ROGUE JUSTICE

THE MAKING OF THE SECURITY STATE

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CHAPTER 4

Tearing Down the Wall

On September 10, 2002, Solicitor General Theodore Olson stood before a panel of three judges in a steel-encased secure room. The room, in the Department of Justice building on Pennsylvania Avenue, had been built especially for FISA hearings, but on this day it was being put to a different use. Olson was addressing the FISA Court of Review (FISCR), a panel of three judges that was meeting for the first time in the twenty-four-year history of the statute. The meeting, like all FISA Court proceedings, was held in secret.

Olson was at the hearing to oppose, on the government's behalf, a decision the FISA Court had made that May. The memo Ashcroft had sent to FBI director Robert Mueller and other top department officials in March had demolished whatever remained of the FISA wall, but before the new policy could go into effect, the FISA Court still had to be willing to accede to it. At the May hearing, held in the same cloistered courtroom, David Kris had argued before a panel of seven judges that the court needed to understand the new normal.

The new policy wasn't just an expedient way to address the 9/11 failures, he told them, but a legitimate reading of the legislation that had created FISA. Congress had surely not intended to impede national security, Kris argued; Janet Reno, who had institutionalized the strict notion of the wall as impermeable, had made a mistake, and the court had been going about its business incorrectly ever since.

On May 17, 2002, the FISA judges responded to Kris's argument with a decision written by Judge Royce Lamberth. Patriot Act or not, he declared, the law continued to require that "law enforcement officials shall not make recommendations to intelligence officials concerning the initiation, operation, continuation or expansion of FISA searches or surveillances." After all, Lamberth reasoned, "if criminal prosecutors direct both the intelligence and criminal investigations ... coordination becomes subordination of both investigations or interests to law enforcement objectives." Similarly, if the attorney general or other department officials ran intelligence investigations or otherwise made those missions an integral part of criminal law enforcement, they would be violating the letter and the spirit of FISA—and especially Congress's explicit attempt to minimize the program's potential to infringe on constitutional rights by requiring the separation of prosecution and intelligence. Kris had expended "considerable effort justifying deletion of that bright line," Lamberth wrote, "but the Court is not persuaded."

The Justice Department challenged Lamberth's decision, which brought Ted Olson to face the review judges in September. "It's a potential matter of life or death," he told them. The words were particularly meaningful coming from Olson, whose wife, Barbara, had been on the flight that crashed into the Pentagon almost exactly one year earlier. She had called her husband just moments before she died, a story that still resonated in Washington circles. "Three thousand lives were taken from us that day," Olson continued, "because the resources that we have been given to protect us from such acts either did not work or were not being used effectively." Olson placed

some of the blame on FISA. The wall had stood in the way of investigators; indeed, if someone wanted "to make it difficult for us to detect and prevent another September 11th," he said, maintaining the FISA wall would be the perfect way to do it.

In attendance at the hearing were two men who wanted the wall removed—David Kris and Larry Thompson—and two who wouldn't have minded if it were but who seemed intent that its continued existence would not present an impediment their secret system of justice, John Yoo and David Addington. Presiding was Laurence Silberman, a Reagan appointee who had been associated with some of the more notorious political scandals of the late twentieth century. During the 1980 election, he participated in a meeting with Iranian representatives that allegedly resulted in the "October Surprise" delaying the release of the US hostages in Iran until after Reagan became president. (Silberman maintains that the Iranian offer to delay the release of the hostages was rejected.) He was also associated with early efforts to impeach Bill Clinton, and was on the panel of circuit court judges who overturned the conviction of Oliver North for his participation in the Iran-contra scheme, with Silberman voting to reverse.

Silberman was often mentioned as a candidate for top legal positions, including Supreme Court justice and attorney general, but his influence was visible in another way: through the clerks he had mentored who had then gone on to positions of power. John Yoo, Olson deputy Paul Clement, Patriot Act author Viet Dinh, and numerous Supreme Court clerks had graduated from Silberman's informal academy of conservative jurisprudence. Occasionally, at national security meetings, Silberman's clerks would look around the room, pause, and acknowledge aloud to one another the number of Silberman clerks who were present. Silberman was also one of Olson's close friends. When Olson remarried in 2006, the judge flew out to Napa County to perform the ceremony. Both were deeply involved in the Federalist Society, which Olson had helped found in 1982.

This hearing, like all FISA Court proceedings, lacked an advocate for the opposition. The closest equivalent was an amicus brief filed by the ACLU (and another by the National Association of Criminal Defense Lawyers) over Silberman's objections. The ACLU pointed out that FISA warrants did not require their targets to be notified, as was the case with conventional court-ordered surveillance. That meant not only that targets could not challenge their surveillance in court, but also that, as in the days of Nixon's COINTELPRO, citizens might be the subject of government-held dossiers they did not know existed. Ashcroft's policy, the brief warned, was an "audacious reinterpretation of FISA" that amounted to an "end-run" around the Fourth Amendment. "Neither the text of FISA as amended by the USA Patriot Act nor twenty years of judicial interpretation supports this result," the brief argued. FISA, it reminded the court, "does not authorize surveillance whose primary or exclusive purpose is law enforcement." Nor could national security serve as a rationale for diluting constitutional protections: "The notion that a search or surveillance may be justified simply because the government invokes the rubric of 'national security' flies in the face of the most basic principles of American constitutional democracy."

Owing to the novelty of the proceedings, the decision to accept amicus briefs was made late in the process, in fact after the hearing, which might be why the judges did not seem to have their arguments in mind as they questioned Olson. The solicitor general, often speaking directly to Silberman, reiterated the message Ashcroft had sent in his memo, and in testimony to Congress weeks after the attacks of September 11. By contradicting Ashcroft, he argued, the FISA Court was obstructing efforts to "accomplish the vital and central purpose for which [FISA] was created . . . the protection of the United States and its citizens from attack and from international terrorism." Maintaining the wall, Olson told the court, would be like forbidding a surgeon and an anesthesiologist from discussing the status of the patient upon whom they were operating. He urged

the court to let prosecutors out of their "dreadful box" for the sake of the country. Reverence toward the restraints imposed by the Constitution needed to be put aside in favor of keeping the nation safe. Business as usual was no longer an option.

EARLIER IN THE SUMMER, SENATOR Patrick Leahy (D-VT), chair of the Judiciary Committee, had gotten wind of the fight over the wall and had written a letter to the FISA Court in July asking for clarification about Ashcroft's new rules and procedures. When he learned the date of the September hearing, he scheduled a hearing of his own for the next day to discuss the fate of the FISA wall. The press had also heard about the skirmish. A couple of weeks before the FISCR and Judiciary Committee hearings, *The New York Times* published an editorial on the subject. "The public needs to know more about how the government is prosecuting the war on terror," the paper proclaimed.

At the hearing, Leahy reminded the Judiciary Committee of the reasons that FISA had been created. This was a subject on which he could speak with authority: he'd been in the Senate when the law was passed in response to the Church Committee report. "FISA was originally enacted in the 1970s to curb widespread abuses," which included the illegal "bugging and wiretapping of Americans" by presidents and FBI officials alike. The Constitution had been violated, and the executive branch had gone unchecked in its power grab, he recalled, and FISA had been part of the response: a law that preserved the ability to gather evidence while protecting citizens from intrusion.

The history lesson given, Leahy went on to discuss the status of FISA after 9/11. Here again he was an authority; he'd been a major participant in the writing of the Patriot Act, especially the sections that addressed surveillance. Congress had not intended "to fundamentally change FISA from a foreign intelligence tool into a criminal

law enforcement tool," he said. Their aim was "to improve coordination between the criminal prosecutors and intelligence officers, but we did not intend to obliterate the distinction between the two, and we did not do so." He'd been relieved, he said, that the FISA Court had remained true to this intent by rejecting Ashcroft's reading of the Patriot Act in May.

Leahy's colleagues chimed in with similar concerns. Senator Dianne Feinstein (D-CA) recalled that the Senate had intended "to lower the bar slightly but not entirely." Under Ashcroft's new policy, "the administration need not show any purpose of gathering foreign intelligence in any investigation involving national security." Russ Feingold (D-WI), the only senator who had voted against the Patriot Act, accused the Justice Department of "abuse . . . of the language of the bill," adding that the potential for this kind of "unreasonable interpretation" was "just the reason I could not in the end vote for the USA PATRIOT Act." Richard Durbin (D-IL) said the Department of Justice "has abused the faith entrusted them with this change in the FISA law." Even Charles Schumer (D-NY), typically known as a law-and-order type, argued that "DOJ's powers shouldn't be unfettered. If we blur the line too much between criminal investigations and foreign intelligence gathering, the Fourth Amendment may get tossed out with the bath water."

Kris was the first witness at Leahy's hearing. He rehashed the argument Olson had made at the FISCR hearing the day before. "What is at stake here really is the Government's ability effectively to protect this Nation against foreign terrorists and espionage threats," he said. "And I don't . . . mean to be melodramatic about it, but the truth is that when we confront one of these threats, whether it be a terrorist or an espionage threat, we have to pursue an integrated, coherent, cohesive response to the threat. We need all of our best people, whether they be law enforcement personnel or intelligence personnel, sitting down together in the same room and discussing . . . the best way to neutralize this threat."

"Is this saying that for twenty years the courts have been deciding these things wrongly? . . . I mean basically what you are trying to do is change twenty years of a way of doing things," Leahy asked.

Kris answered simply: "Yes."

LEAHY AND HIS COLLEAGUES COULD do no more than register their dismay at this change of course. On November 18, 2002, the FISCR released the only opinion on the matter that counted. In a forceful opinion written by Silberman and echoing Kris's brief almost verbatim, the FISCR declared that the FISA Court had erred when it rejected the Ashcroft policy. Its action was reversed, and the policy was implemented. As Kris put it, "Legally, the wall came down that day." No longer did national security investigations, with their lower standard for obtaining a warrant, need to be cordoned off from criminal investigations. The decision was final; only the government could appeal, which it was not about to do, and the Supreme Court turned down without comment the ACLU's attempts to push it further.

It was a brilliant accomplishment for Kris and his allies, one with vast implications. Not only had the court granted law enforcement a freedom from constitutional restraint previously reserved for foreign intelligence, it had also gone beyond Kris's argument in the same way Yoo's memo on surveillance had. It opened the door to legalized warrantless surveillance. Silberman's opinion had rested in part on a 1980 case—*Truong Dinh Hung v. United States*—in which the Fourth Circuit ruled that warrantless wiretapping leading to the conviction of a Vietnamese spy had been legal. Because the case involved foreign intelligence surveillance, the court reasoned, prosecutors did not need to show probable cause of criminal activity to obtain a criminal warrant. According to Silberman, this meant that "the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information" when national security was at stake and that FISA "could not encroach on the President's constitutional power" by limiting that authority. Just as John Yoo had used a memo about *the* versus *a* to build a rationale

for warrantless surveillance, Silberman was using an opinion about policy to establish a legal basis for the government to spy on its citizens, despite what the Constitution said.

THE FISCR DECISION GAVE ASHCROFT'S prosecutors permission to use tactics that would have been unthinkable just a year earlier. But it also created a difficulty: even if those tactics were legal under FISA and yielded evidence of a suspect's guilt, the new emphasis on intelligence collection affected the prioritization of criminal prosecutions for terrorism suspects; the intelligence value of investigations stood to take precedence over the incapacitation value of a prosecution. In addition, sources and methods stood the chance of being revealed. The tension between trials, with their transparency requirements, and counterterrorism, with its demands for secrecy, thus put prosecutors in a delicate position, one that the decision helped to clarify. They were to pursue prevention even at the cost of prosecution. In this sense, they had been conscripted into the war on terror.

The decision had another subtle but profound effect. It not only diminished, by removing the wall, the role of the FISA Court in maintaining civil liberties; it also signaled that judges were willing to take the urgency of the nation's fight against terrorism, or at least the Bush administration's view of it, as reason to back away from long-standing precedent regarding due process. The Department of Justice now had at least one court on its side. To be sure, it was an obscure court, one with unusual practices and a limited jurisdiction, but it was nonetheless an important cog in the machinery of justice. And the federal judges who presided over it had signaled that they would not stand in the way of the DOJ's crusade to reorganize itself around prevention. Soon enough, partly under the direction of David Kris, national security and law enforcement would become even closer. And going forward, the courts would struggle to maintain their role in jurisprudence related to the ever-expanding war on terror.

CHAPTER 5

The Twilight Zone

When he said goodbye to his wife and family in Egypt early in May 2002, Jose Padilla did not know he would not be seeing them again for a very long time, perhaps ever. When he boarded his Chicago-bound flight in Zurich, he did not know intelligence agents from both Switzerland and the United States were following him onto the plane. Nor did he know he'd been under investigation for months, based on allegations leveled by a man the CIA had fingered as one of Al Qaeda's top operatives, or that FBI agents were waiting for him in Chicago, ready to take him into custody, or that he would soon disappear from his family, his friends, his lawyers, and any traces of the justice system that, as an American citizen, he'd known for the thirty-one years he'd been alive.

Padilla was well acquainted with being on the wrong side of that system. He'd been a hotheaded kid who, at fourteen, had kicked a man in the head as he lay dying from a knife wound inflicted by Padilla's fellow gangbanger, an act that earned him five years in juvenile detention. He'd been out only a year or so when a road rage

CHAPTER 8

Legal Cover—Uncovered

The justices of the Supreme Court were not alone in having misgivings about the president's power grab. Even some executive branch officials were wondering if the White House had gone too far. One Justice Department lawyer in particular found himself deeply disturbed by some of what his predecessors, colleagues, and friends had done, leading him to question their legal competence and even doubt their moral integrity.

Jack Goldsmith thinks he was an "improbable choice" to head the Office of Legal Counsel (OLC), the DOJ section responsible for providing advice and counsel to the president. Most of his career had been spent in the university rather than in politics. Just forty, he'd been a law professor, most recently at the University of Chicago, with a focus on the relationship between US and international law, when he became special counsel to the Pentagon's top lawyer in the fall of 2002. There, he advised the military on Guantánamo, military commissions, and the occupation of Iraq. "I hadn't even sought the OLC job," he wrote in a memoir of his ten-month stint

in the position. But his Pentagon boss recommended him for the position, and in October 2003, six months before the Abu Ghraib revelations, he was hired.

Goldsmith was not the first choice for the job, at least not from the White House's perspective. They had wanted John Yoo, who, as an assistant in the OLC, had been working closely with them since 9/11, an integral part of the "War Council," as its members called themselves, that included Cheney's lawyer David Addington and White House counsel Alberto Gonzales. But even as it gave Yoo power, this group did not ingratiate him with Ashcroft, especially because Yoo had not always consulted him before giving the White House his advice. Yoo, it seemed, was taking his orders from Gonzales and Addington rather than from the attorney general himself, and when the White House recommended Yoo for the OLC post, Ashcroft seized the opportunity to remind everyone who was the real boss, telling White House chief of staff Andrew Card that Yoo was "not competent" for the job. Yoo recommended Goldsmith for the post and soon left Washington to teach at the UC Berkeley School of Law. In his interview for the job, Goldsmith recalled, Ashcroft seemed focused on a single issue: "keeping the Attorney General in the loop."

Goldsmith managed to assure Ashcroft of his loyalty. But he was friends with Yoo, he'd clerked for Anthony Kennedy alongside Gonzales's top aide, and he'd been a team player at the Pentagon, so David Addington must have been surprised when Goldsmith, soon after taking office, informed him that he didn't think the exemption the White House had claimed from the Geneva Conventions for enemy combatants would apply to civilians captured in Iraq and considered terrorists. Whatever crimes they had committed, Goldsmith reasoned, they were citizens of a sovereign country and thus entitled to the protections of international law. To treat them otherwise was to court international scorn and to leave the people making and carrying out the orders susceptible to prosecution for war crimes.

Goldsmith's analysis perplexed Gonzales, who said that he didn't understand "how terrorists who violate the laws of war can get the protection of the laws of war." And it infuriated Addington. "The President has already decided that terrorists do not receive Geneva Convention protections," he informed Goldsmith. "You cannot question his decision." The president had apparently also decided that anyone he designated as a terrorist was a terrorist and thus subject to whatever treatment he saw fit to authorize.

It was clear from the start that while Goldsmith was a staunch supporter of the war on terror, he was not going to massage the law into a shape that would give legal cover for the activities the White House was seeking to carry out. The rule of law had to come first. He would limit his analysis to "legality, regardless of what morality may indicate, and even if harm may result," as he had done with the Geneva Conventions question. He would not, in other words, be the War Council's man at Justice. He would not be their John Yoo.

WHEN HE TOOK OVER THE OLC in October 2003, Goldsmith knew Yoo as a colleague, a squash partner, and a fellow traveler in conservative legal circles. He didn't know him as the legal architect of America's torture policies until about six weeks later, when Patrick Philbin, the lawyer who had taken over from Yoo when he left for Berkeley Law, alerted him to a Yoo memo that was, in his words, "out there." As Goldsmith later wrote, Philbin "was not squeamish about pushing the President's power to its limits. He was a longtime friend of Yoo. . . . Any worries he had about flaws in OLC's post 9/11 national security opinions were informed and credible."

So Goldsmith dug—first into the memo Philbin had pointed to, then into others Philbin had flagged. What he found alarmed him. Some of the opinions that guided counterterrorism policy, including detention and treatment of prisoners, were "deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President." Particularly

guilty of these flaws were a series of opinions and letters authored by John Yoo.

The documents concerned questions that had first arisen with the capture of Abu Zubaydah in March 2002. The CIA was sure that he was "the one guy who would likely know when, where, and by whom the next attack would be carried out." But he had not divulged those details yet, and the CIA agents on the scene thought that the FBI's approach was unlikely to succeed. They wanted to kick FBI agent Ali Soufan off the job and turn it over to a new "interrogation specialist" and a "training psychologist," who would "move the interrogations into . . . an increased pressure phase." Here they were climbing out onto a legal limb, and if it snapped off, they might find themselves falling into the category of war criminal—as would the superiors who had given them the orders to turn up the heat. They needed to know exactly what they could do to extract the information. Just how much pressure could the CIA bring to bear on a prisoner in order to stop the time bomb from ticking?

It was the CIA's lawyer, John Rizzo, who brought the question to the Office of Legal Counsel. He might have settled for a promise from the Department of Justice not to prosecute should the interrogation stray into illegal territory, but that was the request Chertoff had refused to grant. So he sought an official opinion from the OLC as to whether the CIA's plans complied with the law. If they did, no one would need immunity, because they would be acting legally.

Rizzo told me that when he approached the OLC, he wanted an honest analysis. "I wanted them to tell us if we had lost our senses," he said. If they had concluded that "a lot of this stuff clearly constituted torture" and thus was off-limits, it "would have been perfectly okay with me, provided the 'no way' was put in writing." Either way, he wanted a buy-in on any decisions about the techniques to be employed, so that when and if the use of harsh methods (or the decision not to use them) came to light, "we would all be in this together, for better for worse." To get the most accurate answer, Rizzo reasoned,

he'd have to give an accurate account of what the CIA intended to do to Zubaydah. So "I laid it all out, in graphic detail."

But what is chilling about the details is not how graphic they are. To the contrary, to read Yoo's memo to Rizzo, issued on August 1, 2002, is to behold the sanitizing power of bureaucratic language—not to mention the trouble that looms when legality, regardless of morality or harm, becomes the focus of inquiry. Each of the ten techniques for which Rizzo sought guidance is named (the "attention grasp," the "insult slap," "cramped confinement") and described the way a procurement clerk might describe an order for paper clips. Here is how Yoo summarized Rizzo's account of the method that became most notorious and for which the CIA apparently did not have a bureaucratic name—"a technique called the 'waterboard.'"

> In this procedure, the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual's blood. The increase in the carbon dioxide level stimulates increased effort to breathe. The effort plus the cloth produces the perception of "suffocation and incipient panic," i.e., the perception of drowning.

Rizzo promised Yoo that this would never go on for more than twenty minutes. He guaranteed that nothing they did would exacerbate the gunshot wound Zubaydah had suffered in the course of being captured. He assured him that if they put an insect in the tiny lightless box in which they intended to place Zubaydah, it would not

really be a stinging bug (as they would describe it to Zubaydah, who "appears to have a fear of insects") but a "harmless insect such as a caterpillar."

It's not clear whether all the sterile language was the CIA's attempt to sell the OLC on the torture program or part of an effort to ensure that history would not be unkind to either agency. What is clear is that Yoo, writing on behalf of the OLC, gave the CIA the green light to torture Zubaydah. Of course, Yoo did not put it that way. What he said instead was that "the interrogation procedures you propose would not violate Section 2340A," the federal law that defines torture.

In Section 2340A, Yoo wrote, Congress had defined torture as "an act . . . specifically intended to inflict severe physical or mental pain or suffering." And none of the techniques in question causes pain "difficult for the individual to endure and . . . of an intensity akin to the pain accompanying serious physical injury such as death or organ failure," as the law demands. "Discomfort," perhaps, or "muscle fatigue," but not severe pain. Even when the interrogator slaps the prisoner in the face, "the slap is delivered with fingers slightly spread"—a technique "designed to be less painful than a closed-hand slap"—and, furthermore, it is delivered to "the fleshy part of the face." When the interrogator slams Zubaydah into a wall, he will roll a towel around his neck to prevent whiplash, and besides, because the wall will be flexible, "the sound of hitting the wall will be far worse than any possible injury to the individual." And when he crams Zubaydah into a box too small to stand up in, even if that might inflict severe pain on most people, "Zubaydah remains quite flexible, which would substantially reduce any pain associated with being placed in the box." Between the CIA's own good intentions and the prisoner's good physical condition, it seems, harsh treatment can be stopped from turning into severe pain.

But what about mental pain? Yoo asks. Here the law tells us the mental harm must be "prolonged" and the result of certain specific acts: the infliction or threat to inflict severe physical pain, the use

of drugs "calculated to disrupt profoundly the senses or the personality," the threat of imminent death, or the threat that these acts will be inflicted on another person (presumably a family member or someone else close to the prisoner). None of the techniques Rizzo described meets any of those criteria, Yoo reasoned, except one: waterboarding. "Any reasonable person undergoing this procedure . . . would feel as if he is drowning" or, in the words of the statute, under "threat of imminent death." But does it inflict "prolonged mental harm," as the legal definition requires?

As it happens, there is some data on this question, owing to the more than ten thousand American military personnel who have been subjected to waterboarding as part of their training in how to resist interrogations. And aside from a couple of people who tried to blame their shoplifting and child pornography habits on their training, and one who suffered "an adverse mental health reaction that lasted only two hours," it would appear that whatever mental injury might result from being repeatedly brought to the brink of death by drowning is short and negligible. If, in coming to this conclusion, Yoo considered the difference between being waterboarded by members of your own army who you are pretty sure are not going to kill you and being waterboarded by avowed enemies who have shown you no mercy, he did not say so. He did, however, give waterboarders the ultimate out: even if harm was inflicted, the law required the would-be torturer to have the "specific intent" to inflict pain. Clearly the interrogators were not using the proposed techniques in order to cause their subjects pain but rather as a means to the end of getting information. The CIA, his explanation held, was running not an S&M dungeon but a prison devoted to defusing ticking time bombs.

Much as he was following the legal rules, Rizzo confessed "surprise at some of the techniques that were approved." "No one pushed back," he said, still seeming to wonder about this. "No one." But he wasn't disappointed. The CIA, which had hardly been treating Zubaydah with kid gloves—it had held him in total isolation

for forty-seven days—was now free to do what it wanted with him. So was everyone fighting the war on terror, for Yoo's analysis was not for the CIA alone. On the same day he gave the official go-ahead to Rizzo (Ashcroft had delivered the good news verbally a few days earlier), he sent a fifty-page memo and a letter to Alberto Gonzales at the White House. And in March 2003 he sent a similar opinion to the Pentagon's lawyers, authorizing twenty-four techniques for the use of military interrogators.

All these memos, authored by Yoo and signed by OLC head Jay Bybee, reiterated Yoo's conclusion that the techniques in question did not constitute torture. But they put it in terms that Gonzales and his colleagues would like, arguing that the Authorization for Use of Military Force—the order authorized in part by Yoo that gave the president sweeping powers to conduct the war on terror—made these questions moot. A criminal statute such as Section 2340A could not infringe "on the President's ultimate authority" in the conduct of war. This meant that even if Yoo's opinion was someday overturned and the acts it authorized declared illegal, anyone who ordered or carried out the interrogations would, according to their reasoning, be exempt from criminal prosecution on the grounds of self-defense and necessity. His legal analysis could be wrong, and the proposed techniques might be considered not mere brutality but actual torture, but it didn't matter. The president's need for information that could save the nation was more important than his responsibility to uphold the law. Yoo had turned the question about torture into an opportunity to extend his, and the rest of the War Council's, radical reinterpretation of American law.

THE OLC'S JOB MIGHT HAVE been to provide legal advice without regard to morality or harm, but Goldsmith's reading of this mission was far different from Yoo's. To Goldsmith, the OLC's objectivity must be tempered by a calculation of the stakes of its opinions. "The nature of the question informed how OLC should

answer," he wrote. "Interpreting the torture law is not like resolving an interagency dispute about regulatory control over a merger." Unlike the effects of a corporate merger on employees or society at large, "the stakes in the interrogation program were unusually high," Goldsmith wrote. National security was important, but so was the US commitment to outlawing torture internationally, "its relations with the Muslim world . . . [its] moral reputation and honor. In this context it was unusually important for OLC to provide careful and sober legal advice about the meaning of torture."

This was, in Goldsmith's view, exactly what Yoo had failed to do. To assert, as he had in his memo to Gonzales, that "any effort by Congress to regulate the interrogation of battlefield detainees would violate the Constitution's sole investing of the Commander-in-Chief authority in the President" was to take an extreme and unprecedented position, one with sweeping consequences for all laws, both military and civilian, governing the treatment of prisoners. In claiming that courts had long established that war granted presidents the power to abrogate laws, Yoo had cherry-picked the cases that supported his position and left out those that did not—like the Supreme Court's ruling in *Youngstown* that the Korean War did not give the president the power to shut down a steelworkers' strike. In striking a "tendentious tone," one that made clear from the beginning that he was arguing in support of a position rather than laying out both sides of an argument, Yoo had written a memo that "lacked the tenor of detachment and caution that usually characterizes OLC work," one that seemed "designed to confer immunity for bad acts." In going beyond Rizzo's question about specific techniques into the definition of torture and the limits of presidential power, Yoo had made arguments "wildly broader than was necessary to support what was actually being done," and in effect handed interrogators (and their bosses) a "blank check." In short, Yoo's work "seemed more an exercise of sheer power than reasoned analysis." Goldsmith was forced to conclude that his friend and colleague had gone about his crucial business with "an unusual lack of care and sobriety."

Goldsmith didn't mean to stop interrogation by the military. "These separately and specifically approved techniques," he wrote, "contained elaborate safeguards." But those safeguards were not in accord with the larger argument made in the memos—the one that gave the president and his men power over the bodies of prisoners (and with it the ability to "maintain, and not without justification, that they were acting on the basis of the OLC's view of the law"). Yoo had moved the line between legal and illegal in a way that seemed transparently political—a gerrymander that Goldsmith thought could threaten the integrity of the Department of Justice and, with it, the confidence of citizens in the attorney general as their lawyer.

There was, in Goldsmith's view, only one option. The torture memos had to be revoked—and with them the presumption of legality for the enhanced interrogation techniques. He started with the most recent one, a Yoo memo from March 2003 written for the Pentagon. Tried and true methods of interrogation, Goldsmith wrote later, were already part of the military manual and had been determined to be in accord with the Geneva Conventions; they were neither brutal nor abusive. But as he informed the Pentagon's chief counsel over the 2003 Christmas holiday, while the techniques were legal, the analysis was flawed and could not be relied upon for any other interrogation methods. He was shredding the blank check issued by Yoo.

The CIA's memos, on the other hand, posed a different problem. Goldsmith wasn't even sure the methods Yoo had authorized were actually legal. It seemed that no one other than Yoo had pondered that question, and his judgment was suspect. "I wouldn't know until we had figured out the proper interpretation of the torture statute, and whether the CIA techniques were consistent" with it. With the reputation of his office and the legal fate of those who relied on its guidance at stake, Goldsmith was reluctant to withdraw the memos before his interpretation of the law was confirmed. Neither did he want to leave the CIA with no guidance at all. So until he could fashion a replacement opinion, he did not want to withdraw the memos.

But the torture question was only one of many urgent conundrums with which Goldsmith and his staff were struggling in the first half of 2004. They had not resolved the future parameters of the interrogation policy when the Abu Ghraib story broke—and with it the story of the torture memos. With each revelation, the scandalous photos became less a record of individual misbehavior than powerful testimony to malfeasance at the highest levels of government, orchestrated by its lawyers. "Every day the OLC failed to rectify its egregious and now-public error was a day that its institutional reputation, and the reputation of the entire Justice Department, would sink lower yet," wrote Goldsmith. The legal analysis was still incomplete, and Goldsmith's staff had not yet come up with a new opinion, but on June 14, a week after the first news stories about Yoo's opinions had emerged, Goldsmith withdrew the torture memos. A parochial concern—the reputation of his office—had motivated what repugnance alone could not. It also spelled the end of Goldsmith's brief tenure at OLC. Exhausted, demoralized, and presumably tired of fighting with the White House, he resigned on June 16.

GOLDSMITH'S RESIGNATION DID NOT SADDEN David Addington, who resented the OLC's meddling. At a meeting in Alberto Gonzales's office during the Abu Ghraib crisis, Addington had taken an index card out of his pocket. It listed all the OLC opinions that Goldsmith had either revoked or modified during his brief tenure. "Since you've withdrawn so many legal opinions that the President and others have been relying on," said Addington, "we need you to go through all of OLC's opinions and let us know which ones you still stand by."

And that was before Goldsmith formally rescinded the torture memos. But Addington wasn't referring only to the question of interrogation. He had also been incensed by Goldsmith's pushback on yet another of Addington's pet projects: Stellar Wind.

It was Patrick Philbin, the lawyer who had first brought Yoo's

memos to Goldsmith's attention, who had urged, in November 2003, that Goldsmith be alerted to the program. Philbin was one of the few people outside the White House who knew about Stellar Wind. He also knew about the legal reasoning that supported it—an opinion also authored by John Yoo, in which he argued that the Court's jurisdiction over electronic surveillance for foreign intelligence was "an unconstitutional infringement on the President's Article II authorities." Once again Yoo had used a narrow question about policy as an opportunity for a broad assertion of presidential power.

Philbin had to work hard to convince Addington to let Goldsmith in on the secret. "Prepare for your mind to be blown," he told Goldsmith when he got the go-ahead. And it was. Not, Goldsmith emphasized, because he thought "vigorous surveillance of terrorism" was itself a bad thing, or because he opposed any changes to FISA. "We were at war with terrorists . . . armed with disposable cell phones and encrypted emails," he wrote. The FISA laws had been fashioned long before the Internet revolution, so they were at least outdated and perhaps unrealistic in their demands for the president to seek permission for every last wiretap. Reforming them seemed both necessary and prudent. But reform was not what the White House had in mind. "We're one bomb away from getting rid of that obnoxious court," Addington had told him in February.

The War Council was dealing with FISA "the way they dealt with other laws they didn't like," writes Goldsmith. "They blew through them in secret based on flimsy legal opinions that they guarded closely"—so closely, in fact, that the National Security Agency's own lawyers had not been allowed to see the analysis that had authorized the agency's intelligence gathering. Philbin had made sure Goldsmith saw the opinions, and his response was no more positive than it had been to the torture memos. He concluded that Yoo had once again cherry-picked laws, this time sections of FISA law, to critique; left undiscussed the sections relevant to war; and used specious legal reasoning. In addition, he had made factual errors.

Once again opinions that were deeply flawed had been used to justify activities at the outer edge of legality. And this time the defects were so severe that, at least in Goldsmith's view, "the presumption of legality flipped."

Goldsmith insisted that James Comey, the second-highest-ranking lawyer in the department since December 2003, be brought in on the secret. Comey met with Ashcroft over lunch. Using the salt and pepper shakers and silverware on the table, Comey outlined Stellar Wind to his boss, explaining that the NSA was sweeping up both content and metadata of phone and email communications on a wholesale basis and without any FISA oversight. He detailed the flaws in Yoo's legal analysis. It was the first time Ashcroft had heard of the program, despite the fact that one of his staff had written the memo authorizing it. But he seemed anxious to resolve the issue quickly. "Just fix it," he told Comey.

Meanwhile, Goldsmith and Philbin had met with Addington and Gonzales to let them know that they had reviewed the legal authorization for the surveillance programs carried out under the auspices of Stellar Wind and were now recommending that certain parts be brought to an end. It was a crucial moment; the authorization for Stellar Wind would expire on March 11, 2004. The White House lawyers tried hard to convince the Justice Department lawyers that the wiretapping was necessary to preserve national security, but neither Philbin nor Goldsmith had ever doubted that. Nor did they want Stellar Wind entirely dismantled. They just thought portions of the program, including what eventually became known as the Terrorist Surveillance Program, should be put on a firmer legal footing. The White House was not reassured. Hedging its bets against the possibility that the OLC would never find that new rationale, the president's team arranged a meeting with congressional leaders to discuss legislation directly authorizing the continuation of the program. The members of Congress had to know this was important to the White House: Cheney led the meeting.

Time was running short for Stellar Wind, and so was the patience

of the War Council, which drafted a reauthorization that could stand in, at least for the time being. Aware that the program, having been exposed to the light of day, needed some form of legal backing, the council looked to John Ashcroft's signature to save it. But there was a new problem: since the day after Comey told him about Stellar Wind, Ashcroft had been in George Washington Hospital with acute gallbladder disease. On March 10 he was still in the intensive care unit. That night he took a call from the White House. His wife, who was at his bedside, relayed the message Ashcroft had gotten to his chief aide: Alberto Gonzales and Andrew Card, President Bush's chief of staff, were on their way over to see Ashcroft. At eight o'clock the aide called Comey, who was serving as acting attorney general while Ashcroft was indisposed. Comey called his own chief aide and told him to scramble his top staff to the hospital. In the car at the time, he told his driver to hit the lights and siren. When he arrived at George Washington, he ran up the stairs to the ICU, his security team in tow. Philbin, Goldsmith, and FBI director Mueller soon joined him. They were in the room, Comey sitting by the head of Ashcroft's bed, when the White House team arrived, bearing an envelope. Gonzales explained that they needed Ashcroft's signature on the reauthorization.

"Attorney General Ashcroft then stunned me," Comey later told a Senate committee. "He lifted his head off the pillow and in very strong terms expressed his view of the matter, rich in both substance and fact." After his disquisition, Comey said, Ashcroft "laid his head back down on the pillow, seemed spent, and said to them, 'But that doesn't matter, because I'm not the attorney general.'" He pointed at Comey.

Card and Gonzales, who knew where Comey stood on the matter, left without talking to him. (In subsequent testimony, Gonzales claimed to have been oblivious to Comey's presence in the room.) But almost immediately Card called Comey and ordered him to appear at the White House right away. Comey refused to comply unless Solicitor General Ted Olson attended the meeting. They met at

eleven. In the meantime, Comey had conferred with his staff and told Card that many of them were prepared to resign if Card and Gonzales insisted on renewing Stellar Wind when the Justice Department had determined (and advised them) that it had no legal basis.

Just a few hours later, four trains were bombed in Madrid during the morning rush hour, killing 191 people. At a six a.m. meeting at the White House, Gonzales told Goldsmith that his critique of Yoo's memo was misplaced. But the legal quibble was academic. The president was going to go ahead and renew the surveillance program that very day, with or without the Justice Department's approval.

The next day Bush stopped Comey after the morning cabinet meeting (which he was attending in Ashcroft's place) and asked to meet with him. Comey told the president what troubled him about Stellar Wind, about the Justice Department's attempt to stop its renewal, and about why the president's order to renew it anyway was illegal. Bush was not persuaded. According to *Washington Post* reporter Barton Gellman, Bush told Comey, "I decide what the law is for the executive branch."

"But I decide what the Department of Justice can certify to and can't certify to," Comey replied. "And despite my absolute best efforts I simply cannot in the circumstances. As Martin Luther said, 'Here I stand, I can do no other.'"

But it wasn't theology that convinced Bush that he could not be the decider this time. It was the prospect of losing Robert Mueller, who was waiting for Comey and who, Comey told Bush, was among the Justice Department officials prepared to resign over the matter rather than order his agents to engage in activities the attorney general deemed illegal. With mass resignations would come scrutiny—of the program and of the White House's disregard of the law.

"Just tell Jim [Comey] to do what Justice thinks needs to be done," Bush said to Mueller.

Reconciling the surveillance program with the law (as opposed to the other way around) turned out to be "by far the hardest challenge

I faced in government," Goldsmith wrote. Much of what changed remains classified, but the Justice Department was eventually satisfied that the program was legal, and the FISA Court was ultimately reformed to give the president more flexibility in ordering surveillance. The reformed program would still, for the time being, operate outside the authority of the FISA Court and Congress, but it would be reauthorized every forty-five days by the signature of the president and the attorney general. Future steps remained to be determined. In May, Goldsmith completed a memo in which he found that the program, as reformed, did not violate the Fourth Amendment. He agreed largely with the president's position that the AUMF was an "express authorization to conduct targeted electronic surveillance against al Qaeda and its affiliates," and that to the extent that FISA had been used to limit the president from "directing surveillance of the enemy to prevent future attacks upon the nation," it amounted to "an unconstitutional infringement" on the president's commander-in-chief powers. While he had strongly rebuked Yoo, he ultimately ratified the opinion that constitutional rights could be curtailed in the name of national security.

JACK GOLDSMITH'S RESIGNATION TOOK EFFECT on July 7, 2003. In his ten months at the OLC, he had put what he believed to be two necessary components of the nation's defense on a solid legal footing. Enhanced interrogation continued, only now supported by a limited and more legally strict reading of the law, while substitute memos for those he'd withdrawn and called into question still remained to be written. The surveillance policies survived more or less intact. Both would continue to be revised over the next few years. Occasionally they would surface in the news media—sometimes explosively, as they did years later when Edward Snowden revealed the breadth of the country's domestic spying program in 2013. But even after the departure of John Yoo, the rest of the War Council got largely what it wanted: not exactly a blank check,

but still the ability to treat inmates harshly and detain them indefinitely, and unprecedented power to tap into the private communications of American citizens.

Goldsmith's work—the work that had eventually led to the hospital showdown—accomplished another purpose, one that Goldsmith perhaps did not intend. He had forced the War Council's disregard for the Department of Justice, and with it the rule of law, into the open. A memo written collectively by senior DOJ lawyers summarized what had transpired, outlining the disregard for the law that had led Goldsmith to resign. The document elicited a response from Alberto Gonzales (although probably authored by David Addington) so strong that it came to be known as the Fuck-You Memo. "Your memorandum appears to have been based on a misunderstanding of the President's expectations regarding the conduct of the Department of Justice," it said. "While the President was, and remains, interested in any thoughts the Department of Justice may have on alternative ways to achieve effectively the goals of the activities authorized by the Presidential Authorization of March 11, 2004, the President has addressed definitively for the Executive Branch in the Presidential Authorization the interpretation of the law." Unpleasant as this and the other exchanges were, they at least compelled the administration to openly declare its disregard for the Justice Department, which until this point it had expressed only through circumvention and deception. (In the case of the Fuck-You Memo, it might have all been for show: Gonzales left a voicemail for the Justice Department reassuring Goldsmith and Comey that he would be implementing the changes anyway.)

Goldsmith later pointed out that much of his work should have been unnecessary. After all, if the White House had not treated the Department of Justice as the enemy, or asked one of its lawyers to gerrymander the law—if, in other words, it had followed the usual practices—then "the whole ordeal could have been avoided." The two sides were really not opposed. Goldsmith's view of what was permissible under the law was not all that different from Gonzales's,

except for one important matter. Addington and Gonzales were concerned not only with the war on terror but also, and perhaps more centrally, with the extension of presidential power—not just for their president but for all American presidents to come. A strong executive was not simply the means to fight a war; it was an end in itself, and the more the president's men could flex their muscles, the more the rest of the government would back down. That was exactly what Goldsmith and Comey (and even Ashcroft) would not do. That such loyal men would stand up so firmly, and at such risk, against their own colleagues was a good measure of just how far Addington and Gonzales had tried to push their cause.

The standoff might also have alerted the president to what his staff were doing. In their meeting on March 12, Bush told Comey he didn't like the way the question of the legality of Stellar Wind had come up just a day before the deadline. Comey explained to the president that the question had been on the table for months, ever since Goldsmith had flagged it. Comey believed Bush about his being blindsided and was duly shocked: the president's advisers had kept him in the dark.

When he left Washington for a professorship at Harvard Law School, Goldsmith had not ended the troublesome detention and surveillance policies of the Bush administration. But that was not necessarily his intention; what he meant to do, and what he succeeded at, was to make the policies legal, where he could, without recourse to strained and cynical readings of the law. In this sense, his efforts, incomplete when he left, amounted to less heinous and more legitimate policy. Even so, and especially in light of the Supreme Court decisions in the three prisoner detention cases (which followed his resignation by two weeks), his work had shifted the momentum of the legal battle even as it shined a light on the policies that would continue to be debated for years to come. But whether or how much he had succeeded in slowing the rogue elements in the American justice system remained to be seen.

CHAPTER 9

Glimmers of Light

In November 2004 George Bush was elected to another term as president. Whatever the degree to which his administration's detention, torture, and surveillance policies had penetrated the public consciousness, they had not induced voters to reject him. Nor, evidently, had they led him to reconsider the approach the administration had been taking to the justice system—at least not when it came to replacing John Ashcroft. According to one government lawyer, Ashcroft had submitted his resignation as a formality, expecting to be reappointed. Whatever his expectations, he was passed over. The new man in charge of the Department of Justice would be White House counsel Alberto Gonzales, whose loyalty to the president was beyond question. No longer would the president's men have to work around an attorney general who might not share their opinions. With Gonzales at Justice and David Addington, now Vice President Cheney's chief of staff, back at the White House, the new administration was in a perfect position to consolidate the gains of the past four years, continuing to dilute citizens' rights and liberties

CHAPTER 11

The Crown Jewels

In July 2005 Congress reauthorized the USA Patriot Act. Among the new provisions was the creation of the National Security Division (NSD) at the Department of Justice. Its job, according to Senator Pat Roberts (R-KS), chair of the Senate Intelligence Committee, would be to "provide crucial legal services and policy guidance for the operational elements of the intelligence community." Senator Carl Levin (D-MI) promised that the assistant attorney general who would run the office would "play a central role in establishing legal policy for the intelligence community."

The NSD was the first new division in the Justice Department since the Civil Rights Division had been established in 1957. It gathered the department's counterterrorism and espionage units, along with its Office of Intelligence and Policy Review (OIPR), under one umbrella, and it added a Law and Policy Section. The reorganization had been proposed by a committee investigating the intelligence failures that had led to the 2003 invasion of Iraq. Laurence Silberman, the judge who had ruled that the FISA wall should be removed, was

the cochair of that committee, and the proposal reflected the same conviction that had driven his ruling in that case: that in a post-9/11 world, national security had to take precedence over other concerns, including, if need be, civil liberties. Removing the FISA wall had opened the way for the intelligence side of the department to talk to the criminal side; the NSD set up shop along the border, taking in offices from both sides. But it was clear which function would take precedence. As the press release describing the new Patriot Act explained, the new division would allow the Justice Department to take a leading role in helping to "prevent another terrorist attack on America." Prevention, as it was understood after 9/11, was largely the work of the intelligence community—which had already had at its disposal a lower bar for eavesdropping and other surveillance.

Some lawyers in the Justice Department worried that creating a free-standing intelligence-oriented division would amount to amassing "barbarians at the gate," as one of them told me, empowered to run roughshod over constitutional protections and to turn the Criminal Division into a "stepchild" of the department, less important than the intelligence-driven tasks of the unit. Nor were the lawyers who focused primarily on intelligence satisfied by the change. The OIPR's head, James Baker, would commemorate the demise of his office by handing out plaques with beginning and ending dates of his leadership at the OIPR to his staff at a farewell meeting. Others thought the barbarians were on the other side of the gate—law-enforcement-minded lawyers who would impede intelligence efforts on civil liberties grounds.

It fell to Ken Wainstein, the first assistant attorney general for national security—and a man who had had experience in both worlds, serving in 2002 and 2003 as general counsel and chief of staff to Robert Mueller as he was increasing the FBI's intelligence capabilities and then as the US attorney in DC—to mediate between these forces even as he tried to build his division from scratch. In addition, he had to consider the ongoing protests by groups like the ACLU over policies such as warrantless wiretapping and prisoner detention. At

his confirmation hearing, Wainstein acknowledged the difficulty of the job in front of him, but he assured the Senate Select Committee on Intelligence that he and his staff would work hard "to protect our civil liberties, but also be the ally of the investigator."

Wainstein had a chance to make good on his promise almost immediately. He was sworn in on September 28, 2006, a Thursday. On the following Monday he and Matthew Olsen—the close friend he picked to become a deputy assistant attorney general for the new division and who, as head of the Office of Intelligence, would field FISA applications—received a visit from Vito Potenza, the general counsel of the National Security Agency, and Steven Bradbury, head of the Office of Legal Counsel inside the Justice Department. The men told the newcomers about the Terrorist Surveillance Program (TSP), which was still operating outside the authority of the FISA Court and Congress, reauthorized every forty-five days by the signature of the president and the attorney general.

"These were the cards we were dealt," Wainstein told me. And the TSP was only one hand; the detention and prosecution policies were also on the table, and all three were rife with political and legal trouble. Wainstein knew the TSP in particular needed to be placed on sounder legal footing than a discredited memo by John Yoo, the White House's say-so, and two (admittedly high-ranking) signatures. And after Judge Anna Diggs Taylor ruled that the ACLU could challenge the NSA's TSP, he told me, "we knew it was not sustainable." So he and Olsen set about to improve their hand, or at least to play it better.

Wainstein believed it was possible to return oversight of the TSP to the FISA Court, which the system of renewable signatures had cut out of the loop. He assured David Addington, who by then had also concluded that the rogue program could not be sustained, that the FISA process could be made less cumbersome and more adaptable to new technologies that had made the original FISA legislation, passed in 1978, obsolete. The original law, for instance, did not require a FISA warrant for international phone calls transmitted via

satellite, as most of them were in 1978. Because intelligence agents could acquire the call directly from the satellite, the surveillance had not taken place on US soil and thus lay outside the purview of FISA. But three decades later most communication traveled via fiber optic cables, which meant that signals could be picked up in the United States, thus constituting the kind of "electronic surveillance" for which FISA required a warrant. Careful legal work by NSD and Office of Legal Counsel lawyers, Wainstein thought, could remedy problems like these.

Late in 2006 the NSD settled upon a case to take before FISC Judge Malcolm Howard. In addition to a two-page list of phone numbers of Al Qaeda suspects, Howard was asked to approve the monitoring of "facilities" located in the United States, which included the switches and servers that routed communications. With Howard's approval, which came on January 10, 2007, the court gave the NSA the legal authority to do what it had been doing all along: sweeping up large amounts of phone and email data from people in the United States. The order also gave the NSA the power to determine whether there was probable cause to target a facility or an individual. Once the agency made that determination, it was free to proceed without returning to the court, so long as it documented its activities, along with the reason for the surveillance. On January 17 Alberto Gonzales informed the Senate Judiciary Committee of Howard's ruling, assuring the senators that from now on, wiretapping would be "conducted subject to the approval of the Foreign Intelligence Surveillance Court." As a result, he continued, "the President has determined not to reauthorize the Terrorist Surveillance Program when the current authorization expires." Within a few months of its birth, the National Security Division had scored an early victory, bringing the rogue wiretapping policy in out of the cold.

IT WAS A WIN-WIN, AT least on the surface. Though the ruling was not without its detractors—Olsen had to field complaints from

the agency that the reporting required by Howard's decision was a "massive effort" that compromised its "speed and agility"—these were minor problems compared with the major victory that had been handed to the NSA. The NSD had restored some semblance of FISA oversight, enough to give the program a patina of legitimacy. But the White House had gotten virtually all it had wanted, only now with a court's blessing.

But the good times didn't last long. The Howard order was valid for only ninety days, and the renewal came before a different judge, Roger Vinson. He was troubled by some aspects of the original ruling, especially by the way it had left the NSA in charge of determining probable cause. A judge did have the power to order the surveillance discontinued, but only on the grounds that the NSA's reasoning was insufficient, and the court had no authority to obtain evidence beyond what the NSA provided. With the NSA in charge of what the court knew, all an agent had to do was come up with a plausible story, and the wiretap would remain in place.

Vinson balked. "The clear purpose of [the FISA laws]," he wrote, "is to ensure that . . . surveillances are supported by judicial determinations of probable cause before they commence." That obviously was not the case here. The Howard ruling undermined Congress's intention "to provide an 'external check' on executive branch decisions to collect surveillance." If the president wanted to proceed that way, he should ask Congress to change the laws governing the FISA Court, rather than embed so sweeping a change in a single order. "Until Congress took legislative action," however, "the Court must apply the statute's procedures." Vinson refused to sign the order, suggesting instead that the NSA go back to Howard for another extension while the problems he had flagged were worked out—preferably by changing the law.

Gonzales later confessed to "disappointment" at Vinson's decision. It "confirmed our concern about going to the [FISA Court]," he told an inspector general. Taking the man out of the White House had evidently not taken the White House out of the man.

But Gonzales could not protect his former bosses from the judge's ruling. In May, Vinson approved a version of the renewal that required more frequent and detailed reports than Howard's had, and FISA judges began to apply what the inspector general later called "a more rigorous standard of review" to the NSA's probable cause claims. Under the judges' scrutiny, the NSA could monitor "only a fraction" of the targets it wanted to, which led the White House to do exactly what Vinson had suggested and what Wainstein and Olsen saw as the most viable option for TSP's future: ask Congress to modify the law.

A complete overhaul of FISA was too complex a task to be undertaken in a short time. So the Bush administration drafted a stopgap measure—the Protect America Act. The PAA addressed Vinson's objections directly but perversely. In its original form, FISA defined the "electronic surveillance" that required a warrant as the interception of communication to or from a person in the United States. According to the PAA, however, "nothing in the definition of electronic surveillance . . . shall be construed to encompass surveillance directed at a person reasonably believed to be located outside the United States." It no longer mattered if the person (or facility) was in the United States, or if the target was a US citizen, or even if there was probable cause to think the target was up to no good. So long as it "reasonably believed" that the communication involved someone in a foreign country (a determination the law left in the NSA's hands), the agency could monitor all the phone calls or emails it wanted to, foreign or domestic. And should the agency run into technical difficulties or want information not available from a single phone or email address, the law gave it the authority to demand the "assistance necessary to accomplish the acquisition" from phone and Internet service providers and then to compel the companies to keep the demand a secret.

The bill went to the Senate on August 1 and to the House of Representatives four days later. Only 28 senators and 183 representatives were disturbed enough by its provisions (or willing enough to oppose a bill claiming to protect America) to vote against it, and the measure passed both houses easily. The ACLU immediately weighed in, arguing that the new law "turned FISA on its head," placing the exact communications it was intended to protect—those of US citizens on US soil—out of the law's reach. The law engendered enough bad press to spur the Department of Justice's public relations arm into action. It sent out a press release titled "Dispelling the Myths," in which it assured the public that the new law did not eliminate civil liberties protections. In place of that "myth," the department offered this "fact":

> The new law simply makes clear—consistent with the intent of the Congress that enacted FISA in 1978—that our intelligence community should not have to get bogged down in a court approval process to gather *foreign* intelligence on targets located in *foreign* countries. It does not change the strong protections FISA provides to Americans in the United States—surveillance directed at people in the United States continues to require court approval as it did before.

The press release did not mention the fact that the new law removed from protection any communication that the NSA decided might end up (or start) in a foreign country, which meant that the agency could engage in "reverse targeting," surveillance that had as its primary target someone in the United States whose overseas communications provided the opportunity to avoid FISA scrutiny. It didn't point out that the NSA was still in charge of determining probable cause and that this assessment was not subject to review, or that its newly granted authority to demand records from the telecommunications industry gave it unprecedented access to the emails and phone calls of virtually everyone. Nor did it make clear what many inside the NSD (and the NSA) likely knew: that a goal of the law was to diminish the role of the FISA Court as a firewall between citizens and the security apparatus. The court, which

had never turned down a government surveillance request—and had modified only one—prior to 9/11, might not have been much more than a thorn in the NSA's side, an inconvenience rather than an actual impediment to its surveillance ambitions. But even so, the NSD had sided with the NSA, agreeing that even the paperwork requirements were too onerous, that intelligence agents should be left alone to do their jobs the way they thought best, and that those ambitions should not be thwarted by too absolute a reading of the Fourth Amendment.

In June 2008 the provisions of the PAA were incorporated into the FISA Amendments Act (FAA), a more comprehensive modification of the law. "I thought it was a pretty elegant solution to a difficult problem," Ken Wainstein told me. "How to permit targeting of non-US information but to do so by collecting it within the US." He never thought the law would be used to target Americans directly, but he hadn't counted on the NSA's determination, or on its ability to parse the word *intentionally.*

Fixing the FISA mess was hardly the only major challenge Wainstein faced in his first year. Also in need of immediate attention was the Jose Padilla prosecution. The case had made little progress since Gonzales had announced the charges against Padilla in November 2005. Early in 2007, Padilla's lawyers had asked Judge Marcia Cooke to dismiss the case on the grounds that their client was, in the words of one of their forensic experts, "a broken man" as a result of five years of nearly continuous solitary confinement, not to mention the stress positions, sleep deprivation, and threats of immediate execution to which his lawyers claimed he had been subjected. In addition, according to a psychologist, Padilla was suffering from Stockholm syndrome and was now concerned that if his mistreatment was revealed, it might hinder the government's efforts to extract information from him. His lawyers were claiming that Padilla was unable to assist in his own defense and thus was incompetent to stand trial, and that "through its illegal conduct, the government has forfeited its right to prosecute." Judge Cooke disagreed, ruling

that Padilla was a "knowing participant" in his defense and suggesting that the questions about his treatment were a "discussion . . . for another day."

In insisting on letting the trial go forward, Cooke was responding not only to the particulars of Padilla's case but also to the mounting pressures on the federal judiciary to show that it could indeed handle terrorism cases. Even some former prosecutors, including the lawyer who had prosecuted the Blind Sheikh, Omar Abdel Rahman, had expressed their doubts, joining with leading national security figures to advocate for the military commissions as the proper venue for these trials. As it had been in the Moussaoui trial, the burden on the federal court system was immense, the stakes as high as they got.

The government's case against Padilla was relatively weak. The evidence revolved around the data sheet found in Afghanistan with his fingerprints on it, allegedly showing that he had applied to join Al Qaeda. But the government's own witness admitted it was hard to tell who actually had signed the document, or when. Moreover, it turned out that only 7 of the 230 intercepted calls that formed the basis of the conspiracy charges actually had Padilla's voice on them, and in none of these had he plotted violence or other terrorist acts.

The witnesses included a CIA agent who appeared disguised behind a fake beard and under a false name to testify that in 2001 an Afghan man had shown up at an American base outside Kandahar in a Toyota pickup and offered a blue binder to forces there, claiming that he had found it in an office "used by Arabs." The binder, according to the agent, held Padilla's "membership application." Beyond that, however, the prosecution team was hard-pressed to substantiate the connection between Padilla and Al Qaeda. They could not find a witness who had seen Padilla at the al-Farooq terrorist camp, which he allegedly attended, instead calling a defendant from an earlier terrorism case to testify in general terms about the camp. But at every opportunity the prosecution mentioned Osama bin Laden—91 times in its opening statement, and more than 100 in

closing. As one defense lawyer put it, it was as if "[t]he government is trying to put al-Qaeda on trial."

The tactic succeeded. On August 16, after just over a day of deliberation, the jury found Padilla guilty on three counts of providing material support to terrorists. In January 2008 Judge Cooke sentenced Padilla to seventeen years—less prison time than John Walker Lindh, Abu Ali, and Zacarias Moussaoui had each received. In handing down her relatively lenient sentence, Judge Cooke noted Padilla's treatment in detention and asserted that "the conditions were so harsh" as to "warrant consideration." (Her reasoning did not pass muster with the appeals court, which in 2014 ruled that the sentence was too lenient and sent the case back for reconsideration. Cooke resentenced Padilla to twenty-one years in prison. At resentencing, Cooke, who refused the prosecutors' request for a thirty-year term, said, "I was then, and am now, dismayed by the harshness of Mr. Padilla's prior confinement.")

The trial showed that prosecutors had a way to use the courts effectively to try suspected terrorists. Despite the various interrogation policies that might make evidence inadmissible, despite weaknesses in the case, and despite the fact that he'd been treated more as a war criminal than as a criminal defendant, Padilla had had a trial. He had been held outside the criminal justice system, interrogated as the government saw fit, and denied access to counsel. He had been shattered by the process. The evidence that he had committed the crimes for which he had been charged (which were different from the crimes for which he had first been arrested) was scant. But the prosecution had a formidable weapon, one that could overcome a case weakened by poor evidence or mistreatment: allege a conspiracy with Al Qaeda, or remind a judge and jury of the mayhem and tragedy that Al Qaeda had unleashed (and was threatening to repeat), or invoke the name of Osama bin Laden, and a prosecutor could make the weakness of the case disappear in a miasma of fear. It was what a *New York Times* legal reporter called "a new prosecutorial model in terrorism cases." And under the new model,

civilian prosecution was not so much of a threat to the war on terror as it had once seemed.

The completion of the Padilla trial might have kept the military commissions at bay, but only by changing the rules of the game. Now lawyers could prosecute not only plots, attacks, or tangible acts but associations with terrorists, as in the Padilla case, as well as aspirations to commit a terrorist act, as in Moussaoui's. The hand the prosecutors had been dealt included a trump card, and they were not reluctant to play it.

"That was some of the best lawyering I've ever seen," Kenneth Wainstein told his staff in the early fall of 2007. He was talking about the deal that had brought the Terrorist Surveillance Program in out of the cold, the last in a list of accomplishments he cited in celebrating the first anniversary of the NSD's founding. Standing in front of the statues of justice in the Great Hall of the Justice Department, he congratulated his staff for "not just standing, but standing . . . pretty tall and strong." The division was "fulfilling every mission, meeting every expectation, and doing everything in its power to keep our country safe, free, and secure."

BUT THERE WAS ONE SUBJECT that Wainstein did not bring up: Guantánamo. His lawyers had been working with military commissions lawyers to develop cases against Guantánamo detainees, as the Military Commissions Act had required, but so far only one had been resolved—the case of David Hicks, the Australian detainee who pleaded guilty to charges of providing support to terrorism and was recommended for a sentence of seven years in prison, a term that was whittled down by a plea deal to nine months served in Australia, with the guilty plea ultimately being overturned by a Military Commissions appeals court. And as difficult as the commissions process was proving to be, there was another task that was even trickier: the detainees' lawyers, heartened by the Supreme Court decisions in the Rasul and Hamdi cases, had still not given up trying to gain

habeas rights for their clients, and the government had still not given up trying to stop them.

The latest skirmish in the habeas wars was a case brought on behalf of six men of Algerian origin, including Lakhdar Boumediene, for whom the case was named. Boumediene was a Bosnian citizen who had been working for the Red Crescent in Sarajevo when, in late 2001, US intelligence caught wind of a plot to blow up the embassy there. He was rounded up along with five other Algerians and, at the request of the United States, taken into Bosnian custody. In January 2002 the Bosnian Supreme Court determined there was no reason to hold the men and ordered their release. When they left prison, they were immediately captured by US forces and sent to Guantánamo. In 2004 the Center for Constitutional Rights filed a suit on behalf of the six men, challenging their detention and demanding a habeas corpus hearing.

The Algerian Six, as they came to be known, had been among the first Guantánamo prisoners to appear in front of the Combatant Status Review Tribunals (CSRTs) established in order to comply with the Supreme Court's ruling in the Hamdi case. The Court had ruled that "a citizen held in the United States as an enemy combatant [must] be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker." At their CSRT hearing, the Algerian men were determined to be enemy combatants, a decision they appealed to the DC District Court, the court designated to hear such cases. In the meantime, however, Congress passed the Detainee Treatment Act, which, along with requiring humane treatment of prisoners, had also instructed the courts to throw out all pending habeas cases, on the grounds that the tribunals were an adequate substitute for a court of law. In 2007 Boumediene, whose case had by then been combined with that of another Guantánamo prisoner, Fawzi al-Odah, appealed that provision to the DC Circuit Court. The circuit court upheld the constitutionality of the law's blanket denial of habeas corpus and ordered all the petitioners to seek their remedy with the CSRTs. The detainees

appealed this ruling to the Supreme Court, but in April 2007 the court declined to hear the case. The detainees were ordered to take their case back to the circuit court—a court that had already determined that as they were noncitizens held outside the United States, constitutional rights did not apply to them.

The Supreme Court routinely denies *certiorari*, as requests for judicial review are known, and though the disappointed parties routinely ask the Court to reconsider, the Court nearly always refuses these requests. Nevertheless, the detainees' lawyers petitioned the Supreme Court for a rehearing. And as the appeal made its way onto their schedule, the justices received an affidavit by Stephen Abraham, a former military lawyer who had worked on behalf of the government in the CSRTs. In twenty-four blistering paragraphs, he charged that the CSRTs were "an irremediable sham," a claim he substantiated with evidence from his participation in them. Of the pool of judges, lawyers, and "personal representatives," those assigned to the detainees in lieu of defense attorneys, "[f]ew were trained in either the legal or intelligence fields." Moreover, they were arbitrarily assigned to different roles in the hearings, without regard to their background or skills. The information they worked with was "often outdated, often 'generic,' rarely relating to the individual subjects of the CSRTs." Requests for further information were routinely denied—and not because there was no more material to be had. "I was given no assurances that the information provided for my examination represented a complete compilation," Abraham wrote. "On those occasions when I asked [for] a written statement that there was no exculpatory evidence, the requests were summarily denied," leaving Abraham to "'infer' that no such information existed." And in the few instances in which a tribunal determined that a prisoner was not an enemy combatant (which they did in less than 10 percent of nearly six hundred hearings), a meeting was called to focus on "'what went wrong.'" It was as if the only possible cause of a negative finding was a flaw in the tribunal's reasoning.

Abraham recounted a hearing in which he and the other two

tribunal members "found the information presented to lack substance. What were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence." A request for more information was stonewalled, the personal representative "did not participate in any meaningful way," and when the panel determined that there was no evidence that the prisoner was an enemy combatant, the director of the tribunal program "immediately questioned our findings" and ordered it to reconsider. The panel stuck to its original finding, and, wrote Abraham, "I was not assigned to another CSRT panel."

Certiorari deliberations are not public, but as legal scholar and detainee lawyer Jonathan Hafetz reported, many court watchers "suspected that Justice Kennedy had been moved by [the] new and devastating critique" delivered by Abraham. What is known is that in late June 2007, two months after declining to hear the Boumediene case, the Court reversed itself—the first *certiorari* decision to be overturned in forty years. It placed the Boumediene case on its docket for the upcoming term.

In December, Seth Waxman, who had served as solicitor general under Bill Clinton, told the justices that the CSRTs, despite their legislative origin, were nothing more than an ad hoc procedure set in place by the executive and were certainly no substitute for habeas corpus. The hearings, after all, took place as Abraham had detailed—detainees were left without lawyers or access to all the relevant evidence, subject to the caprice of the tribunal. Just as Neal Katyal had done in *Hamdan*, Waxman pointed out that the lower court—in this case the DC Circuit—had merely accepted the evidence presented by the government as "accurate" and "sufficient," taking the executive branch's assertions at face value even though the very purpose of a habeas petition was to challenge those assertions. A genuine habeas court, Waxman pointed out, would weigh the accuracy and relevance of the evidence to determine whether continued detention was warranted; without this crucial feature, the tribunal could not be considered an adequate substitute for a court of law.

Paul Clement once again had the task of convincing the justices that enemy combatants, especially noncitizens held outside the nation's borders, had no rights under the US Constitution. Even if they did, he continued, the CSRTs were an adequate substitute for a habeas court. He pointed out that the rules guiding them were "virtually identical" to the army regulations governing the treatment of prisoners of war, which, in turn, were derived from the Geneva Conventions. "The deviations," he argued, "are ones that, we would submit, enhance the rights of the detainees in this particular circumstance." Clement was being disingenuous; after all, as one expert put it, the right to challenge the CSRTs was "limited to whether the CSRTs followed their own procedures, not the substantive determination of whether someone was an 'enemy combatant' or 'no longer an enemy combatant.'" (Clement didn't bother to mention that had the Bush administration decided in 2001 to treat the detainees as POWs, they would not have had the right to habeas in the first place.)

Justice Stephen Breyer was skeptical and offered a hypothetical situation that was barely hypothetical. Let's say you're a Bosnian held by the United States for six years, he told Clement. You go before a tribunal, and it finds you should remain in custody (although still without charges). Now you go before the DC District Court, which is the court reviewing CSRT decisions, and you concede that the tribunal's "procedures are wonderful, and . . . it reached a perfectly good result." But, Breyer continued, you want to say, "'Judge, I don't care how good those procedures are. I'm from Bosnia. I've been here six years. The Constitution of the United States does not give anyone the right to hold me six years in Guantanamo without either charging me or releasing me.' I don't see anything in this CSRT provision that permits" that argument. "So I am asking you," Breyer said to Clement, "where can you make that argument?"

"I'm not sure he can make that argument," Clement replied.

"Exactly," said Breyer. That had been his whole point: that the CSRTs did not address the central issue of habeas—the right to

challenge one's detention. As such, they were not an adequate substitute for the habeas courts, no matter how "wonderful" their procedures might be.

Indefinite detention might have been lawyered into legitimacy, but the Supreme Court was evidently unimpressed by the results. On July 12, 2008, in a 5–4 decision written by Justice Anthony Kennedy, the Court ruled in favor of Boumediene. Kennedy's opinion took Congress and the president to task. "Protection for the habeas privilege was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights," he wrote. And the fact that the prisoners were being held in Cuba did not abrogate the government's responsibility to provide this safeguard. The base was not US sovereign territory, and the lease between the US and Cuba stipulated that Cuban law did not apply in Guantánamo; that was one of the reasons the island had been so attractive as a prison location in the first place. But that didn't mean the base was a land of no laws, and there was no doubt which country was in charge. "The Nation's basic charter cannot be contracted away like this," Kennedy wrote. "The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. To hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this Court, say 'what the law is.'" Guantánamo was governed by US law, US law required the president to justify a prisoner's detention or release him, and Congress could not legislate away that burden.

The Boumediene case was returned to the DC District Court, which now had the authority to order the release of the Algerian Six, and after reviewing his file, Judge Richard Leon did exactly that for five of them, including Boumediene. Leon felt he had no choice: "To allow enemy combatancy to rest on so thin a reed would be inconsistent with this court's obligation; the court must and will grant their petitions and order their release." He cautioned, however, that "this is a unique case. Nobody should be lulled into a false sense that all

of the . . . cases will look like this one." But even if the rulings by both courts did not amount to a get-out-of-jail card for the Guantánamo detainees, taken together they comprised a sharp rebuke to the president and to Congress. When it came to detention, the courts were insisting on due process. With the conviction of Jose Padilla and the release of Yaser Hamdi, no more Americans were being held as enemy combatants. And the detainees at Guantánamo had gained the right to challenge their imprisonment. The Bush administration's lawyering might have been good, but it was not good enough to put an end to the oldest democratic right.

CHAPTER 12

That Dog Will Not Hunt

The most unusual thing about the case argued in federal court in Providence, Rhode Island, on June 19, 2008, was not that the court convening it, the FISA Court of Review, had met only once before in its thirty-year history. It wasn't the way technicians had swept the room for bugs and cut it off from the Internet, turning Courtroom 3 temporarily into a Sensitive Compartmented Information Facility (SCIF). It wasn't the briefcases full of classified information that the three Justice Department lawyers had physically held on to for the hours-long trip from Washington, or even the intrigue surrounding their journey, which had led at least one of them to lie to his wife about his destination that day. And it certainly wasn't the argument itself, in which a government lawyer once again asserted that the war on terror could not be fought without restricting Fourth Amendment rights, while his opponent countered that to take away civil liberties in the name of national security was to compromise the very principles for which the war on terror was being waged.

No, the strangest thing was that the lawyer worrying over

constitutional rights, Marc Zwillinger, was not from the ACLU or the Center for Constitutional Rights; nor was he representing detainees or tortured prisoners. Instead, he represented a large American corporation: the Internet company Yahoo! The issue at hand was a government order forcing Yahoo! to "assist in warrantless surveillance of certain customers" by turning over records of their communications. Yahoo! had so far failed to comply with this order, a defiance that was about to cost the company $250,000 a day in fines. But Zwillinger's argument in court that day wasn't about the cost or difficulty of supplying the government information about the private communications that passed through its servers in California. And it was only a little bit about the consequences to its bottom line should its customers discover the breach. Mostly Yahoo!'s objection rose above petty corporate interests and invoked the basic principles of American jurisprudence. The government, Zwillinger told the three-judge panel, was compelling his company "to participate in surveillance that we believe violates the Constitution of the United States." It was refusing to supply the data on principle. It was evidently one thing for a corporation to amass huge amounts of data on its customers to sell to other corporations—which was, after all, Yahoo!'s business model—and another for that company to be required to provide its information to intelligence agencies.

The Yahoo! case got on the FISCR docket only after the FISA Court itself ruled that Yahoo! had to comply with the order. The judge in that case, Reggie Walton, was not necessarily a friend to the Bush administration. He was best known for denying bail to Vice President Dick Cheney's chief of staff Scooter Libby pending appeal of his conviction for revealing the identity of CIA agent Valerie Plame. Even so, Walton upheld the government's directives, largely with the same reasoning—straight from John Yoo's infamous memos—that had led Laurence Silberman to order the FISA wall removed: foreign intelligence need not be the "primary purpose" of an investigation in order to qualify for an exception to the Fourth Amendment's requirement for warrants, but only, as

the Patriot Act had said, a "significant purpose." Even if the emails of US citizens would inevitably be swept up as part of the Yahoo! order, Walton wrote, the president had the "inherent authority" to "conduct warrantless searches to obtain foreign intelligence information." The limits of that authority, he argued, were at stake in the FISA Court hearing. "There are times when there is an inevitable tension between the interests protected by the Fourth Amendment on the one hand and the federal government's obligation to protect the security of the nation on the other hand." Balance between those interests was "not easily achieved," Walton ruled, but in this case, it was easy to see which one should be given more weight; it was, he ruled, permissible for the government to put its thumb on the scale.

In appealing Walton's decision, Zwillinger argued that there was no balance at all in the surveillance order. He ticked off the problems: the lack of FISA Court (or any judicial) oversight of the NSA's assertions that it had probable cause to conduct a search, the lack of any requirement for the orders to directly and explicitly connect the individual customer to a foreign power, the overall "magnitude of the surveillance," the possibility that a clerical error could result in an American citizen being placed under scrutiny without cause or notice, and the lack of meaningful restriction on what the government could do with the information. Even according to the terms of the Protect America Act—under which, Zwillinger said, it seemed that surveillance was "rampant"—the order (and by extension the PAA itself) failed to meet the "reasonableness" standard for warrantless spying and was therefore unconstitutional. In what might have been an unprecedented move, a major American company had gone to court to protect the rights of American citizens.

The FISCR judges were skeptical, especially about Yahoo!'s claim that the surveillance put its customers, and therefore the company, at risk. "If the order is . . . secret, how can you be hurt?" asked Judge Morris Arnold. "The people don't know that they're being monitored in some way. How can you be harmed by it? What's the damage to your consumer?" Judge Ralph Winter made it personal. "It seems

to me it would be highly unlikely there would be any consequences if they got . . . into my email account," he said. "Even if I had something on there that would be even in the remotest interest to anyone else, so what?"

"I don't think the case law suggests that an intrusion into someone's privacy, an invasion of their communications, a ransacking of their private papers is harmless if the government makes no further use of it," Zwillinger replied. "There is . . . harm to individuals when their privacy is intruded upon." But for all his eloquence, Zwillinger was only confirming what the judges were suggesting: that Yahoo! was making an argument on an abstract principle about the right to privacy, one that had at least been weakened, if not abandoned entirely—and one that was not necessarily any of Yahoo!'s business.

Zwillinger conceded as much when, near the end of his argument, he brought up a ruling that the Supreme Court had just issued the previous week. "The Boumediene case," he said, "while about habeas was really about reconciling privacy against security. And the question in Boumediene was, is an executive branch only procedure an effective and reasonable substitute for the Constitutional guarantee of habeas; and the Court said it was not." And the reason for its decision, he continued, was that "you cannot trust constitutional rights of this magnitude to a closed and accusatorial process that is run and determined by an interested party"—the attorney general, who, along with the rest of the executive branch, is neither neutral nor disinterested. As for Boumediene, so too for Yahoo!'s customers, said Zwillinger. "The full panoply of the Fourth Amendment protections . . . are not here. They're not being given," he said, but without specifying that a single customer had been harmed, or that Yahoo! had lost a single dime.

Zwillinger did manage to gain a toehold with at least one judge when he mentioned the possibility that a government armed with an order like the one at hand could be "building a database on millions of people in the United States." This, he suggested, "would be a grave harm."

"Now you're getting close to a real harm," agreed Justice Winter. "I will ask the Solicitor General if that's happening."

It was Judge Bruce Selya who posed the question to Acting Solicitor General Gregory Garre. "Incidental collections from U.S. persons"—communications from someone other than the foreign target, including not only his American correspondent but all the contacts of both parties—are "destroyed and not used or disseminated," he assured the judges. "There is no database that is taken from incidental collections." And who would determine which material was used and which was not? The president, of course. "The presumption is . . . the executive acts constitutionally," he said.

That was exactly the opposite of what Zwillinger was arguing: that the Fourth Amendment's very reason for existing was that you couldn't presume "that the executive will always act in a constitutional manner"—especially, he added, when he is "invading [citizens'] right to be secure in their own homes. . . . We cannot vest that discretion in the executive branch."

But while the court at least listened to the constitutional argument, it wasn't buying it. In August, it upheld Walton's decision. The bar for domestic surveillance might once have been high, but that was before 9/11, the Patriot Act, and the Protect America Act, and, wrote Judge Selya, "that dog will not hunt" any longer. "The interest in national security is of the highest order of magnitude," he explained. So long as the "purpose involves some legitimate objective beyond ordinary crime control," he continued, there is a "foreign intelligence exception to the Fourth Amendment's warrant requirement." Under this reasoning, the president's authorization "at least approaches a classic warrant" and thus preserves enough of the intent of the Fourth Amendment to be considered constitutional.

As to the "parade of horribles trotted out by the petitioner" in support of its claim that the president should not simply be trusted, Selya wrote, "it has presented no evidence of any actual harm, any egregious risk of error, or any broad potential for abuse in the circumstances of the instant case." Indeed, Zwillinger's argument

amounted to "little more than a lament about the risk that government officials will not operate in good faith." There was no reason to think that "placing discretion entirely in the hands of the Executive Branch without prior judicial involvement" could lead to abuses. The executive, he was certain, acted constitutionally.

It would be another five years before Americans—including, presumably, Judge Selya and Solicitor General Garre—were alerted by Edward Snowden to how misplaced their trust was and to just what that discretion meant to a president who was at that very moment assembling the database that Garre had assured the court simply did not exist.

The day the FISCR ruling was handed down, Attorney General Michael Mukasey came to the NSD himself to congratulate the team. The decision was a big win, because the government could now issue similar orders to Apple, Google, and Facebook, which, having seen what happened to Yahoo!, would not put up any resistance. It also solidified the government's long-standing assertions about the president's wartime powers.

The Yahoo! case was not the only victory scored by advocates of executive power in the summer of 2008. During the month between the Providence hearing and the FISCR's decision, Congress had been debating the FISA Amendments Act, the more permanent version of the Protect America Act, which had expired in February. This time some Democrats fought the bill. Christopher Dodd (D-CT) objected to a section that granted telecommunications companies immunity from the lawsuits their customers were already filing in response to the discovery that their phone companies were providing their call histories to the government. So long as the corporations could show that the president had assured them the spying was legal, the FAA provided, the companies could not be sued; the act thus protected the companies from liability while it also protected the government from the kind of disclosures required in litigation. For his part, Senator Russ Feingold (D-WI) was concerned that the proposed law would threaten civil liberties. "It is possible to defend

this country from terrorists while also protecting the rights and freedoms that define our nation," Feingold said. Most of his colleagues did not agree, however. He and Dodd filibustered the bill, but only long enough to delay its passage a few weeks.

When the FAA was signed into law on July 10, it still included the section protecting telecommunications companies from lawsuits. But of more concern to many was the part of the law known as Section 702. That section made permanent the PAA's lowered bar for identifying targets, giving the attorney general and the director of national intelligence authority to order surveillance of anyone they thought was a foreigner in a foreign country. As long as they weren't "intentionally" targeting an American citizen at home or abroad, or a noncitizen inside the United States, their requested surveillance would qualify for the warrant exception built into the original FISA legislation. They would have to notify the court of the surveillance and submit a report explaining their reasoning. But the report would be sealed, to be opened only in the case of a challenge that occurred within thirty days of its submission to the court—and if the court overturned the order, the surveillance could continue for sixty days while the government appealed the decision. And besides, since the only parties that would know of the order (besides the attorney general, the director of national intelligence, and the intelligence agents tasked with its enforcement) would be the now-immunized telecommunications companies, challenges would likely be few. (Indeed, until January 2014, no firm had challenged an order, and that company, whose name remains classified, lost in court.)

The FAA not only codified what the government had been doing all along—spying on American citizens, without warrants or other restraint—but also added a particularly Orwellian twist, authorizing the spying even as it forbade it. The proposed law prohibited the attorney general and the director of national intelligence from *intentionally* targeting citizens. So if those officials, both members of the executive branch, claimed that they did not mean to gather

intelligence about the citizen on the American end of an email, or if they were mistaken in their belief that the target was a noncitizen, still they had the data, and it could be assembled into the database that, the new solicitor general, Gregory Garre, assured the review court, the government was not building. And so long as the attorney general and the director of national intelligence swore to the purity of their intentions in a sealed affidavit that the FISA Court could not read unless the order was challenged within a month (and consider how difficult it would be for anyone to challenge what the attorney general or the director of national intelligence said was inside their heads), it would all, under the FAA, be perfectly legal.

Some legislators had noticed this. Congresswoman Jackie Speier (D-CA), for example, took to the House floor to denounce the bill in terms that would prove prescient. "The proposed FISA law protects no one other than the administration and those within it who may use this new-found power to snoop and spy in areas where they have no business looking," she said. "The truth is, any American will subject their phone and e-mail conversations to the broad government surveillance web simply by calling a son or daughter studying abroad, sending an e-mail to a foreign relative, even calling an American company whose customer service center is located overseas." The ACLU noticed, too. Within hours of Bush's signing, it had filed its complaint challenging the new piece of legislation. The suit—which became known as *Amnesty v. Clapper*—alleged that the FAA "allows the mass acquisition of U.S. citizens' and residents' international communications. In some circumstances, it allows the warrantless acquisition of purely domestic communications as well," because some domestic emails or phone calls pass through servers in foreign countries, at which point they can be considered foreign. Because Amnesty International and other nongovernmental organizations that joined the ACLU suit represent "people the U.S. Government believes or believed to be associated with terrorist organizations," they would have to assume their communications were being intercepted and thus would have to meet with their clients in

person or buy expensive encryption programs—burdens that could chill their ability to do their work, regardless of what the president and his men intended. The FAA, according to the complaint, "violates the First and Fourth Amendments to the U.S. Constitution," and by giving so much power to the executive branch, it also violated "the principle of separation of powers." The ACLU asked the Southern District of New York's federal court to strike down the new law.

It was a bold request. For ACLU lawyer Jameel Jaffer, who would argue the case, the concerns raised by the FAA went beyond the obvious surveillance excesses and to the heart of the balance of power problems that had developed in the name of national security. As Jaffer explained to me, "The extent of executive power, and the extent to which it was unsupervised," was once again apparent in "narrowing dramatically the authority of the courts to oversee how that power was going to be used." The FISA Court was now overseeing general procedures rather than ruling on specific cases, just as the courts had either been pushed aside or had reneged on oversight of detention and interrogation issues. The suit would give the federal judges of the Southern District one more chance to reverse that trend. Jaffer hoped that this time they'd take it.

ONE OTHER PROMINENT PUBLIC FIGURE registered his dismay over the FAA. He was a senator from Illinois, and by July 2008 it appeared he would be the Democratic candidate for president. In February, during the first attempt to replace the Protect America Act, Barack Obama had come out against the new law. But now, he said, he had become convinced that "given the legitimate threats we face, providing effective intelligence collection tools with appropriate safeguards is too important to delay." He said he would support the bill, but "with a firm pledge that as President, I will carefully monitor the program" that had evolved from the Terrorist Suveillance Program into what became known as the Section 702 program under the FAA.

This wasn't the only controversial policy Obama would have to monitor after he took office in January 2009. He had to keep an eye on Guantánamo in the aftermath of the *Boumediene* decision, on the lawyers and judges still struggling to sort out how to prosecute terrorists who had been implicated by tortured witnesses and who had sometimes been tortured themselves, and on all the other fallout of the intelligence-first policies that had been put into place after 9/11. And as if that were not enough, the struggle Obama was inheriting had entered a new phase, one that as a former law professor he would have to have noticed: as the rogue policies came out of the shadows, they were making their way into the very institutions in which justice was sought and meted out, and on whose fairness and devotion to the rule of law the society depends.

PART III

THE LONG GAME

CHAPTER 14

Winning for Losing

The courtroom on the twenty-first floor of the Daniel Patrick Moynihan Federal Courthouse in lower Manhattan filled up slowly the morning of October 12, 2010. All entrants, including the defense attorneys, were required to pass through two metal detectors—one in the lobby and another at the doors to Judge Lewis Kaplan's courtroom. Once visitors were inside, seats were hard to come by—in part because nearly half the seats available to the public were reserved for family members of the 224 Africans and Americans who had been killed in the bombings of the US embassies in Tanzania and Kenya in 1998. Also in attendance were a number of the survivors, some of whom had been among the thousands wounded in the attacks. For some of this audience, it was a second trial: they'd also witnessed the convictions of four of the conspirators in June 2001.

This time around the defendant was Ahmed Ghailani, one of twenty-one individuals (including Osama bin Laden) indicted for the bombings. Ghailani, who had been twenty-four in 1998 and even

now still had the face of a teenager, stood accused of helping to procure the explosives for the Tanzania attack. Apprehended in 2004 along with twelve other suspected Al Qaeda members in a house in the northwestern tribal areas of Pakistan, Ghailani had been tortured at black sites, where he was held until being moved to Guantánamo two years later. A devastating act of violence, a defendant renditioned, evidence obtained through torture: Ghailani presented the ideal opportunity for Holder to demonstrate what he already felt confident of—that despite these obstacles, the civilian courts could successfully prosecute Guantánamo detainees accused of lethal attacks on the United States.

Jury selection had been swift, with the judge often asking the jury pool questions en masse rather than individually. The resulting jury, which was kept anonymous, represented a range of professions, ages, races, and socioeconomic levels. The jurors were instructed to prepare for a five-month trial—through Thanksgiving, Christmas, even Valentine's Day. Their first glimpse of the defendant came when he was brought into the courtroom by a US marshal and flanked by his four attorneys. Wearing a powder blue sweater, he was standing quietly with his back to the observers when a woman at the front of the gallery, just behind the wooden rail, called his name. "Ahmed," she said. "Ahmed, it's me, Dr. Porterfield." Katherine Porterfield was a clinical psychologist who had evaluated Ghailani at the request of his defense team. The defendant turned and gave her a wide smile. The woman approached, along with a pair of uniformed soldiers. The four exchanged hellos and hugs and stood together until the judge appeared and called the court into session.

The moment passed quickly, but the jury had seen something that could not have made the prosecution happy: that the defendant was human, not a monster, and that people—the lawyers who had represented him before the military commission at Guantánamo, his civilian lawyers now preparing their case, and the psychologist working with them—cared for him, and that he returned

their affection. The potential perils of a trial by jury, at least for th prosecution, were already in evidence.

THE GHAILANI TRIAL WAS NOT the only terrorism prosecu tion that was making its way through federal court in 2010. Na jibullah Zazi, an Afghan American living in Aurora, Colorado, ha been under FBI surveillance since shortly after his return in Januar 2009 from a four-month stay in Pakistan, where he had trained wit Al Qaeda. Agents following him and listening in on his phone cal learned that he had bought various explosive agents and was plan ning, along with others, to detonate suicide bombs on the New Yor City subway. On September 8 he drove a rented car to New York. O the FBI's request, local police stopped him at the George Washing ton Bridge for what they described as a random drug search. Afte they found no contraband in the car (it later turned out that explo sives were hidden in a suitcase in the trunk), Zazi was let go. Bu the search—combined with a phone call that a New York iman had made to Zazi, alerting him to the fact that the authorities were watching—spooked him, and he returned to Colorado without carry ing out the plot.

He was arrested on September 19, and in January 2010 he pleaded guilty to conspiracy and providing material support to a terrorist or ganization. As the Ghailani trial got under way, Zazi was awaiting sentencing in the Metropolitan Detention Center in Brooklyn, just a few miles from the Moynihan building. His two coconspirators their arrests based in part on Zazi's statements to the FBI, were being held without bail pending a trial. Three more men, including the imam and Zazi's father, were also charged with crimes related to the foiled subway plot.

The month after Zazi's arrest in Colorado, Chicago authorities indicted David Headley, an American conspirator in the 2008 terrorist bombing in Mumbai and in threats against the Danish newspaper that had published cartoons of Muhammad. Born Daood

Sayed Gilani, Headley was a former DEA informant who had been arrested on drug charges and who had begun involving himself with Lashkar-e-Taiba—a Pakistani terrorist group affiliated with Al Qaeda—in 2000, when the DEA sent him to Pakistan on an undercover operation to bust heroin traffickers. In 2002 he trained in a Lashkar camp in Pakistan. In 2005 he adopted his mother's Western-sounding name, and in early 2006 he began working with Pakistani intelligence. He was finally arrested at O'Hare International Airport in October 2009 while on his way back to Pakistan. He pleaded guilty in March 2010 and, like Zazi, was in prison awaiting sentencing at the time of the Ghailani trial.

On Christmas Day 2009, Nigerian-born Umar Farouk Abdulmutallab was apprehended after he attempted to set off a bomb in an airplane as it approached the Detroit airport. Abdulmutallab had boarded the plane in Amsterdam with the device sewn into his underpants. When he ignited it, it did not explode. The fire was quickly extinguished, and Abdulmutallab, who soon became known as the underwear bomber, was subdued by passengers. He was arraigned on federal charges while still in his hospital bed and was in prison awaiting trial as the Ghailani trial got under way.

And in May 2010 the Customs and Border Patrol arrested Faisal Shahzad aboard a Dubai-bound plane at JFK International Airport after he had left a car packed with propane and poised to explode in Times Square. Shahzad was a thirty-year-old Pakistani immigrant who had been naturalized as a US citizen in April 2009. He quit his job as a financial analyst in June 2009 and traveled to Pakistan regularly. In July 2009 he went to Peshawar, where his parents lived, and from there traveled to a terrorist training camp in Waziristan. He had returned from his most recent trip to Pakistan in February 2010. Weeks later he bought an SUV with cash and assembled the car bomb. Shahzad pleaded guilty to all ten charges against him. Just the week before the Ghailani trial started, he was sent to the Supermax prison in Florence, Colorado, for the rest of his life.

These cases were a powerful vindication for Holder's contention

that the civilian courts were the proper venue for terrorism cases. They demonstrated that terrorists could be charged, convicted, and sentenced for their crimes. But they did not settle the question of what would happen when defense lawyers began to challenge remote testimony or hearsay or evidence obtained through illegal wiretaps or torture, or when a prosecution's case depended on classified information—all problems that the military commissions were able to sidestep. So the Ghailani case would give Holder's Department of Justice its first real opportunity to showcase its abilities to bring terrorists—even those being held at Guantánamo—to justice in accordance with the principles and guarantees of the Constitution. In short, much was riding on the Ghailani trial.

A year before the trial began, and three weeks after the passage of the new Military Commissions Act, a confident Holder had taken the podium in the briefing room of the Department of Justice. The date was propitious: November 13, 2009, exactly eight years from the date President Bush had issued the military order giving the Pentagon, rather than the Justice Department, oversight of detention and trial for foreign detainees in the war on terror. It was a good time to announce what Holder called the "toughest decision I've had to make as Attorney General." The five most important detainees in US custody—Khalid Shaikh Mohammed; Walid Bin Attash; Ramzi bin al-Shibh; Ali Abdul Aziz Ali, a.k.a. Ammar al-Baluchi; and Mustafa al-Hawsawi, all alleged 9/11 conspirators—were to be tried in federal court in New York. All five of the men had been held and tortured at black sites, but Holder was certain the civilian courts could obtain convictions nonetheless. (In the same press conference, he announced that five other suspects would be tried by military commissions.)

Holder's decision came after a summer and fall in which teams of experts had assessed the viability of holding civilian terrorism trials, taking into account the prospect of challenges made in court over treatment while in detention, the possibility of coerced confessions, the need to consult intelligence agencies about what evidence

to produce, and the handling of "outrageous government conduct" motions likely to emerge in response to harsh interrogation practices. After they had reported their recommendations, and after he had talked with some of the victims of the 9/11 attacks, Holder had come to the conclusion that "the venue in which we are most likely to obtain justice for the American people is in federal court." The trial would take place in New York, where, he said, "the Justice Department has a long and a successful history of prosecuting terrorists for their crimes against our nation."

Holder was confident that Ahmed Ghailani's prosecution would be a fitting dry run. Some of his confidence came from the particulars of the Ghailani case. There had already been successful prosecutions for crimes related to the attacks that Ghailani stood accused of perpetrating. The four men who had been convicted by a jury in May 2001 for their participation in the Al Qaeda conspiracy that let to the embassy bombings had been sentenced to life without parole. Some of the same witnesses were available to testify, and some of the forensic evidence from the earlier case was relevant to Ghailani's, too. But the case also offered a new challenge: some of the evidence against Ghailani had been obtained through torture and was thus inadmissible; there was no way to determine how this would affect the outcome. The team of prosecutors was led by Michael Farbiarz, the head of the Counterterrorism and Narcotics Unit at the Manhattan US attorney's office. Farbiarz's team included several assistant US attorneys who had worked with the Obama task force reviewing evidence against Guantánamo prisoners. They were thus familiar with the evidentiary problems created by detainee treatment and could hopefully overcome those hurdles.

The defense was led by Peter Quijano, who cut a distinctive figure with his shock of white wavy hair, his ostrich boots and designer three-piece suits, and his penchant for dramatic gestures and phrasing. At his side was an associate, Anna Sideris, younger and quieter, who remained close by Ghailani throughout the trial. Quijano also brought on board Michael Bachrach, a criminal defense attorney

with a specialty in international law as well as experience trying a death penalty case, and Steve Zissou, another prominent criminal defense lawyer. Bachrach and Zissou had worked together successfully in the past to obtain life imprisonment instead of the death penalty for defendants convicted of capital crimes. At the outset, the defense team indicated its intention of making the fact of Ghailani's torture part of the proceedings, including the argument that such treatment meant that the death penalty should be taken off the table. (The government ultimately chose not to pursue the death penalty, though the matter of torture remained an issue through the early stages of the prosecution.)

Ghailani was initially reluctant to attend court. He claimed that the cavity search required each day as he arrived and left the courtroom triggered flashbacks to his torture at American hands. He waived his right to be present at many pretrial hearings but was forced to attend some, including one in which he watched his defense attorneys argue for his right to boycott his own trial. Dr. Katherine Porterfield, the woman Ghailani had greeted on the first day of the trial, took the stand to testify, partially in a closed courtroom due to classification issues, that Ghailani had developed post-traumatic stress disorder as the result of being tortured by the CIA; she explained that stimuli reminiscent of the original trauma can overwhelm people with PTSD. After this hearing, however, Ghailani changed his mind and decided to attend the courtroom session. Porterfield later told me that his turnabout came when he realized for the first time that his defense team was genuinely fighting for him.

Judge Lewis Kaplan, whose specialty was the white-collar crime that makes up much of the caseload in the Southern District of New York, had never presided over a terrorism case. But from the outset of the proceedings, Kaplan, a judge with a scholarly mien and a tendency to be professorial in the courtroom, showed himself unafraid, even eager, to confront the murkier aspects of the case, including the subject of Ghailani's treatment while in detention. That

issue surfaced repeatedly, first with a defense motion to dismiss the case because Ghailani had been denied his Sixth Amendment right to a speedy trial. Kaplan denied the motion, on the grounds that Ghailani's extended detention "served compelling interests of national security." The government's decision to detain and question him rather than bring him to trial had been "effective in obtaining useful intelligence," he wrote, adding that his defense had not been impaired by the delay brought about by his time in interrogation.

But Ghailani's treatment raised a much thornier problem. He was the first federal court defendant (and, as of September 2015, the last) who had indisputably been subjected to torture. Kaplan did not avoid that term or the question it forced: Could a legitimate trial could take place in cases where torture had played a role? The issue was inescapable because the prosecution was planning to call a witness from Tanzania, Hussein Abebe, who had, so the defense claimed, been discovered only because of information provided by Ghailani while undergoing torture at a CIA black site in Poland.

This was a confrontation that prosecutors and courts had been avoiding for eight years. In 2002 a plea deal had allowed the government to skirt the issue of John Walker Lindh's abuse while in US custody. The trial judge in the 2005 case of Ahmed Omar Abu Ali, the American citizen detained in Saudi Arabia and then tried in Virginia, determined that he had not been tortured. Khalid Shaikh Mohammed and Ramzi bin al-Shibh, both of whom were tortured, had "testified" in the Moussaoui case only by way of summary statements prepared by others, thus preventing defense lawyers from raising questions about the treatment of witnesses and defendants by the CIA and other government agencies. In both the Moussaoui and the Padilla cases, allegations of abuse had been mostly ignored and never discussed under oath. In the Ghailani case, prosecutors decided early on not to use statements or confessions that he had made while in CIA custody or when questioned, without having been read his Miranda rights, at Guantánamo.

But even if they could do without Ghailani's own words, the

lawyers needed Abebe. Kaplan held a hearing on Abebe's status. Over the course of three days, representatives from the CIA, the FBI, and the Tanzanian national police testified. Occasionally the judge asked the questions himself, sometimes incredulously.

"Here you are asking me to assume for the purposes of deciding the motion that everything Ghailani said from the minute he arrives in CIA custody to the minute he arrives at Guantanamo at least is coerced?" he asked Farbiarz.

"Yes, Judge, yes," replied the prosecutor.

Without any dispute over the facts, the hearing had a pinpoint focus: Kaplan had to decide whether testimony linked to a statement coerced through torture was tainted in the same way as the statement itself. Perhaps this had been the government's strategy all along—to get a decision on the record about circumstances like these, which might affect future cases.

If this was a trial balloon, however, it plummeted quickly. Three weeks after the hearing, Kaplan ruled this pivotal testimony inadmissible. "If the government is going to coerce a detainee to provide information to our intelligence agencies, it may not use that evidence—or fruits of that evidence that are tied as closely related to the coerced statements as Abebe's testimony would be here—to prosecute the detainee for a criminal offense.

"The Court has not reached this conclusion lightly," Kaplan continued. "It is acutely aware of the perilous nature of the world in which we live. But the Constitution is the rock upon which our nation rests. We must follow it not only when it is convenient, but when fear and danger beckon in a different direction. To do less would diminish us and undermine the foundation upon which we stand."

By adhering to constitutional principles, Kaplan did not intend to put an end to terrorism prosecutions. Indeed, by grappling with the issue that judges in cases like Lindh's and Moussaoui's had not, Kaplan was able to suggest a way forward, for the Ghailani case and any other in which torture was at issue. A trial's evidentiary trail would begin when law enforcement was involved and not

before. Information gathered by the CIA would be inadmissible, but the fruits of FBI interrogation were fair game. At least in Kaplan's courtroom, there would be a wall between intelligence and law enforcement.

And even if the lack of evidence led to the unthinkable—an acquittal—Kaplan pointed out that Ghailani's "status as an 'enemy combatant' probably would permit his detention as something akin to a prisoner of war until hostilities between the United States and al Qaeda and the Taliban end." As high as the stakes of the trial were, they were in this way low: justice could be done the constitutional way and the integrity of Kaplan's courtroom preserved, and if the government didn't like the outcome, it always had the option of indefinite detention. It was a decision as cynical as it was heroic. Kaplan was defending the integrity of the Constitution and the court system, while at the same time acknowledging a way out. His decision, whatever its other consequences, would not result in Ghailani's release.

THE GHAILANI TRIAL WAS MUCH more orderly than the Moussaoui trial had been. Ghailani never tried to grandstand or wrest control of the proceedings from his lawyers. He remained calm and composed throughout and never provoked the judge. Given the case's high profile, however, Kaplan did take some unusual security precautions. The jury was not only anonymous, as it had been with Moussaoui; it was also transported by bus to a secret entrance to the courthouse. Over the course of the trial, routine measures like metal detectors and a cell phone ban were augmented with other prohibitions. Water bottles, for example, and eventually *The New York Times* and other newspapers became forbidden items, the former because they might contain explosives, the latter because they might contain explosive headlines about the case that could be glimpsed by jurors, who were not supposed to know that Ghailani had been tortured or held at Guantánamo, or that he had worked as Bin Laden's cook and bodyguard.

Stripped of their star witness, prosecutors turned to the evidence before them—the detonator for the bomb found in Ghailani's room, the fragments of explosives among his belongings, and Ghailani's presence at the bomb-making site. Ghailani, they told the jury, had been a part of the plot, had procured the truck and explosives knowing how they would be used, and had fled the country right after the attack, in what they argued could only be understood as a sign of guilt. They alluded to Bin Laden, to Al Qaeda, and to the attacks of 9/11 at every opportunity. The defense didn't dispute the evidence, but it argued that the government had the context all wrong. In "Ahmed's world," Quijano told the jury, brokering deals to buy a truck and some gas cylinders and receiving a commission in return, as Ghailani had done, was just business as usual in Kariakoo, the bustling market section of Dar es Salaam where Ghailani had allegedly arranged the fateful deal. In such a place, "Why would anyone question buying anything?" Quijano asked. "It's not like you're buying a gun. You're buying commercial items in a commercial temple."

The trial yielded at least one pleasant surprise, at least for the jurors: it did not take anywhere near the five months Kaplan had told them to expect. The judge kept the proceedings lean, pushing the lawyers to be efficient in their questioning of the witnesses and helping the pace along with his own questions when the testimony seemed to drag. By November 9, only four weeks into the trial, both sides had rested.

During their deliberations, the jury queried Kaplan about his "ostrich instruction," in which he had explained the legal concept of "conscious avoidance," informing the jury that consciously avoiding knowledge is tantamount to having it—so that if, say, you are asked to buy a truck and some gas cylinders for people you have reason to believe are planning a terrorist attack, then legally speaking, you know what they are up to even if you don't ask and they don't

tell. They sent him pointed legal questions whose sophistication he praised. They deadlocked long and hard enough for one juror to send a note to Kaplan saying, "At this point am secure and I have come to my conclusion but it doesn't agreed with the rest of the juror. My conclusion it not going to change. I feel am been attack for my conclusion. Therefore am asking you if there is any way I can be excuse or exchange for an alternate juror." But after five days, the jury signaled that it had reached a verdict.

Within fifteen minutes of the announcement, the courtroom had filled up with reporters, lawyers, and onlookers. At the back of the room was David Raskin, the man expected to be the lead prosecutor in the 9/11 trial should it ever come to federal court. Raskin, his arms folded, had been thinking about how to best empower the federal courts in the post-9/11 era and had not only been part of the Moussaoui prosecution team but had worked with Matt Olsen on the task force that was trying to ferret out those cases suitable for military commissions and those for federal courts. Like most people in the room, he had little reason to doubt what was coming—namely, a conviction for Ghailani. Terrorism cases tried in the federal courts had resulted in convictions at a rate bordering on 91 percent; for those accused of activities resulting in someone's death, the conviction rate was 100 percent.

It was late in the day when the jury filed in, crossed the courtroom, which was lined by US marshals, and took their seats. Ghailani was being tried on 285 charges, and the courtroom deputy could ask about guilt or innocence on each individually. Kaplan warned that no one could enter or leave the room once the proceedings began. The sun was already setting.

Kaplan took a look at the charge sheet, on which the jury checks off guilty or innocent for each charge. He took a second look and passed the paper on to his deputy. "How do you find the defendant on Count One?" the deputy asked the jury.

"Not guilty," came the answer from the jury foreman.

The courtroom was silent. In the hush, the clerk asked, "How do you find the defendant on Count Two?"

"Not guilty."

Suddenly, papers were rustling throughout the viewing gallery. Confusion and disbelief appeared on the faces of the lawyers and the marshals and the FBI agents and the reporters and the witnesses.

Count Three?

Not guilty.

Count Four?

Not guilty.

At the defense table, Quijano's young associate, Anna Sideris, placed her arm over the shoulder of the defendant, who was standing to hear the verdict, dressed again in his blue sweater and tie. David Raskin stood in surprised silence at the back of the room.

Count Five?

Guilty.

Reporters and lawyers scanned their notes. What was Count Five again? A whisper went through the crowd. The *New York Times* reporter, Ben Weiser, often the first to know the details of a case, passed the news down the line: conspiring to destroy US property and buildings—to many ears, the least harmful-sounding of the accusations against the defendant. It seemed possible that the jury had bought the defense's story and believed that Ghailani had neither known nor consciously avoided knowing what his customers had in mind for the items he bought. Raskin felt relief—he had put years of work into terrorism trials, including the early stages of this one.

The clerk then asked for one decision for counts 6 to 285, including the 224 counts for those whose deaths were caused by the bombings.

Not guilty.

The stunned courtroom sat still. How was it possible that a jury sitting just a few blocks from the World Trade Center site, having heard testimony about a crime for which people had already been

convicted—in the summer before 9/11—and in a country where two-bit terrorists were convicted as a matter of course and murdering terrorists always were: How was it possible that a jury in such a case could vote for acquittal on 284 out of 285 counts?

The prosecution's prediction that the case was nearly impossible to try successfully without Abebe's testimony might have been correct. Or maybe it was the sudden discovery of the detonator only after Ghailani's room had originally been searched that swayed the jury. Or perhaps Quijano had effectively convinced the jury that Ghailani was only a "kid from Kariakoo" trying to make a buck and unaware of what his customers were up to, or a young innocent trying to please older men whose motives he had no reason to know. Or possibly the jury, despite Kaplan's careful instruction, just didn't accept the concept of conscious avoidance. The jury members' reasoning remained mysterious. They went home without explaining themselves.

What was clear was that the civilian courts, the ones guided by the Constitution and all its guarantees, had done exactly what they were supposed to do: heard evidence and argument, turned the question over to a jury, which deliberated with serious concern for the legal issues, and yielded a verdict reflecting that seriousness. "This case should put to rest any unfounded fears that our federal justice system cannot conduct fair, safe, and effective trials in terrorism cases," said the ACLU's Hina Shamsi. "We should be proud of a system that isn't set up to simply rubberstamp the government's case."

Two months later, when he sentenced Ghailani to life in prison without parole, Kaplan defended the system against a different fear: that it was too lenient. In his sentencing remarks, he tried to counter the notion that the court had gone easy on a terrible man because he had been tortured. "Whatever Mr. Ghailani suffered at the hands of the CIA and others in our government," he said, "and however unpleasant the conditions of his confinement, the impact on him pales in comparison to the suffering and the horror that he and his confederates caused. For every hour of pain and discomfort that he suffered, he caused a thousand-fold more pain and suffering to entirely innocent people."

Still, Kaplan had done what no judge had yet been willing to do in the war on terror: confront torture as a legal issue in court proceedings. A trial in US federal court could not admit evidence elicited through torture. But the trial *could* take place. Kaplan had surmounted the hurdles that supporters of the military commissions had worried about. So, too, had he stood up for the criminal justice system and its judges. Unlike the judges in countless cases since 9/11, he did not defer to the government's claims that national security required changes to the rules of evidence, or to the procedures for handling classified materials. Instead, he had overseen an efficient, evidence-based trial without compromising the Constitution and due process, even at the risk of jeopardizing the government's victory. His rulings stood alone in the annals of justice after 9/11.

But the criminal justice system had succeeded in part by acquitting Ghailani, an accused terrorist, on the vast majority of counts. This did not bode well for an administration that wished to put torture in the rearview mirror—here was a case that showed that the issue would not simply disappear. The prosecution had clearly been hobbled by Kaplan's ruling, and the result—a meager single conviction on a crime against property—was little better than an outright acquittal, at least from the perspective of politicians and pundits responsive to a public still smarting from the attacks nearly a decade earlier. In this respect, the court's victory was also a defeat, for it gave ammunition to those who believed that the civilian courtroom might not be the proper venue for a nation to seek its vengeance.

Those politicians and pundits did not lose any time using that ammunition. "This is a tragic wake-up call to the Obama administration to immediately abandon its ill-advised plan to try Guantanamo terrorists . . . in federal civilian courts," and, as such, demanded an immediate end to federal prosecutions of Guantánamo detainees, including Khalid Shaikh Mohammed, Congressman Peter King (R-NY) said in a statement issued the day after the verdict. King's

colleague Pete Hoekstra (R-MI) agreed. "We must treat them as wartime enemies and try them in military commissions," he argued. "This case was supposed to be the easy one, and the Obama administration failed." And Liz Cheney, chair of Keep America Safe, added her voice, which sounded a lot like her father's, to the chorus: "We urge the president: End this reckless experiment. Reverse course. Use the military commissions at Guantanamo. . . . And, above all, accept the fact that we are at war." Whatever headway Holder had intended to make via the Ghailani trial, his plan had faltered.

CHAPTER 15

Losing Ground

Eric Holder's November 2009 announcement that the government would try Khalid Shaikh Mohammed (KSM) in New York City had sparked an immediate outcry from business and community leaders in lower Manhattan, who worried that the trial would be too disruptive, or even too dangerous, to hold in their neighborhood. They were joined in opposition by their representatives in New York's legislature and then, at the end of January 2010, by Mayor Michael Bloomberg, who had initially backed Holder. Within hours, both of New York's senators had withdrawn their support, and the next day the White House announced that the Moynihan courthouse would not be the venue for the trial.

If he was abandoning the plan of holding the trial in Manhattan, Holder was still determined to try KSM and the four other 9/11 conspirators in civilian court. Yet as he scouted for other possible venues, Congress was debating the National Defense Authorization Act (NDAA), the massive bill it passes every year to fund the armed services. Inserted into its 609 pages were three paragraphs designed

CHAPTER 18

The Ever-Elusive Pendulum Swing

On September 25, 2014, President Obama announced the resignation of Attorney General Eric Holder, pending the confirmation of his yet-to-be-named replacement. Both men gave the kind of anodyne speeches expected at such events. The president lauded Holder's accomplishments in his nearly six years in office. Each made warm reference to the other's family, expressed gratitude for his hard work, and offered best wishes for the future. Holder just barely brushed against the problem that had dogged him from his first day in office: the ongoing failure to bring the 9/11 conspirators to justice. "We have kept faith with our belief in the power of the greatest judicial system the world has ever known to fairly and effectively adjudicate any cases that are brought before it," he said, "including those that involve the security of the nation that we both love so dearly."

A year earlier, however, he had been less reticent about the gap between his belief in that power and his ability to exercise it. It was the fourth anniversary of the announcement of his ill-fated decision

to try Khalid Shaikh Mohammed and his codefendants in civilian court, and a reporter asked Holder to comment on the occasion. "I was right," Holder said. "I think that the facts and events that occurred since that date demonstrate that." Politicians, with their dire warnings of $200 million trials and disruptions in lower Manhattan, had prevented him from going forward with a case he was sure he could win. It was, Holder said, an "example of what happens when politics gets into matters that ought to simply be decided by lawyers and by national security experts." Had they been left in charge, he declared, "the defendants would be on death row as we speak."

Whether his confidence was justified, Holder's negative view of the military commissions was indisputable. While five defendants had pleaded guilty during the Obama years, not a single trial had been brought to completion since he had taken office. In fact, no trial had even begun. Questions about hearsay and evidence elicited through torture, obscured by the fog of war, or otherwise tainted by activity of intelligence agents continued to dog attempts to move beyond pretrial maneuvering, sometimes in unexpected ways. The FBI was caught trying to turn a defense security officer into an informant. Ramzi bin al-Shibh complained to his judge that the interpreter he'd been assigned "was working at the black site" where he'd been held, so he was reluctant to trust him. And in perhaps the most bizarre twist, a white-noise generator used at the judge's discretion to mask argument that might include classified material mysteriously turned on during one of the countless pretrial hearings for the 9/11 conspirators, leaving spectators unable to hear. The judge in the case was rankled when he discovered that the CIA, which was monitoring the proceedings, had installed its own switch, which it could flip on if agents thought testimony was straying into dangerous territory.

If progress was slow to the point of being imperceptible, an October 2012 decision by the DC Circuit Court threatened to bring it entirely to a standstill. The ruling came in the case of Salim Hamdan, the same detainee whose case had led the Supreme Court to invalidate the military commissions in 2006. Congress had responded

to this decision with a new Military Commissions Act, and Hamdan had been the first defendant tried under the new law. He was convicted on the charge of providing material support to terrorism, sentenced to five and a half years, and upon completing the sentence in 2008 had been returned to Yemen. But his lawyers continued to challenge his conviction even after his release. Only war crimes could come before a military commission, they argued, and material support hadn't been a war crime until the 2006 MCA had made it one. Since Hamdan's support for Al Qaeda had come long before 2006, he had committed the wrong kind of crime for a military tribunal to charge or try him for, and thus, they argued, his conviction should be overturned.

The DC Circuit Court had not proved a friendly venue for Guantánamo prisoners, commonly rejecting habeas appeals, but it agreed with Hamdan and threw out his conviction. Immediately, other defense attorneys began to file motions to overturn the material support convictions of their Guantánamo clients. So, too, did they begin to challenge the conspiracy charge. Michel Paradis, the lawyer for one defendant, Ali al Bahlul, alleged to be an Al Qaeda public relations director, argued successfully that the conspiracy for which his client had been convicted had also not been a war crime when he committed it. By the summer of 2015, four of the eight convictions had been overturned. The military commissions were not only failing to make forward progress; they appeared to be on the verge of moving backward.

IN THE FEDERAL COURT SYSTEM, however, momentum seemed to be gathering. In March 2014 Bin Laden's son-in-law Sulaiman Abu Ghaith had been convicted in the Southern District of New York on charges of conspiracy and material support and sentenced to life in prison. Two months later, after a long extradition battle, Mostafa Kamel Mostafa, also known as Abu Hamza al-Masri, was tried, convicted of terrorism charges, and sentenced to life without parole.

These were legacy cases, long-delayed trials for crimes related to 9/11. But more recent cases were also coming into the criminal justice system under the direction of the National Security Division, now headed by John Carlin. Carlin was one of an emerging group of professionals working at the intersection of law enforcement, national security, and intelligence. He was a protégé of his predecessor at the NSD, Lisa Monaco, who was now directing counterterrorism efforts at the White House, and his roommate at Harvard Law School had been Rajesh De, now the general counsel of the NSA.

Under Carlin's leadership, the new cases, long in the works, proceeded with little drama and much efficiency but with Washington in more control of cases than in pre-9/11 times. The three men who had plotted to explode bombs in the New York subway were already serving their prison sentences. And two foreigners captured overseas and tied to terrorist groups, who in the past might have been brought to Guantánamo, had instead been taken into civilian custody. Ahmed Abdulkadir Warsame, a Somali national accused of being a military commander for the terrorist group Al Shabab, was captured by Americans en route from Yemen to Somalia in April 2011. Over objections from members of Congress, he was given his Miranda warning and indicted by a grand jury, and in December he pleaded guilty in the Southern District of New York. His plea agreement was sealed but was widely reported to have included a promise of cooperation with authorities. To date, there has been no public notice of any sentencing. Ahmed Abu Khattala, a Libyan member of the terrorist group Ansar al-Shariah, was captured by US Special Forces in June 2014 and indicted in October 2014 in the DC District Court. As of November 2015, he was awaiting trial at the Alexandria Detention Center.

Civilian authorities had arrested and prosecuted both men for criminal actions, but that didn't mean the military and intelligence agencies lost their opportunity to question them. Prior to entering the custody of law enforcement officials, Warsame and Khattala were questioned by the High-Value Interrogation Team (HIG),

formed at the recommendation of a task force appointed by Obama to examine policies about treatment of captives. The interrogation, carried out aboard US naval vessels, was extensive; in Warsame's case, it lasted for two months, in Khattala's two weeks. Once the intelligence team was finished with them, the prisoners were read their rights, then questioned anew by the FBI, which turned over the results to the grand jury that then indicted the men.

The men were not held indefinitely, they were not tortured, and the intelligence and criminal interrogations remained separate. At least in this case, old-fashioned justice seemed to be working even in an age of terror, just as it did when the United States took into custody a twenty-nine-year-old US citizen, Mohanad Mahmoud Al Farekh. His name had once been on the "kill list," but in the last days of his tenure at the DOJ, according to Mark Mazzetti and Eric Schmitt of *The New York Times*, Holder and other Justice Department lawyers had persuaded the president to capture and try him rather than kill him by drone strike. In May 2015 material support charges were filed against Al Farekh in federal court in Brooklyn; as of September 2015, he awaits a trial date.

No crime has demonstrated the ability of the federal courts to handle terrorism cases as convincingly as the one committed by Dzhokhar and Tamerlan Tsarnaev, American citizens who in April 2013 set off bombs at the finish line of the Boston Marathon, killing three people and wounding 264 more, many of them grievously. Tamerlan was killed in the manhunt that followed, but Dzhokhar was captured and taken into custody. He was held in federal prison, tried, and sentenced to death just two years after he committed his crime. Neither abuse in custody nor illegal interrogation practices nor undisclosed surveillance techniques had hampered the trial. Prosecutors, defense attorneys, the jury, and the judge were able to stay focused on the facts of the case and the applicable laws. The brisk efficiency of the Tsarnaev trial stood out mostly for its contrast with the horror of the crimes—and for its vindication of the criminal justice system as a venue for terrorism trials. Even as the prosecution

of Mohammed and his codefendants remained stuck in the military commissions labyrinth, the worst terrorist attack in the United States since 9/11 was prosecuted in civilian court and went off without a hitch.

ALTHOUGH THE OBAMA ADMINISTRATION TENTATIVELY turned toward the courts to handle terrorism cases, it continued some of the rogue policies of the past. Notably, the White House abandoned its early pledge to restore transparency to the conduct of the war on terror. It did release documents related to Bush-era torture, but its own policies often remained shrouded, and it made great efforts to keep them that way. FOIA requests, such as those filed by the ACLU for information on surveillance and targeted killings, were routinely denied, and the photos of torture that the ACLU had sought for years had still not been released. Moreover, leakers were ferreted out and punished without hesitation. Between 2010 and 2015, seven people were indicted for leaking government secrets, six of whom were tried, convicted, and sentenced in civilian courts—to terms as long as three and a half years. Edward Snowden is the seventh. An eighth leaker—army private Chelsea Manning—was convicted by court-martial and sentenced to thirty-five years in military prison.

Prior to 2010, there had been only three such convictions in the nation's history. One, a 1984 conviction of a naval intelligence civilian analyst who had provided classified information to the press, resulted in a twenty-four-month sentence that was overturned years later by President Clinton. Another, a leaker convicted during the Bush years, led to a sentence of ten months at a halfway house and community service. In perhaps the most high-profile such case, the prosecution of Daniel Ellsberg for releasing the Pentagon Papers, the charges had been dropped. In this respect, Obama once again seemed unashamed of his excesses.

But the president did not have full control over the release of information about the war on terror. At the end of 2014, the Senate

Select Committee on Intelligence released the results of a five-year investigation into the enhanced interrogation program. Neither the White House nor the CIA was keen on releasing the report; they had held it up for eight months and insisted on redactions that in some places made the public version (a six-hundred-page executive summary of a six-thousand-page report) nearly unintelligible. It also spawned ferocious battles between the committee—especially its chair, Dianne Feinstein—and the CIA, with each side lodging charges of spying and theft against the other.

When it finally came out, in December 2014, the report was unstinting in its depiction of the CIA's practices. From Senator Feinstein's introductory remark that "it is my personal conclusion that, under any common meaning of the term, CIA detainees were tortured" in the CIA's "enhanced interrogation" program to its conclusion that the program "was not an effective means of acquiring intelligence or gaining cooperation from detainees," the report was comprehensive and devastating. Issued as the *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, it rapidly became known as the Senate torture report. Based on millions of documents, including email exchanges that detailed the role of various officials and government agencies in the program, the report introduced terms like "rectal feeding" and "mock execution" to the American public. It provided details about the treatment of specific detainees in CIA custody that had theretofore been unknown, including a cable suggesting that whatever was inflicted upon Abu Zubaydah, "we need to get reasonable assurances that [he] will remain in isolation and incommunicado for the remainder of his life." The report left no doubt that the CIA had systematically lied to both the president and Congress about its actions. And it made clear that the Bush administration had told its own lies, and spun its own version of the truth, in order to mislead the American people about the depth and depravity of the program, which had been "brutal and far worse" than the CIA had previously admitted.

The Senate torture report also left no doubt that whatever intelligence torture might have produced could have been (and often was) elicited in other ways and with much greater accuracy, since people being tortured will often say whatever they think their interrogators want to hear. Even the CIA knew this, although it was reluctant to acknowledge or act on it. According to Senator Feinstein, "Sometimes, the CIA knew detainees were lying. Other times, the CIA acted on false information, diverting resources and leading officers or contractors to falsely believe they were acquiring unique or actionable intelligence and that its interrogations were working when they were not." But, at least according to the Senate torture report, at all times the CIA acted to avoid oversight. The program it worked so hard to preserve, the report concluded, had "damaged the United States' standing in the world" and was a "stain in our history that must never be allowed to happen again."

What the torture report failed to do was name names. Countries that hosted black sites and individuals who participated in the torture were given pseudonyms in the full version, but the White House and CIA balked at releasing the executive summary with those fictitious names intact. In the final version, the countries' aliases are preserved, but the torturers' are redacted. The White House claimed this was to prevent anyone from figuring out the real names of the participants, but with all names blacked out, as Andrea Prasow of Human Rights Watch put it, "You don't know if the same person who got memos saying this isn't working later said everything's fine, this guy's talking and then decided to up the severity of the abuse." But it wasn't just narrative coherence that suffered from the redactions. As Josh Gerstein wrote in *Politico,* "the result is a report that states what happened but defies many attempts to establish a chain of responsibility." Which might have been exactly the point: an administration that had been from its first days eager to leave the past behind, that had never sought to prosecute interrogators who tortured prisoners or lawyers who tortured the law, wasn't about to allow the release of a public document that might identify those who could be held accountable.

FOUR MONTHS AFTER THE RELEASE of the Senate torture report, another extensive document about government wrongdoing came into public view, this one conducted inside the executive branch rather than Congress. In April 2015 the Department of Justice made public the *Report on the President's Surveillance Program,* which had been compiled by the inspectors general of five agencies, including the CIA, the NSA, and the Department of Justice. A thirty-eight-page version of the report, released in 2009, had already alerted citizens to the existence of Stellar Wind and the surveillance programs launched under it, and, of course, the Snowden disclosures had filled in the details of domestic spying in the two years prior to the release of the full report. But the full 407-page DOJ part of the report was filled with new revelations, not the least of which was the conclusion that the surveillance programs, like torture, were largely ineffective at preventing terrorist attacks. One FBI official, responding to NSA complaints that they weren't hearing enough about the results of the information they were passing along, explained to the inspectors that he was receiving "little feedback from field offices other than, 'You're sending us garbage.'"

The DOJ inspector general's report, like the Senate report, also detailed the efforts made to evade and subvert the law in order to carry out the program. And it identified people in the government, such as Jack Goldsmith and James Comey, who had noted the program's illegality and objected to it. But as the report detailed, much of this dissent was squelched, sometimes openly, as James Baker had discovered when he was still the head of the Office of Intelligence and Policy Review. As he was reviewing a request for a FISA warrant, he began to wonder if the information leading to the request had come from a FISA-authorized wiretap, as it should have. The only way

to answer his question was to let him in on the secret Stellar Wind program and the John Yoo memo that had declared it legal. Baker disagreed with Yoo's reasoning and pressed the Justice Department to inform the FISA Court of the program and the memo. Attorney General Ashcroft not only refused; he forbade Baker, in writing, to inform them himself.

According to the report, Baker made at least one other attempt to interfere with a process that he sensed was operating outside the rules. He went to the Justice Department's Professional Responsibility Advisory Office (PRAO) to get an opinion on the ethics of the situation. The head of PRAO agreed with Baker that it was his duty to inform the FISA Court about Stellar Wind, that indeed he should not sign the pending FISA application unless the FISA Court knew the whole story. At the White House, Addington declared that Baker should be "fired for insubordination," ordered Baker off the job, and directed his fellow Justice Department lawyer Daniel Levin to sign the application and present it to the FISA Court judge. Levin complied, but not before Baker called the judge to tell him what was going on. The judge approved the application anyway. Baker remained head of the OIPR, but eventually his department and its portfolio disappeared into the newly formed National Security Division. Baker might or might not have intended to speak over the inspectors general's heads and to history. Either way, their report surely vindicated him. It is impossible to read the report and not conclude that the surveillance programs skirted the law and damaged the relationship between citizens and their government—and for no discernible benefit.

NEITHER THE SENATE'S TORTURE REPORT nor the inspectors general's report on Stellar Wind called for prosecution or other sanctions. Most of those who designed and implemented the policies continue to thrive in their professional lives. But the reports did shift the momentum within the institutions of government,

especially in the courts, where the legacy of the expansive security state was bound to have an impact. It has been left to organizations like the ACLU and the Center for Constitutional Rights (CCR) to seek accountability—if in no other way than to make sure that information illegally obtained or withheld cannot be used to convict terrorists.

But in early 2014 it was a federal prosecutor, and not lawyers from the ACLU or CCR, who informed the Eastern District of New York court of government misconduct "that has changed the landscape" of a terrorism case. As Loretta Lynch, who a year later would be appointed attorney general, told Judge John Gleeson, the government's charges against Albanian architect Agron Hasbajrami, who had pleaded guilty to one count of material support in April 2012, had depended in part on information acquired through surveillance authorized by Section 702 of the FISA Amendments Act—a fact of which Hasbajrami hadn't been informed until two years after his guilty plea. Hasbajrami's was one of the cases that were being revisited in the wake of Verrilli's discovery that defendants who were discovered via 702 intercepts had not actually been informed of that fact.

Here was an opportunity for the ACLU to make the government pay a price for violating its own laws. And Hasbajrami seemed determined to seek the maximum redress. He didn't want only to challenge the use of the 702 materials. He wanted to withdraw his plea and start all over again with the prospect, in his mind, of a dismissal or even an acquittal. His lawyers advised against this. When he announced the sentence in 2012, Judge Gleeson had complained bitterly. "If I were the prosecutor, I wouldn't have given you this deal," he said, making it clear that he would have preferred to mete out a more severe punishment than the fifteen years he'd given Hasbajrami. And as Hasbajrami's lawyers pointed out to him, the original charges carried potential sentences totaling sixty years.

Still, their client wanted to take the gamble. The ACLU was following the case with interest. It had long wanted an opportunity to

challenge the constitutionality of the surveillance laws in court. It had come close in its case against the NSA, receiving standing in the district court, only to have it overturned by the circuit court. "We were looking for any door or window" into the Fourth Amendment questions, Ben Wizner once told me, and the Hasbajrami case seemed to provide one.

Hasbajrami already had a crack team of defense lawyers, all experienced at terrorism cases, and ambitious enough to want to argue any Supreme Court case that might result from the retrial. But the ACLU had the expertise on the Fourth Amendment issue. It entered the case with an amicus brief and a promise that its lawyers would participate in arguing the constitutional question in court.

That question came up almost immediately. Gleeson granted Hasbajrami's plea withdrawal motion in October, noting that the failure of the prosecution to notify the defendant of the source of the evidence against him had resulted in "the overwhelming—and false—impression that no FAA-obtained information figured in the government's case." In January 2015 he heard arguments about the Section 702 evidence. Hasbajrami's lawyers wanted the evidence excluded on the grounds that it was not collected in accordance with 702, and even if it had been collected in accordance with Section 702, it still was not lawful because Section 702 authorized surveillance "without a determination of probable cause," without "any particularity regarding the place, time, person or thing that can be searched," and with minimal FISA Court oversight, and was therefore unconstitutional. So the evidence was "the fruit of the poisonous tree," said lead lawyer Michael Bachrach. Also, like evidence derived from torture, he argued, it should be considered the product of "outrageous government conduct" and thus ruled ineligible as evidence.

At the end of his argument, Bachrach drew on the film *American Sniper*, which had just opened, for a striking metaphor about the true nature of Section 702: "Instead of using a sniper's rifle, [the FAA] uses a machine gun. Instead of using a scope, it puts on a blindfold.

And instead of targeting foreign persons abroad, it turns around with the machine gun and just sprays across at anything it can hit on U.S. soil. That is not constitutional, Your Honor." Even if he'd seen the movie, Gleeson was not persuaded. He denied the defense's motion seeking suppression of the 702 materials. He gave no reason for his ruling, promising a written opinion—which, as of November 2015, he still had not presented. But when Hasbajrami ultimately decided to plead guilty again, Gleeson consented and added one year to the sentence. Both parties agreed that the appeal would be limited to the issue of the 702 materials and the sentence itself.

The Hasbajrami appeal wasn't the ACLU's only active challenge to the FAA. In March 2015 it filed a complaint on behalf of the Wikimedia Foundation. The subject was new—UPSTREAM, a program exposed by Snowden that intercepts text-based communications while in transit. The argument was by now familiar: FAA-authorized mass surveillance—which allows the NSA to read the content as well as gather the metadata of communications of any conversation involving a foreign address (or just a switch or server in a foreign country), even those with an American participant—would chill expression, in this case, the debates for which the foundation's flagship project, Wikipedia, was famous and on which it thrived. It thus violated the First and Fourth Amendments.

As that case began its journey through the courts, another ACLU case reached a crucial milepost. On May 7, 2015, the Second Circuit Court of Appeals announced its decision in *ACLU v. Clapper*, the case built on the organization's relationship with Verizon. The decision was a bombshell, one that marked a turning point in the fourteen-year conflict between security and justice. In an opinion written by Judge Gerard Lynch, it ruled that the bulk collection of telephone records exceeded the intent of Congress when it enacted Section 215 of the Patriot Act—in other words, the program was illegal.

At issue, in particular, was the government's definition of the term *relevance*. As Lynch explained, the creation of "a vast trove

of records . . . to be held in reserve in a data bank, to be searched if and when at some hypothetical future time the records might become relevant," relied on a definition of *relevant* bounded by neither "the facts of the investigation or by a finite time limitation." That definition only works if "there is only one enormous 'anti-terrorism' investigation, and that any records that might ever be of use in developing any aspect of that investigation are relevant to the overall counterterrorism effort." And surely if Congress intended to make the "momentous decision" to define relevance in a way that would result in "an unprecedented contraction of the privacy expectations of all Americans," Lynch wrote, "we would expect such a momentous decision to be preceded by substantial debate and expressed in unmistakable language."

But Congress had held no such debate and had written no such language into the law; indeed, as Lynch pointed out, even though the data collection had been going on since at lest 2006, most representatives and senators didn't even know about it at the time they passed the Patriot Act, so they couldn't have debated, let alone "ratified a program of which [they] were not aware." Congress had meant to authorize the collection of specific data related to specific investigations; the NSA had clearly exceeded its authority.

The circuit court judges did not rule on the Fourth Amendment question; under the doctrine of constitutional avoidance, once it finds a violation of the law, a court is not supposed to go on to address larger constitutional issues. But Section 215 surely raised Fourth Amendment questions. Because "the seriousness of the constitutional concerns . . . has some bearing on what we hold today, and on the consequences of that holding," Lynch did not shy away from those concerns—or from suggesting a way to resolve them. "Congress is better positioned than the courts to understand and balance the intricacies and competing concerns involved in protecting our national security," he wrote, "and to pass judgment on the value of the telephone metadata program." Such a judgment "would carry weight" with the courts, and so, Lynch suggested, Congress

should take up the question directly and decide just how far the expectation of privacy should be contracted in the fight against terror.

Congress, as Lynch noted, would have the opportunity to do that very soon. The Patriot Act was set to expire in just a few weeks, and there was already a replacement bill pending, the USA Freedom Act (like the Patriot Act, a bulky acronym, standing for "Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet-collection and Online Monitoring Act"). Perhaps Congress would vote to explicitly allow a program like the one under discussion, at which point "there will be time to address appellants' constitutional issues." Or perhaps it would vote to end dragnet collection. Either way, with the decision so close at hand, the appeals court was not going to grant an injunction against metadata collection but, rather, would leave that ruling to the district court, which would have a different legal landscape in which to make its decision.

In the meantime, the monitoring of every phone call, every day, indefinitely would continue at least for a few weeks. But on June 1 the Patriot Act would expire, and unless Congress voted to extend or replace it, metadata collection would end. Throughout May, Justice Department officials, including James Comey and the recently confirmed Loretta Lynch, urged lawmakers to find a way to extend the program, lest the government suffer "a serious lapse in our ability to protect the American people." But members of Congress also heard from another voice within the DOJ: the FBI's inspector general, who had been investigating Section 215 surveillance. The report reiterated the conclusions that the President's Review Board and the PCLOB had each made more than a year earlier. According to the FBI IG's report, issued in May 2015, FBI officials had been "unable to identify any major case developments that resulted from use of the records obtained through use of Section 215 orders." Information obtained through 215 surveillance had been useful to corroborate facts and discover new leads, but not to develop existing leads or prevent attacks.

By the end of May, it was clear that Congress was prepared to

let the Patriot Act's Section 215 die by passing the Freedom Act, which it did on June 2. The new law put an end to the bulk collection of metadata collection, at least by the government. Telecommunications companies would still have to hold on to data for eighteen months, which the Federal Communications Commission already required, and the government would need to get an individualized warrant to search that data. Information about citizens' calling and emailing and browsing would still be amassed, but by corporations, which could use it to annoy them with advertisements, in contrast to the government, which could arrest them. The Freedom Act also enacted other reforms, notably that the FISA Court would have to publish its significant decisions and that a "special advocate" would participate in FISA Court proceedings, representing (without their knowing it, of course) the proposed targets of surveillance.

The ACLU opposed the new law on the grounds that it did not force investigators to be specific enough about their targets, and it asked for an injunction against a short-term continuation of the Section 215 program that Congress had allowed. But still, the outcome, first in the courts and then in Congress, was encouraging. It had taken persistence, the slow turning of public opinion, the work of Congress in its oversight capacity, and the actions of one renegade NSA contractor, but after fourteen years of battling, and mostly losing, the organization standing for the country's allegiance to the constitution could finally claim a victory.

It was possible that the tide was turning, that the wave of fear that had swamped civil liberties was finally beginning to recede.

EPILOGUE

Whether the momentum will continue, whether the attempt to preserve America will also preserve Americans' values and their rights under the Constitution, remains to be seen. As Barack Obama's presidency draws to a close, the flames of the counterterrorism frenzy that were ignited fifteen years ago have begun to die down. Neither civil liberties nor the rule of law was consumed. Instead, what lie in the ashes are the most egregious violations of them: torture, mass surveillance, indefinite detention, extrajudicial trials, and indiscriminate drone killings, all of which, after bruising battles, have been reined in, if not abolished.

This might not have been the case had the handful of officials who first objected to these policies at the end of George Bush's first term not worked hard and tried, quietly and without fanfare, to change them. Nor would it have happened if the Obama administration had not been determined to return to the federal courts the jurisdiction that military tribunals and secret law had taken away, and to commission and make public reports, like the inspectors general's account

32 **"the government's interest against":** John Yoo to David Kris, "RE: Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the 'Purpose' Standard for Searches," U.S. Department of Justice, Office of Legal Counsel, September 25, 2001, 3, http://nsarchive.gwu.edu/torturingdemocracy/documents/20010925.pdf.

32 **his undergraduate thesis:** Paras D. Bhayani, "Ex–Bush Official's Thesis Reflects Current Views," *Harvard Crimson*, February 13, 2006.

33 **"criminal investigation constitutes":** Yoo to Kris, September 25, 2001.

34 **"A warrantless search":** Yoo was quoting from the Supreme Court decision in *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (internal quotations omitted).

36 **"measures that would . . . lead":** Laura W. Murphy and Gregory T. Nojeim, "Letter to the Senate Urging Rejection on the Final Version of the USA Patriot Act," October 23, 2001, https://www.aclu.org/letter/letter-senate-urging-rejection-final-version-usa-patriot-act.

36 **speech delivered in Cleveland:** Anthony Romero, "In Defense of Liberty at a Time of National Emergency," City Club of Cleveland, OH, copy in author's possession.

37 **"allows FISA to be used *primarily*":** John Ashcroft to FBI Director, Criminal Division Assistant Attorney General, Counsel for Intelligence Policy, and United States Attorneys, "Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI," U.S. Department of Justice, Office of the Attorney General, March 6, 2002, http://fas.org/irp/agency/doj/fisa/ag030602.html.

38 **John Yoo was writing another memo:** John C. Yoo, "Memorandum for the Attorney General," November 2, 2001, http://www.justice.gov/sites/default/files/olc/legacy/2011/03/25/johnyoo-memo-for-ag.pdf.

38 **top secret edict:** "A Review of the Department of Justice's Involvement with the President's Surveillance Program," Office of the Inspector General, U.S. Department of Justice, July 2009, 1, https://oig.justice.gov/special/s0907.pdf.

39 **Hayden's reservations:** Ibid., 14.

CHAPTER 3: A PAWN IN THEIR GAME

43 **Frank received an email:** Frank Lindh, interview by author, July 13, 2015.

44 **"an obligation to assist":** "Prepared Statement of John Walker Lindh to the Court," October 4, 2002, US District Court, Eastern District of Virginia, Alexandria, VA, http://news.findlaw.com/hdocs/docs/lindh/lindh100402statment.html.

44 **"All I want to do is talk to you":** Colon Soloway, "'He's Got to Decide If He Wants to Live or Die Here,'" NBCNews, December 6, 2001.

45 **"malnourished and in extremely poor":** Government Discovery Letter #2, cited in "Proffer of Facts in Support of Defendant's Suppression Motions," *USA v. John Phillip Walker Lindh*, 13.

45 **"simple training camp":** John Walker interview, CNN, December 2, 2001.

47 **"You've got to be kidding me":** Jess Bravin, *Terror Courts: Rough Justice at Guantanamo Bay* (New Haven: Yale University Press, 2013), 41.

47 **He was enraged:** Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Anchor, 2009), 82–83.

49 **"He was sleep-deprived, malnourished, hungry and in pain":** Motion to Suppress at 2, *U.S. v. Lindh*, No. 02-37A (E.D. Va. June 13, 2002), 2.

50 **"wasn't going anywhere":** David Kelley, interview by author, December 23, 2014.

50 **bound to elicit sympathy:** See, for example, comments from *Los Angeles Times* readers to "Ascribing Intelligence to John Walker Lindh," *Los Angeles Times*, June 19, 2002, http://articles.latimes.com/2002/jun/10/opinion/le-bec10-1.

52 **"I plead guilty":** Bob Franken and John King, "'I Plead Guilty,' American Taliban Says," CNN, July 17, 2002. See also "Lindh Has Fulfilled Plea Deal, U.S. Says," *Los Angeles Times*, September 28, 2002.

52 **"I have never supported terrorism":** "Prepared Statement of John Walker Lindh to the Court," October 4, 2002, http://news.findlaw.com/cnn/docs/terrorism/lindh100402statment.html.

52 **"almost miraculous":** Frank Lindh interview.

CHAPTER 4: TEARING DOWN THE WALL

55 **David Kris had argued:** *In re All Matters Submitted to Foreign Intelligence Surveillance Court*, 218 F.Supp.2d 611, 620 (FISA Ct. 2002), *Abrogated by In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002), http://fas.org/irp/agency/doj/fisa/fisc051702.html.

56 **"the Court is not persuaded":** Ibid., 623.

56 **"potential matter of life or death":** "Hearing," *In re All Matters*, U.S. Foreign Intelligence Surveillance Court of Review, September 9, 2002, http://fas.org/irp/agency/doj/fisa/hrng090902.htm.

57 **"October Surprise":** Gary Sick, *October Surprise: America's Hostages in Iran and the Election of Ronald Reagan* (New York: Three Rivers Press/Times Books, 1992). See also "Bush Appoints Iran-Contra Figure to Head up Iraq 'Intelligence' Probe," *Democracy Now!*, February 12, 2004; "Ex-judge on Iraq Inquiry 'Involved in Cover-up,'" *Guardian*, February 9, 2004; "The Partisan 'Mastermind' in Charge of Bush's Intel Probe,"

Salon, February 10, 2004. See also Barbara Hoenegger, "October Surprise," *Chicago Tribune*, August 18, 1989, and "The 'Surprise' That Must Be Probed," *Baltimore Sun*, June 26, 1991.

57 **efforts to impeach Bill Clinton:** "The Partisan 'Mastermind' in Charge of Bush's Intel Probe," *Salon*, February 10, 2004. See also David Brock, *Blinded by the Right* (New York: Crown, 2002).

57 **voting to reverse:** For the *North* decision, see *U.S. v. Oliver North*, 910 F.2d 843 (D.C. Cir. 1990).

57 **involved in the Federalist Society:** For a good overview of the history of the Federalist Society, see Steven M. Teles, *The Rise of the Conservative Legal Movement* (Princeton, NJ: Princeton University Press, 2008).

58 **"audacious reinterpretation of FISA":** Brief for the ACLU as Amicus Curiae, *In re Sealed Case*, 310 F.3d 717 (FISC Ct. Rev. 2002), http://fas.org/irp/agency/doj/fisa/091902FISCRbrief.pdf; Brief for the NACDL [National Association of Criminal Defense Lawyers] as Amicus Curiae, ibid.

58 **Ashcroft . . . testimony to Congress:** John Ashcroft, Testimony Before the House Committee on the Judiciary, 107th Cong., September 24, 2001, http://www.justice.gov/archive/ag/testimony/2001/agcrisisremarks9_24.htm.

58 **"accomplish the vital and central purpose":** Theodore Olson, Oral Argument, *In re Sealed Case*, 310 F.3d 717 (FISC Ct. Rev. 2002) (No. 02-001), http://fas.org/irp/agency/doj/fisa/hrng090902.htm.

59 **"dreadful box":** Ibid.

59 **Leahy . . . had written a letter:** Senators Patrick Leahy, Charles Grassley, and Arlen Specter to Judge Colleen Kollar-Kotelly, Senate Judiciary Committee, July 31, 2002, http://fas.org/irp/agency/doj/fisa/leahy073102.html.

59 **"The public needs to know more":** "Dishonesty in the Hunt for Terrorists," *New York Times*, August 26, 2008.

59 **"to fundamentally change FISA":** *The USA PATRIOT Act in Practice: Shedding Light on the FISA Process*, Hearing Before the Committee on the Judiciary in the U.S. Senate, 107th Cong., September 10, 2002, http://fas.org/irp/congress/2002_hr/091002transcript.html. Leahy was particularly incensed over the fact that Kris's brief had cited the senator himself as thinking there was no longer a need for a distinction between "using FISA for a criminal prosecution and using it to collect foreign intelligence." "They are wrong. It is not my belief. When they cite me, they ought to talk to me first."

60 **"What is at stake here really":** Ibid.

61 **register their dismay:** Later in the hearing, Senator Leahy underscored his concern that the changes could erase the safeguards FISA had originally introduced. "I don't want to go back to the days in the past," he said, "when we started going into these investigations because we didn't like somebody's political views or religious views, because that is a sword that can cut too many ways." Ibid.

61 **forceful opinion:** See *In re: Sealed Case*, 310 F.3d 717 (FISC Ct. Rev. 2002), http://news.findlaw.com/hdocs/docs/terrorism/fisa111802opn.pdf.

61 **"Legally, the wall came down":** David Kris, interview by author, February 14, 2013.

61 **Supreme Court turned down:** The ACLU and the National Association of Criminal Defense Lawyers filed a petition of *certiorari* to the Supreme Court asking for a review of the FISCR decision but were denied a hearing without comment.

CHAPTER 5: THE TWILIGHT ZONE

64 **"Your client is no longer here":** Donna Newman, interview by author, May 12, 2014.

64 **Ashcroft news conference:** Attorney General John Ashcroft Regarding the Transfer of Abdullah Al Muhajir (Born Jose Padilla) to the Department of Defense as an Enemy Combatant, June 10, 2002, http://www.justice.gov/archive/ag/speeches/2002/061002agtranscripts.htm.

65 **In January 2002 Yoo had advised the president:** Jay Bybee to John Ashcroft and William Haynes, memo regarding "Application of Treaties and Laws to al Qaeda and Taliban Detainees," January 22, 2002, 6.

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