The Foreign Intelligence Surveillance Act: Law Enforcement's Secret Weapon

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On the sixth floor of the U.S. Justice Department is a secret courtroom. Although this special court, with its own set of rules, has been in existence for 20 years, most Americans have never heard of it. Even most of the lawyers who work at the Justice Department do not know that this court is there, much less what it does. Created in 1978 by the Foreign Intelligence Surveillance Act (FISA), the FISA (rhymes with surprise-yah) court permits the government to conduct electronic surveillance and searches in ways the framers of the Constitution would never have imagined. It authorizes the government to ferret out the most intimate details about its citizens' psychiatric vulnerabilities, including eavesdropping on conversations between psychiatrist and patient. The unchecked power of the government and lack of due process legitimized by this statute are unlike anything else in the American judicial system.

Although the jury never heard the word "FISA," this statute played a major role in what may be the last espionage trial of the Cold War. The defendants, Theresa Squillacote and her husband, Kurt Stand, were convicted of espionage in Alexandria, Virginia's Federal Courthouse on October 23, 1998. They were sentenced on January 22, 1999—Squillacote to 21 years and 10 months, Stand to 17.5 years.

Parents of Karl, 16, and Rosa, 14 (named for Karl Liebknecht and Rosa Luxemburg, founders of the German Communist Party who were killed in an unsuccessful revolt in 1919), the couple had been charged with 25 years of spying—for East Germany, the Soviet Union, Russia, and South Africa. (A friend indicted with them, James Clark, pleaded guilty and received a 12-year sentence.)

Until she impulsively quit her job when her boss resigned in January 1997, Terry Squillacote, 42, had been a Pentagon lawyer in the Acquisition Reform Department. A model government worker, she was presented with a Reinventing Government Award by Vice-President Al Gore in 1996 for her innovative efforts to reform the Defense Department's procurement process. She had received a secret security clearance in April 1992. (Half a century earlier, her mother was involved in the most sensitive national security secret in history. An undergraduate chemistry student of Enrico Fermi at the University of Chicago, she was assigned to the Manhattan Project and helped to develop the casing for the atomic bomb.)

Kurt Stand, 45, who worked for a labor union, developed his political ideology at an early age. His German immigrant parents resisted the rise of Hitler and left for the United States shortly before World War II. Kurt's father enlisted in the U.S. Air Force and fought against Germany. Concerned, after the war, that the new West Germany was too militant and that there were too many former Nazis in its government, Kurt's parents were openly supportive of East Germany. His father was fired from his factory job for his pro-Communist views.

The Federal Bureau of Investigation (FBI) opened its first file on Kurt when, as a student at Stuyvesant High School in New York City, he visited the Soviet Mission to the United Nations to collect information for a research project. When Kurt left the building,

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he was stopped by three FBI agents wanting to know what he was doing there.

While a teenager, he was active in a variety of political causes: the anti-Vietnam War movement, a coalition for better housing for the poor in New York City, the United Farm Workers, the Black Panthers, and the Young Workers Liberation League (affiliated with the Communist Party). At the University of Wisconsin in Milwaukee during the 1970s, he continued his political affiliations. It was there that he met fellow radicals Terry Squillacote and James Clark, whom he subsequently introduced to East German friends. Lothar Ziemer was an East German spy whom Kurt had known through his parents since he was eight years old. Unbeknownst to Kurt, his wife fell in love and embarked upon a 10-year affair with this older man. (It wasn't until the trial that he learned of Terry's profound emotional attachment to the former intelligence agent, now a real estate agent in Berlin.)

Although Terry and Kurt readily admit that they had a long-standing relationship with East German intelligence through Ziemer, they maintain that the information they provided was their own analysis (such as a 1984 paper on Jesse Jackson's Rainbow Coalition). They claim they shared nonclassified information, which is not a crime.

As the result of a discovery made by FBI agent Katharine Alleman, the Bureau (i.e., the FBI) suspected, however, that Squillacote, Stand, and Clark were agents of a foreign power. In purported copies of files of the former East German intelligence service (the HVA) Alleman found the trio's "true name cards," listing aliases for use on false passports. The cards also listed dates that Squillacote, Stand, and Clark had traveled abroad to meet with their East German contacts, as well as money they had received to cover their expenses.

However, by the time the FBI learned that the three had had a connection to East Germany, the Communist country had long ceased to exist. The Soviet Union was similarly defunct. (The government made virtually no mention at trial of the couple's alleged ties to Russia. An FBI agent would ultimately impersonate a South African agent; but there was never a connection to actual South African intelligence.)

A FISA investigation can be triggered only when there is "probable cause to believe that the target of the electronic surveillance is a foreign power or an agent of a foreign power [FISA, § 1805]." That is, the government had to show that Squillacote and Stand were agents of some foreign power as of the very date that the FISA authority was obtained. Apparently finessing this limitation, the government launched its FISA operation in January 1996.

The primary purpose of a FISA electronic surveillance or secret search must be, according to the Act, "to obtain foreign intelligence information [that] cannot reasonably be obtained by normal investigative techniques [FISA, § 1804]." These "normal" criminal investigations are required (under Title III of the 1968 Omnibus Crime Control and Safe Streets Act) to follow rigorous compliance procedures. A judge or magistrate must be convinced there is "probable cause" that a crime has been or is about to be committed before granting a warrant. If the government wants to use the results of its surveillance in a criminal trial, the defense is first entitled to see the government's applications and challenge their validity. The defendant's lawyer can try to convince a judge that there really was no "probable cause"; if that argument is successful, then any evidence the government collected during its surveillance cannot be used against the defendant.

Under FISA, however, these legal protections are nonexistent. The government does not have to show that a target has committed or is about to commit a crime. All that is required to initiate an undercover investigation is a suspicion that someone may be an agent of a foreign power. If the government later decides to make a criminal case based on its FISA surveillance, the defendants and their lawyers are never given the opportunity to learn what it was that convinced the FISA judge to approve the "order" (the FISA term for "warrant") in the first place. One of seven FISA judges (federal district court judges appointed to the FISA court by the Chief Justice of the Supreme Court for a seven-year term) considers the facts as presented only by a government lawyer. When the surveillance is over, no adversarial proceeding is mandated before the FISA judge, or any other judge, to determine if the government really had the right to snoop and tap. No FISA court hearings or rulings are ever made public.

The FISA statute does, however, clearly state that an investigation is not to be an open-ended fishing expedition: "An order issued under this section may approve an electronic surveillance for the period nec-

essary to achieve its purpose, or for ninety days, whichever is less [FISA, § 1805]."

FISA intercepts, like Title III intercepts, are supposed to be minimized. "Minimization," as defined by FISA, is "designed to limit the acquisition, retention, and dissemination of information that is not foreign intelligence information and which relates to United States citizens or permanent resident aliens [Legislative History, P.L. 95–511, Foreign Intelligence Surveillance Act of 1978, p. 3938]." Congress had noted the courts' approval of minimization: "It is . . . obvious that no electronic surveillance can be so conducted that innocent conversations can be totally eliminated [Legislative History P.L. 95–511, p. 3938]." It was the government's obligation, however, to reduce privacy intrusions by disregarding and eliminating information that has nothing to do with foreign intelligence.

Squillacote and Stand's lawyers believe that the FISA secret searches and surveillance directed against their clients were illegal, violating the minimization provisions of FISA as well as the First and Fourth Amendments of the U.S. Constitution. However, their request to U.S. District Court Judge Claude Hilton for an opportunity to view the FISA affidavits, the foundation of the government's case, was denied.

The defense team (which includes former Justice Department attorneys) had received top security clearances. Despite these credentials, the government maintained that its intelligence "sources and methods" would be compromised if defendants' lawyers were allowed to see, for example, the evidence that had convinced the FISA court there was probable cause that the couple were "agents of a foreign power" in late 1995 or early 1996—when the first of an estimated 18 FISA applications were presented to the secret court.

Lawrence Robbins, Squillacote's lead attorney, bristles at the government rationale that allowing access to these documents could provide a road map for spies. "In cases where the lawyers all have security clearances," he contends, "it's indefensible to be refused access to FISA affidavits. The irony is, by the time the case was over, we had been shown by the government vastly more sensitive information than any that could possibly have been in the FISA affidavits."

The district court judge was persuaded, however, by the government's claim that "no court charged with determining the legality of a FISA surveillance has granted discovery of FISA applications and related materials or a hearing to a target"; and that "applications for the surveillances and searches [of Squillacote and Stand] had been approved by eight different FISA Court judges."

Robbins (in private practice at Mayer, Brown, and Platt in Washington, DC), lead attorney for the defense, explains:

> The FISA statute has become, over time, the worst sort of Catch-22. Because no defense counsel has ever been shown an affidavit, none has been able to successfully challenge probable cause. Because no one has ever successfully challenged probable cause, the government can come into court and tell the trial judge, "don't show these lawyers the affidavit, because no court has ever done that before." Before you know it, this string of victories, secured without the slightest semblance of effective opposition by defense counsel, is held out as the very reason to rule against the defense once again. There is simply no way for defense counsel to do their job. The rights established by the statute are utterly hollow. They may as well be repealed [interview, Nov. 1998].

Since the adversarial process does not apply to FISA, and a judge has never once, in two decades, found merit in a defense challenge, it is not surprising that a FISA order is law enforcement's warrant of choice. (In the decade between 1987 and 1997, for example, 6633 FISA wiretaps and searches were authorized compared with 4,545 federal Title III intercepts.)

Nevertheless, eight months into its FISA investigation of Squillacote and Stand, the FBI had turned up no evidence that they were passing classified information. According to an internal memorandum of the FBI Washington field office dated August 6, 1996, the Bureau had yet "to determine the extent of subject's [Squillacote's] involvement with the former East German Intelligence Service (EGIS) and the current Russian Intelligence Service . . . WFO [Washington field office] cannot yet say what classified information has been compromised nor the true nature of subject's access to that information." It was not for lack of effort. The FBI had placed a microphone in the couple's home; they were well into the process of taping 550 days of phone calls and had searched their house. (Fifty agents conducted one of the three searches, which lasted for six consecutive days.) They had sifted through the family trash and bugged Terry's telephone at her Pentagon office.

Although this comprehensive surveillance had not demonstrated that the couple had transmitted any classified national security information, the FBI had

found in the couple's Washington, D.C. townhouse what appeared to be tantalizing evidence of spycraft, including a doll with a removable head that concealed film and a miniature camera. According to government experts, the camera was the type issued by East German intelligence for espionage. (The FBI photographic technician admitted, under cross-examination, that rust on the camera when it arrived at the lab for analysis made it impossible to load film. There was no way to determine whether the camera had ever been used.)

But another discovery would form the foundation for the government's successful undercover "sting" operation and the ultimate conviction of the defendants: Terry Squillacote's correspondence with a member of Nelson Mandela's government. During one of the secret FISA searches of the couple's house, the FBI had found a Christmas card to Terry from Ronnie Kasrils, the South African Deputy Minister of Defense. Responding to an earlier fan letter she had sent him, Kasrils had thanked her "for the best letter I received in 1995." She had been overjoyed to receive this acknowledgment.

Terry's letter, in addition to expressing her admiration for his book, *Armed and Dangerous,* had presented her analysis of how "one goes about achieving revolutionary change": "As communists," she had written to Kasrils, "I don't think we can express that until we've analyzed 'what went wrong' and put those conclusions into the picture. I am terribly keen that there should be international dialog among reform and former communist parties on these topics." (The FBI discovered this letter on the hard drive of Squillacote's home computer.)

The government had also, in apparent violation of FISA minimization requirements, amassed a tremendous amount of very personal information. They had learned by eavesdropping on Terry's desperate and hysterical phone conversations with her psychiatrist and her brother that the secret love of Terry's life, Lothar Ziemer (the former East German spy), had broken up with her in May 1996. They knew that as Terry approached her 39th birthday, she was preoccupied with her sister Marian's suicide at that same age. The FBI also noted that its target "strongly detests being at the Pentagon and refers to it as a 'concrete bunker.'" Terry was actively looking for a new job. Once she left the Defense Department, she might no longer be a suitable target for an undercover operation.

The Bureau determined that it was time to launch a "sting." A select group of FBI agents, known as the Behavioral Assessment Program (BAP) team met on June 20, 1996 with a PhD psychologist-consultant to discuss how best to exploit Terry's severe emotional distress. With the benefit of over 4,000 taped telephone conversations, the Bureau had more access to her emotional and psychological state than her own psychiatrist did.

Terry's actual psychiatrist, Jose Apud, did not know, for example, if the older man in Europe described by his patient was a real person. Dr. Apud, who had begun treating Terry in April 1996, testified that he was "never 100 percent sure that this person existed."

But Dr. Apud had determined, as had the FBI, that his patient was "depressed with suicidal preoccupations." There was a family history of depression; Terry's late mother suffered from depression and hypertension. Terry's oldest sister, Marian, with whom she had been very close, had been diagnosed with depression and borderline personality disorder. As Terry's therapy progressed, Dr. Apud testified, "there were more and more parallels or identifications with the sister who committed suicide at age 39 . . . and she was now at the time almost 38. . . . The father, he was a second generation Italian who was a very aggressive attorney, very active in civil rights. He had been accused by his oldest daughter of having molested her as a child." Terry's brother, Michael, a chemistry professor, suffered from depression and was on antidepressants. At 14, Terry's sister, Peg, ran away from home and had a child. She had struggled with depression and substance abuse.

Terry, the youngest sibling, was born in 1957 with Ehrlos Danlos Disease Type IV, an inherited connective tissue disorder causing excessive bleeding as well as severe physical deformities: a deformed right leg requiring early amputation, a left clubfoot requiring an amputation of toes, and a lack of separate fingers on her right hand. As a child, Terry was separated repeatedly from her parents for major surgery on her deformed limbs. She endured 16 hospitalizations or surgeries from the time she was three months old to the age of 19. Five hospitalizations occurred before she was two years old. In the late 1950s at the Chicago hospitals where Terry was a patient, parents were expected to observe limited visiting hours. (Only on the night before an operation was a parent

allowed to stay through the night, sitting in a chair next to the child's bed.) There were no semi-private or private rooms. Children such as Terry were, instead, assigned to large wards. Among several dozen other frightened, suffering children, Terry heard their anguished cries blending with her own. It was difficult for a child to separate the screaming of the others from her own considerable pain.

Terry recalls "being absolutely terrified that I had to be totally obedient, or else something awful would happen. I also remember it being drummed into me that no matter how much I hurt, someone else was always suffering more. . . . I remember once when I was somewhat older and was having a bone spur removed from my stump, some machine that was circulating the blood from one part of my leg to another jammed up. The pain was unbearable. I couldn't even cry. It was like stepping into a blast of freezing air; your eyes dry up and teeth hurt. Mom had stepped out to go to the cafeteria. The mother of the little girl next to me was so upset for me. She kept trying to cheer me up with some little purple stuffed animal. And all I could think of was how badly she felt, and that I should try to smile to make her feel better."

Terry's father, aloof and unavailable, very much expected his youngest daughter to find a way to be a high achiever like her parents. Her mother, guilty about having a deformed child who had to undergo so much pain, treated Terry as the favored child. Dr. Eric Plakun, a psychiatrist with the Austin Riggs Center in Stockbridge, Massachusetts, met with Terry over a four-month period while she was awaiting trial. As a defense expert, he testified that the mother became very close to Terry and "let her get away with things, feeling that some kind of transgressions could be overlooked because of what she had been through. . . . Some of this got transmitted to Theresa in her sense of entitlement that is part of her narcissism. 'For what I have endured, I ought to be given some reward.' And, in fact, as she was growing up, she became engaged in a certain amount of shoplifting that had to do with this sense of, 'I am entitled to something to make up for what has happened to me.'"

The BAP team's presentation and analysis of Terry Squillacote's history is detailed in an extraordinary classified document, dated August 16, 1996, that her lawyers were able to obtain through discovery. The movie, *Silence of the Lambs*, gave Squillacote's attorney, Lawrence Robbins, the idea to ask the government prosecutor whether the FBI had prepared a psychological profile of his client. The prosecutor informed Robbins that such a document existed; although it was classified, the defense attorneys were allowed to read it. Subsequently, a Justice Department official who reviews classified documents agreed to consider declassifying this BAP report. She assured the defense lawyers that their submission would "be walled off from the other side" during the review process. Virtually the entire document was released, with the exception of the name of the psychologist who prepared it.

The BAP report provides a rare window into how the government can use its vast powers to entrap a psychologically vulnerable target. Among the intelligence findings in the BAP team's 14-page blueprint for its sting were the following:

> LS [Loftiest Shade, the code name the FBI assigned to Squillacote] walks with a limp due to her prosthetic right limb. She flaunts her handicap by wearing clothing that highlights her limb, and she takes offense when someone makes a joke about handicapped people. She suffers from cramps and depression and is taking the anti-depressants Zoloft and Diserel. She may also be using marijuana and cocaine. The subject's family has been beset with depression: her mother was prone to depression; her sister committed suicide; and her brother is taking anti-depressants.
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> When she feels as though she is losing control and is under stress (which is the majority of the time), she becomes hysterical, sobs, and screams. When she has been under a great deal of stress, she has reported that she has the sensation of falling off a cliff.
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> This person reflects a cluster of personality characteristics often loosely referred to as "emotional and dramatic." She needs constant attention and approval. She reacts to life events in a dramatic, over-emotional fashion, calling attention to herself at every opportunity. . . . She is totally self-centered and impulsive.
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> The subject has been in a state of grief and "hurt" since her handler cut off their relationship. She compared the ending of this relationship to the death of her mother. In addition, there are several instances in which she has referred to her husband as "Daddy."
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> She will likely grieve for about one year for her "lost" (former) East German contact. This is an important time period in which it is possible to take advantage of her emotional vulnerability.
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> The type of UCA [undercover agent] who approaches her will be very important. She will respond to a "type of person who possesses the same qualities of dedication and professionalism as her last contact (although probably not necessarily any physical resemblance) . . . . The new contact will provide some

"praise" for her efforts, but will, like the old contact, tend to be professional and a bit aloof.

. . . she appears to possess the mind of a newly pubescent child, tending to seek an "idealized" relationship with men who are not able, for various reasons, to respond to her.

Because this type of person is given to dramatic and impulsive gestures . . . it is possible that once she has been arrested she will make a suicide attempt . . . . Therefore, it would be prudent at the appropriate time to advise individuals close to her (i.e., her husband, brother, and attorney) of the potential danger.

The involvement of a PhD psychologist in planning this undercover scheme raises compelling ethical questions. Should a professional trained to heal instead use his or her expertise to devise an undercover blueprint that is likely to result in harm? By its own admission, the BAP Report was designed to "take advantage of [the target's] emotional vulnerability" and acknowledged the potential outcome of "a suicide attempt." On the other hand, since the psychologist who advised the FBI did not have a therapeutic relationship with Squillacote, is he governed by conventional ethical constraints? It is hardly unprecedented for professionals with psychological training to assist law enforcement officers in ferreting out suspected wrongdoers.

Johns Hopkins University psychiatrist Jeffrey Janofsky, testifying at trial as an expert witness for the defense, charged the FBI psychologist with violating the code of professional ethics. As director of the Johns Hopkins Psychiatry and Law Program and professor of ethics for the past 15 years, Dr. Janofsky acknowledges that:

[the] APA ethical guidelines contain little of relevance for practicing outside the doctor-patient relationship . . . . In this case we have a mental health professional deliberately, overtly, assessing the patient's vulnerabilities and deliberately exploiting them in the service of the state. I would argue that although the ethics code does not talk directly about this, that this is unethical behavior. I think this crosses the line. I don't think forensic psychiatrists or clinical psychiatrists or any other mental health professional has any business doing this kind of evaluation even if it does serve the interests of the state. I would love to have an open discussion with people who do this for a living. There's only one problem. You cannot because the government won't tell us who they are. I personally find this shocking.

After interviewing Terry Squillacote and her husband, Kurt Stand, for seven hours, reviewing Terry's medical and psychiatric records, and listening to hours of FISA-authorized recordings of Terry's conversations, Dr. Janofsky concluded that Terry suffered from "several mental disorders," including major depression and Cluster B personality disorders (in particular, "borderline narcissistic and histrionic personality disorder". According to Dr. Janofsky, the consulting FBI psychologist devised "an individualized exploitation plan," which was the antithesis of treatment and perfectly tailored to exacerbate Terry's major depressive and psychiatric disorders.

Dr. Janofsky continues:

Here you have the ultimate psychotherapist's fantasy. You know everything your patient is doing—24 hours a day, seven days a week. You just don't know the material they bring in to the therapy session. You know what's really happening. We as mental health professionals are trained to look at someone's vulnerabilities and then formulate an individualized treatment plan. The BAP team's approach was a through-the-looking-glass mirror-image approach. I treat patients every day. I write those pesky treatment plans which are useful in helping the patient. That's exactly what the BAP team did—except that they did the reverse—sideways and upside down.

A viable treatment plan, for example, would be designed to help a patient such as Terry Squillacote form a secure attachment and trusting alliance with the therapist to facilitate recovery. The purpose of the BAP Plan was "to make subject unsure of attachment [to the intelligence agent] so she will feel compelled to take impulsive risks to maintain relationship.

A treatment plan would improve the patient's adaptation to life circumstances. The BAP Plan sought to "worsen subject's adaptation by making her dependent on UCA [undercover agent] while she is still grieving for her lover.

The FBI planned to tap into Terry's abiding fear of abandonment. "Events from early in life shape who we are. The most profound problems arise in people who suffer very early trauma," testified Dr. Plakun of Austin Riggs. "She [Terry] was repeatedly separated from her parents for these hospitalizations and surgeries, and it had an impact on her. She was a girl who really had to learn to walk on two feet, a major accomplishment because she was using an artificial leg the first time she walked. And she was teased and ostracized by other children. It was more pain to endure, a different kind of pain, not physical pain related to the surgeries, but psychological pain of being called different."

When she was 12 years old, Terry tried out for and made the cheerleading squad, but was removed when the school decided her artificial leg spoiled the group's appearance. As a child, Dr. Plakun explained, Terry began to question who she was, believing, "'If I'm alone, I'm a crippled, unloved, lonely freak.' In the same way that she needed a prosthesis, an artificial leg to walk, she needed other people to feel complete. If she had the right person, the

good person there, she could be a genius. Without that person, she thought, 'I'm nothing, I'm empty, alone, abandoned.'"

Dr. Janofsky concurred with Dr. Plakun, concluding that Terry's early history of protracted hospitalizations had left her with an intense fear of abandonment. In his interviews with Squillacote, the two discussed "how difficult that was for her to be alone in the hospital without her mother or father . . . suffering, multiple times." As a result of these experiences, Janofsky concluded that Terry would make extraordinary efforts "to avoid real abandonment or imagined abandonment." As he put it, "the impending separation or rejection can lead to a profound and quite a remarkable change in self-image, mood, thinking and behavior."

While the FBI designed the undercover operation, the agents were fully aware of Terry's fear of abandonment as well as the cumulative impact of more than a decade of personal losses: her mother's death, her sister's suicide, her son's encephalitis, her husband's failure to achieve the kind of greatness she'd envisioned, her father's recent cancer diagnosis. And of course, the loss of Ziemer. "The subject has been in a state of grief and 'hurt' since her handler cut off their relationship." Now is the best time, the agents concluded, to exploit that weakness.

> Because LS seems to crave excitement in her life, a personal false flag approach should be used against the subject. This may be initiated by placing a letter in her own post office box from the object of her adulation in South Africa who will tell her he is sending a personal emissary from the South African Intelligence Service to visit her. The letter could indicate that LS is to meet her handler in New York City for the weekend.
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> The letter could state that the meet will take place at the Waldorf-Astoria Hotel in Manhattan. She should be instructed to travel a circuitous route to New York City from Washington, D.C. This should add a sense of excitement and intrigue to the scenario.

Terry received the FBI's letter on September 25, 1996. Her psychiatrist, Dr. Apud, described her psychiatric condition through September 19 as "still depressed. The pervasive maladaptive behaviors were still there." Dr. Apud's next session with Terry was on September 28. His notes reflect that she seemed happy, had a full range of affect, was verbal, coherent, pleasant. She reported that she was sleeping better and asked whether they might decrease the frequency of the sessions. Since Dr. Apud "couldn't find any particular thing from our conversation that could explain this sudden change of affect, my first thought was that she was becoming manic."

What Terry's psychiatrist didn't know was that she was responding to the FBI's overture just as the BAP team had predicted. The fake letter from the South African Defense Minister begins: "Greetings to you from afar. I hope this note finds you well in body and spirit. I think of you whenever I look at your letter of last year. It helps me put aside the necessary tedium with which I must deal these days and refocus on truly important matters. Thank you again for this gift."

Dr. Plakun, during direct examination, described the initial paragraph as "catering to [Squillacote's] narcissism. A sense that halfway around the world a man, who really in her eyes is a celebrity, thinks of her often, goes back and rereads her letter, and that she exists in his mind."

The flattery comes at a time when Terry "is frantic about having been abandoned by the father figure, prosthetic human, the artificial leg of a human being that she needs psychologically. And suddenly here is this person halfway around the world who considers her writing and her contributions brilliant. This caters to her sense of specialness, to her fantasies of being unique, to her grandiose sense of having something to contribute."

The concluding paragraph reads: "My representative can more securely sustain this important dialog. In time, I hope we can meet, share some time, and reflect upon our experiences over a drink. Until then, good luck and my profound gratitude."

Dr. Plakun explained to the jury that "there is a promise of a personal connection some day with this man who is a celebrity in [Squillacote's] eyes, catering to her sense of self-importance and grandiosity and specialness, and a transferring of his authority to the undercover agent."

FBI Special Agent Douglas Gregory, a member of the BAP team and 23-year veteran of foreign counterintelligence, was tapped for the role of the South African emissary. To prepare for the part, the tall, dark-haired, bespectacled Gregory wrote a detailed script:

> Why don't you call me "Robert" (wink). . . . It's not everyday someone like you knocks on our door asking to help. . . . I could tell within a few minutes of meeting you that you are quite different. I'm really enjoying this conversation.. . . Don't sign your real name to any message. Tonight why don't you select a special name to use for this purpose. It can be anything you want it to be. . . Obviously, it would be best to keep our relationship

confidential. Thank you for a most memorable evening. I feel like I've made a new friend.

During their first encounter at the Plaza Hotel's Oak Bar in New York City, on October 12, 1996, Terry suggested she could contribute her policy analysis to South African intelligence: " . . . policy is the area that I think is the greatest need nowadays." The undercover agent made it clear that if Terry wanted a relationship in the near term, mere "policy analysis" would be insufficient. His intelligence service was looking for "scoops," for "practical information".

Dr. Plakun explained that the undercover agent's approach to Terry was perfectly tailored to exploit her vulnerabilities. Gregory flattered Terry repeatedly, "catering to her narcissism" and conveying the sense that she had a "special" relationship to the government of South Africa. More critically, the agent cautioned Terry that if she was unable to offer concrete or "practical" assistance to him, they might not be able to have a "short-run" relationship, but perhaps only some relationship in the "long" term. By distinguishing "short-run" and "long run" options, Dr. Plakun testified, the agent "raised the specter of 'dropping' Squillacote, of abandoning her, of ending the connection that was formed in the undercover operation. And I think that takes advantage of- . . . her need for a father figure to depend on to make her feel complete."

The agent's efforts left their mark. On January 5, 1997, outside New York's Museum of Modern Art, Theresa Squillacote did deliver—four classified documents. On each of the pages, she had cut out the classified markings.

At the trial, Agent Gregory was asked, under cross-examination by Kurt Stand's attorney, Richard Sauber, of Fried, Frank (Washington, DC), whether anyone at the BAP team meeting had ever said: "We have been at this for a long time, we haven't found anything, let's just get her fired from her job at the Pentagon?"

Gregory responded, "That's not the role of the BAP Team. . . . No, nobody said that."

Sauber returned to the question of how far the FBI was prepared to go, noting that the BAP Plan itself recognized that the sting operation might plunge this deeply depressed woman into suicide: "Did anyone at the BAP raise concerns about proceeding with such a sting operation if it might result in a death of a target?"

Gregory: "No."

Sauber: "Okay. Did anyone say, you know, gee, if this sting might result in death, maybe we should think of a different way to do it?"

Gregory: "No."

Sauber: ". . . Are there any FBI rules or regulations about when death might result in an investigation, of steps you are supposed to take?"

Gregory: "No."

After three days of deliberation, the jury rejected the defense argument that Squillacote had been entrapped, deciding that she had been predisposed to commit espionage. The prosecution's expert witness, Dr. Martin Kelly, Associate Professor of Psychiatry at Harvard Medical School, contradicted the BAP conclusions, referring to them as "pop psychology." He disagreed with the BAP psychologist that Terry had wide mood swings, dependent, childish relationships with men, and the mind of a newly pubescent child: "I don't know what to make of that. It is just factually not correct. . . . the person writing the BAP might have believed that, but, in all fairness, I probably have a lot more information."

Kelly stated under cross-examination that he does not consider the DSM-IV authoritative and admitted misrepresenting Terry's IQ score on the Wechsler Adult Intelligence Scale (WAIS) as 133 instead of 113 because he neglected to convert her raw score into a scaled score.

Dr. Kelly also testified that it was unlikely that Terry ever had a major depression or "that she has a personality disorder because her personality characteristics do not substantially interfere with her functioning in the world. . . . If someone had a significant personality disorder, they would be having . . . erratic work records and things of that sort."

Discounting the BAP observation that a suicide attempt was possible, Dr. Kelly stated: "I, frankly, don't think it was very likely to have happened."

Perhaps the most dramatic moment of the trial occurred as Dr. Kelly took issue with the BAP finding that Terry's older sister's suicide was "devastating." "Yes," he allowed, "she was affected by it, but I disagree with the characterization that it was, quote, devastating." At that moment, Terry Squillacote cried out from the defense table, and, in the company of a U.S. Marshall, ran from the courtroom and into a nearby bathroom, where she threw up.

Although Dr. Kelly had written in *Harrison's Principles of Internal Medicine* (ed 8) (edited by Thorn

GW *et al.* New York: McGraw-Hill, 1977) that "a thorough history and exam of the patient are fundamental to psychiatric diagnosis," he nevertheless did not meet with Terry Squillacote in preparation for his testimony: "There are some controversial aspects of the Code of Ethics in the American Academy of Psychiatry and the Law, particularly as it relates to the issues of examining people before rendering an opinion. And I disagree with that one. . . . the issue of interviewing an individual is not essential to rendering an opinion."

While the defense experts countered the government's suggestion that Terry had been "predisposed" (even before the government approached her) to commit the offenses, the jury was not persuaded. "Agent Gregory was very professional. I think he did his job. I'm glad we have people like him protecting the country," said one juror.

Some 20 years ago, the FISA sponsors had envisioned that their new law would provide a very different kind of protection. Senator Edward Kennedy, in 1977, described his objective in sponsoring FISA as a desire to "reach some kind of fair balance that will protect the security of the United States without infringing on our citizens' human liberties and rights."

How did FISA—which is so at odds with the Fourth Amendment right of Americans "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"—come to be? Ironically, its drafters thought they were doing a good thing, curing, not authorizing, the abuse of civil liberties by domestic law enforcers.

By the mid-1970s, the need to do something about illegal domestic spying was undeniable. President Gerald Ford's Attorney General, Edward Levi, was confronted with the precarious state of Fourth Amendment protections during his very first afternoon on the job. An FBI agent came to his office, unannounced.

According to Levi, the agent "put before me a piece of paper asking my authorization for the installation of a wiretap without court order. He waited for my approval." The agent was surprised when, instead of signing the document, Levi showed him the door. As a law professor and Dean of the University of Chicago Law School, the new Attorney General had taught his students that only judges had the power to sign warrants for electronic surveillance. Yet, even in the post-J. Edgar Hoover, post-Watergate eras, that was not law enforcement's standard operating procedure.

At the same time that Attorney General Levi was receiving his initial on-the-job training, the Senate Intelligence Committee, chaired by Senator Frank Church of Idaho, was disclosing illegal government spying on a grand scale, spanning nine Administrations. Richard Nixon's spying operation was merely the most recent and perhaps most egregious example. (Presidents had always asserted "inherent power" to conduct warrantless surveillance in the name of national security; and neither the Supreme Court nor Congress had contradicted or circumscribed this presidential claim.) While the sheer number of people targeted during the Nixon years may have exceeded those of previous administrations, Congress concluded that the illegal taps and break-ins occurring under Nixon's watch "were regrettably by no means atypical."

The Church Committee reported that "Since the 1930s, intelligence agencies have frequently wiretapped and bugged American citizens without benefit of judicial warrant. . . . The inherently intrusive nature of electronic surveillance . . . has enabled the Government to generate vast amounts of information unrelated to any legitimate government interest—about the personal and political lives of American citizens."

Congress was particularly appalled by the revelations of the FBI's counterintelligence program, known by the acronym COINTELPRO. It was directed at anyone whom the Bureau, at the whim of J. Edgar Hoover, had deemed an undesirable or subversive person. In Hoover's secret vendetta against Martin Luther King and the civil rights movement, for example, FBI agents had performed numerous "black bag jobs" (illegal burglaries) and illegal wiretaps. The FBI's unambiguous goal was to "neutralize" King, one of its perceived enemies of the state, and destroy his movement.

How was the government to prevent future abuses in the name of national security while still protecting *bona fide* national security interests?

The Supreme Court was grappling with this question. In the Keith case, decided in 1972, the Court acknowledged the long-standing Justice Department policy of warrantless electronic surveillance. It recognized the "elementary truth" that "unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could

become so disordered that all rights and liberties would be endangered [407 U.S., at 312]."

"If," the Court noted, "the legitimate need of the Government to safeguard domestic security requires the use of domestic surveillance the question is whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant before such surveillance is undertaken [407 U.S., at 315]."

Congress, heeding the Supreme Court's invitation to legislate a reasonable warrant procedure for gathering intelligence information within the United States, began to fashion such a charter. It would require, for the first time in history, that U.S. intelligence agencies obtain a judicial warrant for virtually all electronic surveillance involving national security.

As the Levi Justice Department continued to advocate, and Congress continued to debate new guidelines governing national security investigations, Jimmy Carter was elected President. The new Attorney General, Griffin Bell, like his predecessor, strongly supported passage of the FISA legislation. But a skeptical Congress, mindful of Watergate and the pervasive history of civil liberties abuses only recently documented in painstaking detail by the Church Committee, was not sure it could trust the executive branch to implement law enforcement reforms. Testifying before the Senate Select Committee on Intelligence, Bell had to remind his audience that "In a democratic society people have to trust the Government. Otherwise you go under."

FISA was enacted by Congress in October 1978 with broad bipartisan support. It was endorsed not only by the intelligence community but also by the American Civil Liberties Union (ACLU). Jerry Berman, currently the director of the Center for Democracy and Technology, was the ACLU's legislative counsel at the time. He recalls that "although there were critics on the left who said no wiretapping is warranted, we [the ACLU] did not oppose the statute. . . . For 40 years wiretaps had been used routinely against domestic dissent. That was untenable. The ACLU had to rationalize its total opposition to all wiretapping. We determined that any judicial supervision would be positive [interview, Nov. 1998]."

The 1978 statute had applied only to electronic surveillance. While the ACLU could support the judicial authorization of national security phone taps (which, at the time, were conducted with no judicial oversight), legitimizing government authority to conduct secret physical searches was quite another matter. "In the late 1970s, the government was very desirous of working out a compromise with the ACLU," recollects Mark Lynch, the ACLU's longtime national security litigator. Now in private practice, Lynch says that "physical searches were not even on the table for consideration" during the FISA discussions. The ACLU would not have supported FISA if it had included provisions for secret searches conducted under the guise of national security. Without the ACLU's support, the law would not have passed.

But just such an Amendment did pass 16 years later. "It's outrageous," continues Lynch, "that the 1994 FISA Amendment watered down historical Fourth Amendment protections, standards that were never in doubt." The Founding Fathers considered physical entry into the home to be one of the chief evils of government power. This fear of government intrusion, Lynch explains, was rooted in centuries of lawlessness carried out in the name of British kings whose agents would ransack homes, searching for evidence of treason and sedition (interview, Nov. 1998).

"The Supreme Court has *never* suggested that there is a 'national security exception' for physical searches," states an ACLU *amicus* brief co-authored by Lynch. In Abel v. United States, 362 U.S., 217 (1960), a case at the very height of the Cold War involving a KGB (Soviet intelligence) agent, "the Court," the brief argues, "dismissed the possibility that a different Fourth Amendment standard, let alone any kind of exception, should apply merely because the case involved national security."

The ACLU vociferously opposed FISA physical searches during 1994 Congressional hearings. That July, Kate Martin, staff attorney for the Center for National Security Studies, decried "Black bag jobs, secret searches of Americans' homes and papers in the name of national security," as "one of the worst civil liberties abuses of the Cold War. Instead of now approving them, the Congress should outlaw them."

She described how the proposed legislation would endanger civil liberties. It would, she said, "authorize government agents to break into and search the houses of Americans, and photograph their private papers, without a warrant, without knocking before entering, without probable cause to believe that the targets have committed a crime, and without ever

informing Americans that their homes and papers have been searched."

The Clinton Justice Department argued that FISA searches would offer greater protection to individual liberties. If Presidents had unfettered inherent authority to conduct warrantless physical searches for foreign intelligence purposes (if it was something they were going to do anyway), wouldn't civil liberties interests be better served if the Executive voluntarily deferred this power to the FISA court?

Testifying on July 14, 1994, Deputy Attorney General Jamie Gorelick identified the "need to strike a balance that sacrifices neither our security nor our civil liberties."

That had also been the mantra when the original FISA was debated. However, it has been impossible to achieve this balance because the law's procedural protections have never been implemented. Congress, according to FISA's legislative history, intended the statute to provide "twin safeguards of an independent review by a neutral judge and the application of a 'probable cause standard.'" Expecting that not all FISA applications would pass muster, the law provided a review process. If the FISA court judge said "No" to the government lawyer, an appeal to one of the other six judges was not to be permitted. That would be the province of a three-judge court of review, also appointed by the Chief Justice.

This review panel has never met. In 1995, three years before his death, Judge Robert Warren, Senior U.S. District Judge in Milwaukee, described his tenure on the FISA Court of Review. It began in 1989 when "I was sent a designation by the Chief Justice, and I asked a couple of people what in the world the court did because I had not even heard of it before I got that designation. I also had some correspondence with my brethren on the Court and we've talked to each other and said, 'What are we supposed to do? And, 'When is something going to happen?' Nothing ever has happened. It's an empty title as far as I am concerned at this point.'"

There is a simple explanation for the FISA Court of Review's lack of a mission. FISA applications are universally granted. Between 1979 and 1998, 11,211 orders were granted. During those two decades, just one was denied. This near-perfect score suggests that the FISA court may merely be a "rubber stamp" for the government. Fran Fragos Townsend, the Director of the Justice Department's Office of Intelligence Policy and Review (OIPR), which prepares and reviews all FISA applications, takes exception to this characterization. She maintains that her office's awesome wining streak before the FISA Court is, instead, a reflection of the care with which each application is prepared and the scrutiny it receives from the FISA judge: ". . . it's not right to conclude that the government's track record in getting FISA applications approved means that the FISA court is a rubber stamp. . . . When FISA judges believe that an application is deficient, they generally permit the government to withdraw the application to amend it or even do more investigating, rather than simply rejecting it."

But only a few years ago, a career federal prosecutor, asked by Attorney General Janet Reno to conduct an internal investigation of the OIPR, uncovered major problems. Richard Scruggs, an Assistant U.S. Attorney in Miami, was working in Washington, DC, as a special assistant to the Attorney General when he began this assignment at the end of 1993. He found "there were so many FISAs being conducted with so few attorneys that the review process to prevent factual and legal errors was virtually nonexistent." At the time he initiated his inquiry, over 7,500 FISA orders had already been granted.

How many of the FISA orders in the last two decades have been targeted at Americans suspected of being "agents of a foreign power"? The 1978 statute did not ask the Justice Department to supply this information to Congress. It did require, however, that each April, the Attorney General would send a report to Congress and the Administrative Office of the United States Court reporting the total number of applications for electronic surveillance as well as how many were either granted, modified, or denied. The annual half-page letter containing that information is publicly available.

The "Congressional Oversight" section of the 1994 FISA Amendment imposed the disclosure requirement that physical searches be reported semiannually to Congress. In addition to "the total number of applications made for orders approving physical searches under this chapter," the Attorney General is to specify "the number of physical searches which involved searches of the residences, offices, or personal property of United States persons."

Starting with the Attorney General's 1996 terse, two-paragraph summary, the number of physical searches has been subsumed within the total of electronic surveillance applications. No breakdown of the two distinct foreign intelligence-gathering meth-

ods is provided. As for the statistic of "United States persons" subject to physical searches, that is classified information.

Senator Kennedy had predicted two decades ago that domestic targets under FISA might perhaps number 100 a year. FISA orders have, instead, averaged a whopping 560 annually. The public, however, is not allowed to know how many involve Americans subject to secret searches of their homes and offices. If factual and legal errors are made in the implementation of the thousands of FISA orders, there is no mechanism to identify and rectify these mistakes. Kenneth Bass, the first Counsel for Intelligence Policy in the Carter Justice Department, acknowledges that there have been applications to surveil U.S. persons "which have raised difficult legal issues that are sometimes very close questions. Nothing in our present process insures that those close questions will be fully aired and subjected to scrutiny from the judiciary."

The statute was intended to give the government the legal authority to act quickly to forestall espionage, sabotage, and terrorism without compromising civil liberties. Clearly, that imperative has not been achieved. The Foreign Intelligence Surveillance Act, as it has been implemented during the past 20 years, may have more in common with the Communist regimes that Theresa Squillacote and Kurt Stand admire than with America's judicial system designed to protect the rights of the individual.