; or, they simply do not care. One long-term evolution in the Department, in both U.S. Attorney's offices and main Justice's litigating Divisions, is the relative composition of career prosecutors versus young lawyers who come to the Department for 3-5 years of advanced training and experience, before going on to other things. If this trend continues, then it threatens to split the Bar into two separate branches, driving federal prosecutors further along the line to emulating the philosopher-kings that they perceive themselves to be. That will not be a good thing for the preservation of sound professional ethics.

I know less about the FBI side of things, which I would suspect has always been more heavily weighted toward career employees. Still, while reading the *Wall*, I was struck by the references to "career" consequences in the discussion of the Resnick episode.[73] This makes me question whether the deadlocked

applied to naming large numbers of potential defense witnesses as unindicted co-conspirators so that they cannot testify, *see, e.g.*, Joe Weisenthal, *The Complete Humiliation Of the Enron Task Force*, BUS. INSIDER (Oct. 26, 2009), https://www.businessinsider.com/the-complete-and-utter-humiliation-of-the-enron-task-force-2009-10#witness-intimidation-9; Margot Cleveland, *Explosive New Documents Reveal Andrew Weissmann's Misconduct in Enron Case*, THE FEDERALIST (Mar. 5, 2019), https://thefederalist.com/2019/03/05/explosive-new-documents-reveal-andrew-Weissmanns-misconduct-enron-case/.

Thus, Weissmann's career represents everything that is wrong about the prosecutorial function within the contemporary Department of Justice. And yet, he continues to evade any public censure by the Department, and his career apparently continues to thrive, as he has gone in and out of the revolving door of the Department for years, most recently in a senior position with the office of Special Counsel Robert Mueller. So, the actual response to over-aggressive prosecution seems to be encouragement rather than censure. Until the Department's actions begin to match its words, and it can rid itself of perhaps the many Andrew Weissmanns that continue to lurk outside the view of the general public, we can expect no real reform.

[73] Horowitz, *supra* note 3, at 65-67.

bureaucratic wrestling match so vividly described by Horowitz's paper may have less to do with FISA and more to do with another piece of 1978 legislation, the Civil Service Reform Act of 1978.[74] While that Act had many disparate parts, one feature was the creation of the "senior executive service,"[75] intended to make middle managers more responsive to their immediate superiors–the dynamic that Horowitz's interviewees claim to have observed.

Horowitz is correct in stating my view[76] that any system of legal control reliant on these types of interpersonal dynamics is unstable, and sure to fail in the longer run. But in examining the particular history here, it seems to have explanatory power.

SUMMARY AND CONCLUDING REMARKS

The theme of the *Wall* is a cautionary tale, echoing the admonition that policymakers should be slow and deliberate in implementing reforms, because things may be bad enough as they are.[77] For me, the imponderables and complexities lead to the question whether the difficulties described are worthwhile, simply to finesse the resolution of an issue under the Fourth Amendment that ultimately will be decided, sooner or later. The crucial policy question is whether this method of conducting counterintelligence, or counterterrorism, has sufficient utility to justify bending the rules just a bit. If not, then FISA is moot anyway.

My discussion of the larger forces at work is intended to suggest that the problems within the Department of Justice go far deeper than this particular episode. Some of these problems are artifacts of the national character itself; others may have more do to the Department's own ethos. A free people will not long endure a Justice Department that does not pursue justice rather than litigating

[74] Pub. L. No. 95-454, 92 Stat. 1111 (Oct. 13, 1978).
[75] § 401, Pub. L. No. 95-454, 92 Stat. at 1154.
[76] *See* Bernard Horowitz, *Introduction to Commentaries on FISA, the "Wall," and Crossfire Hurricane: A Contextualized Legal History*, 7 NAT'L SEC. L.J. 110 (2020).
[77] *See* Parker, *supra* note 70, at 732-33.

advantage. It is time to restore the ethics of *United States v. Berger*,[78] and observe fairness to all, including the prosecuted defendant. That way, occasionally you may be mistaken, but you can never be in the wrong. Why does the Department find it so difficult to observe this simple creed today?

As for Crossfire Hurricane, the more I learn, the more baffled I am. While the code name is sophomoric, the execution seems infantile. Anyone who looks at the pitiable sheets of the Steele dossier cannot take it as a serious intelligence product, nor Steele as a reliable source.[79] Steele had to be a known commodity to Russian intelligence,[80] and disinformation as a tactic goes back to antiquity. What could be an innocent explanation for an FBI lawyer forging an underlying document's meaning, to change it from yes to no, thus concealing from the FISA court that Carter Page actually was a trusted asset of our own CIA?[81] There are still too many loose ends. Perhaps we all should reserve judgment until they are all tied up.

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[78] *See* United States v. Berger, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

[79] In the case of Steele, it would appear that our FBI forgot the admonition I gave above: Steele was a foreign spy, and therefore, under international law, a practitioner of criminal arts. Unless there is some special reason to attach credibility, he had none. In Steele's case, it was somewhat worse than that, because the FBI had information indicating that Steele had been paid by one political campaign to lie about the opposing one. *See* 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 279-81 (2019).

[80] Although Steele was a spy, he was not the "James Bond" type of secret agent. Even his public biography shows that he was operating under diplomatic cover, as an embassy "attaché" of one sort or another. Everyone, including the Russians, knows who these people really are.

[81] *See* Horowitz, *supra* note 3, at 90.