Center for Strategic and International Studies

The National Security Division at 10: Past, Present, and Future

Panel II: National Security and the Rule of Law

Panelists:
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General Counsel,
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Former Assistant Attorney General, Criminal Division,
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Moderator:
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GEORGE Z. TOSCAS: Good morning, everybody. My name’s George Toscas. I’m a deputy assistant attorney general in the National Security Division. I’ve had the great honor and privilege of serving the American people through the Department of justice for almost the last 23 years. I’ve done it my entire career.

And I just want to take a brief moment – I know we’re here today to celebrate the institution of NSD. It’s a tremendous division with tremendous accomplishments, but like any division, it could not function without the men and women who work day in and day out to protect this nation from all manner of national security threats. So if we could just take one moment – I know there’s a lot of NSD employees here in the room; I know there’s even more probably watching the live stream and there will probably be others who are hard at work and will watch this later on tonight or sometime in the future. If we can, let’s just show them and thank them for their work. It’s not something we often have an opportunity to do publicly, and I’d like to do it now. Thank you all. (Applause.)

We have a distinguished panel of guests or panelists today. I’d like to introduce the three of them to you.

James Baker is the general counsel of the FBI. From 2001 to 2007, Jim served as the counsel for intelligence policy at DOJ, where he was head of the Office of Intelligence Policy and Review.

Alice Fisher is the managing partner of the Washington, D.C. office of Latham and Watkins. From 2001 to 2003, Alice was a deputy assistant attorney general for the Criminal Division – my first boss in a leadership role. I was – served as counsel to Alice. And in 2005 she was confirmed by the Senate as assistant attorney general for the Criminal Division, the second woman in history to hold that position.

And Pat Fitzgerald, who we affectionately refer to as Fitzy in the DOJ ranks – he’s currently a partner at Skadden, is the former United States attorney for my hometown of Chicago in the northern district of Illinois. He was appointed in 2001 by President George Bush. He was the longest-serving U.S. attorney ever in Chicago. And from 1988 to 2001, Pat was an assistant U.S. attorney in the southern district of New York.

We thought it would be great to ask these distinguished panelists to come together to talk to us about some of the difficulties that we dealt with in the early years of investigating national security cases, some of the impediments to investigating national security cases, to talk about the wall that was up between intelligence and law enforcement, the wall coming down, the period of time after the wall came down and the creation of our division, and their observations as critical players at that time and throughout that time, and maybe get some of their comments about what they’ve seen NSD doing since its creation after the wall came down.

Let’s start with Jim. You were the head of office of intelligence policy and review at DOJ prior to and on the very day of 9/11. Could you describe generally the role of your office at
that time, what rules and practices were in place that caused the creation of what we have now come to know as the wall?

JAMES A. BAKER: That’s a very narrow question, George. (Laughter.) Thank you.

MR. TOSCAS: The mic will be open for the next two hours for you. (Laughter.)

MR. BAKER: So, first of all, I do want to say that, along the lines of what you said, before, it was a supreme honor to me to work with the men and women of OIPR at the time. I mean, it was an incredible group of folks who worked together under very, very difficult circumstances. And we had our successes, we had our failures, but it was a very challenging environment, but the esprit de corps and the commitment that those folks showed at that time was just tremendous, and it was a tremendous honor for me to be associated with them in any capacity.

Yeah, so I was at OIPR in those days, and OIPR’s function – I’ve struggled to try to figure out how to explain it to folks since it doesn’t exist anymore, but basically it was almost like a boutique office that was responsible for intelligence and national security matters for the department, less what it was that the folks in the Criminal Division were doing, and I’ll talk about that maybe in a bit here. But –

MR. TOSCAS: I know when people think about a boutique office, you don’t think about windowless rooms – (laughter) – only one way in and one way out. But that’s –

MR. BAKER: We did – we did have windows, and as we grew we gobbled up various parts of the Department of Justice business.

But we were very focused on doing several different things. Mainly we were in charge of administering FISA. So we were responsible – I was responsible for representing the United States before the Foreign Intelligence Surveillance court. That was our job. We took those cases to court, working with obviously the folks in the FBI, NSA, and then with the various prosecutors at various points in time. So that was the bulk of what it was that we did.

But we also advised the attorney general, other department leaders, folks in the intelligence community on intelligence policy matters. We conducted oversight of the intelligence community, the FBI, on behalf of the attorney general. So, many of those functions that now exist within NSD, we did before NSD existed. So that’s – I can talk more obviously about OIPR at length, but that’s a basic overview of it.

So, interestingly I think, we had a very – because in those days the attorney general signed almost all of the FISA applications, we had a very close relationship with each attorney general. And so that was a significant part of what we did, and maintaining the confidence – simultaneous trying to maintain the confidence of the attorney general, the FISA Court, the intelligence community, and the rest of the folks in the Department of Justice, was supremely challenging. It was very hard to do all of that at the same time, and yet we tried really hard to do that, in any event. So that’s kind of OIPR.
The wall – so, the wall is very hard to describe in a concise manner, but let me just – to put it in context, let’s go up a couple levels.

So, to my mind – although many have described the wall as one of the fundamental problems that led to 9/11, I just don’t think that’s correct. So, the fundamental problems I think were more along the lines of problems with organizational culture and ineffective management of the intelligence community. That demonstrated itself in particular in two ways – inadequate information sharing and inadequate coordination. So, “the wall,” then was, if you view it in that context – it was both a product of those dysfunctions and it made them worse in some ways. And I’m sure we’ll talk about that, and these folks have felt the implications of that.

And so what I mean by that is that, you know, the wall, for example, emerged because there was a concern that the attorney general and the FISA Court did not really understand what was happening with respect to criminal prosecution activities in the various cases that were – in which there were FISA applications. And so there was a – in particular it came out of – the manifestation that we were all dealing with immediately before 9/11 came out of a series of problems that existed in the Aldrich Ames case, where there was inadequate understanding by the FISA Court, OIPR, the attorney general, about what was happening with respect to the criminal – the criminal prosecutor’s activities in those – in that particular case.

So, to me that’s the right way to think about the wall. It was an effort – it was an effort by the Department of Justice and the FISA Court, well, to really make sure that we were using a very FISA – using FISA, which is a very powerful, intrusive, and flexible tool, in a way that was consistent with the Fourth Amendment and consistent with the Constitution and laws of the United States.

And so that’s what it was intended to do. It was intended to regulate the interactions between the prosecutors and the intelligence officials to make sure that there was no direction and control of the intelligence activities by the prosecutors, and to make sure that the FISA Court and the attorney general and the certifying officials, such as the director of the FBI, were fully informed about what it was that was going on on the criminal side.

So, I’ll stop there. We can talk a lot about that, but that’s the basic idea, I think.

MR. TOSCAS: Do you want to talk about a little bit what was required to obtain a FISA and what standards had to be met in order to do so?

MR. BAKER: So, it’s – well, it’s similar to today. It’s not exactly the same. The basic idea is that you have to have probable cause to believe that the target of the surveillance or search is a foreign power or an agent of a foreign power. And all of those terms are defined in the statute. You have to have probable cause to believe that the thing that’s going to be surveilled – the telephone line, email account, whatever – is being used or about to be used by the target. That’s in essence it.
And then you have to have a certification from a high-ranking government official that – in those days – the purpose, among other things – the purpose of the surveillance was to obtain foreign intelligence information, and foreign intelligence information is a defined term in the statute. So the purpose was the requirement before the USA PATRIOT Act.

Because of the wall and because of a desire to change the regulations with respect to the wall, in the USA PATRIOT Act it was changed to – from “the” purpose to a significant purpose. And Congress made that change, that’s what Congress intended, and then the FISA Court didn’t immediately agree with that, and that eventually led to litigation that resulted in the FISA Court of reviews decision in 2002 saying that FISA was constitutional as it was constructed after the USA PATRIOT Act, and that a significant purpose was sufficient, and that the FISA Court did not have to try to regulate these interactions between the intelligence officials and prosecutors.

MR. TOSCAS: And prior to the PATRIOT Act, you said the statute read “the” purpose –

MR. BAKER: The purpose.

MR. TOSCAS: – and that had been interpreted to mean the primary purpose, correct?


So, the court, the Department of Justice, everybody that was dealing with it at the time interpreted that to mean the primary purpose. So that became then a very difficult standard to try to figure out exactly when did something shift from less than primary to primary. In other words, the way people thought about it was there was a foreign intelligence purpose and then there was a law enforcement purpose, and the foreign intelligence purpose always has to be primary. And so when you’re investigating someone and moving closer to an arrest, at what point in time does it tip?

MR. TOSCAS: Pat, you were an assistant U.S. attorney in the southern district of New York prior to 9/11, and you were one of the few prosecutors in the country who prosecuted terrorism cases at that time. And I know you know this, but many of us have looked up to you for years and years as a prosecutor who led the fight against terrorism, sometimes it seemed single-handedly.

What were some of the challenges you faced in getting the information you needed to prosecute terrorism?

PATRICK F. FITZGERALD: So, there was a great team in New York of agents and prosecutors, and frankly we had good support at main Justice. I have a ton of respect for folks who worked both in the field and at headquarters, and I echo Jim’s appreciation of OIPR.

But the wall was a real problem. I understand the motivations for the rules and the intent to make sure that the primary purpose rule was followed. And I agree with Jim – some of it was law; some of it was interpretation of the law where there was little case law in point – one case in the fourth circuit where there was contact between an agent and a prosecutor, and a judge viewed
that as indicating the primary purpose had shifted. And some of it was culture and the community that law enforcement and intelligence had to be kept apart.

But to put it in practical terms, it was very, very frustrating. So I’ll give you a couple of examples. If you think about a world in which – picture in your mind a picture of al-Qaida – an al-Qaida member overseas, and then picture an FBI agent investigating the al-Qaida member overseas, and hold that thought for a moment. Under the rules with the wall, I was allowed as a prosecutor to talk to local police, FBI agents doing a criminal investigation, the intelligence community, the CIA, foreign police, foreign citizens, foreign intelligence, and that al-Qaida member you’re picturing in your mind. There was nothing restricting me from talking to al-Qaida or our team, and we did. We literally went overseas and met with al-Qaida folks, tried to turn them into witnesses, and sometimes did.

We couldn’t talk to the FBI agent doing the intelligence investigation if they were using FISA techniques. So a world in which a prosecutor investigation al-Qaida is restricted in its contacts with the FBI agent, but unrestricted with the al-Qaida member, is bizarre.

The second part of that was to sit down as a group in New York then, and later in Chicago before it was fixed, and sort of say, hey, we’ve got suspected people with terrorist links in the community; what are we doing about it? Well, I’d call it the two huddles. You’d sit down in the U.S. attorney’s office and talk about the criminal investigation, but you couldn’t sit down with the folks doing FISA investigations over at the bureau because you had to keep that wall.

And if you did something as unimportant as a football game, you’d say – you’d think you’d want one huddle in the defense, because if someone’s uncovered they might score a touchdown. So you want to say, there are 11 people over there; who’s got who? But pre-wall, you had your huddle and the FBI had their huddle, and as a prosecutor you didn’t know when you went after someone whether the FBI was already covering that person, or you might assume it was being covered and it wasn’t. And that was frightening.

And maybe one best example of it is the restrictions on information sharing were such that after the embassies were bombed – the U.S. embassies in Africa, in Kenya and Tanzania in August of 1998, we went and subpoenaed someone – it’s now public from the charges – we subpoenaed a person named Ali Mohamed to the grand jury in New York. We put him in the grand jury just before he was leaving to Egypt. We questioned him in the grand jury and had reason to believe at the end of the questioning, over the course of several hours, that we might be able charge him with false statements or perjury.

As Alice will no doubt smile, generally you don’t make determinations about whether to charge a perjury case about a grand jury testimony that same day. You might want to get the transcript, think about it, see what your evidence is. Well, he was about to leave for Egypt and we had to make a decision whether or not to arrest him. And the idea was we wanted to arrest him because we thought he was dangerous. And we had to make a decision – Mary Jo White made a brave decision to authorize arrest that night, and we did.
We then got access to the FISA search that had been done a short time before out in California, which was off-limits to us. And after he was charged, we had to go through a process to get the evidence, and there in his home in California were al-Qaida materials, training materials. He had been al-Qaida’s first trainer.

It sure would have been nicer to know that day when he was about to leave for an airport to Egypt that you had that evidence. And we made that evidence-blind. The cards were down.

He later plead guilty, admitted he did the surveillance of the embassies in Africa five years before, trained al-Qaida, and said in open court, if we hadn’t arrested him that day, he would have gone back to Afghanistan and rejoined Osama bin Laden.

So the separation of the wall meant you didn’t know who was covered, you couldn’t talk to the agents who you’d want to talk to about FISA coverage. You made decisions in the dark.

The flip side also was that you wanted to have law enforcement information that might be of value to the intelligence community. So another person that we put in the grand jury was Wadih El Hage, and that’s public now, and he was bin Laden’s personal secretary. We put him in the grand jury in 1997. He described a colleague of his, a guy named Haroun, and where he might hide files. And we thought, that’s a pretty important piece of information. It would turn out to be very important. A year later, Haroun would be the guy who organized the embassy bombings and was later charged, was a fugitive, and was later killed in Africa. He was a bad al-Qaida guy.

At the time it was unclear that you could take grand jury information and share it with the intelligence community.

So we took El Hage, as soon as he was finished with his grand jury testimony, outside. There was an agent, because agents aren’t allowed in the grand jury, and asked Mr. El Hage, “Would you mind – he’s very interested in this matter; would you mind telling him what you told us in the grand jury, and draw us the same map that you drew in the grand jury?” And he did. And so now we had this information independent of the grand jury that we felt comfortable sharing.

As I used to tell people, to rely upon the professional courtesies of al-Qaida in order to be able share information is not how you were brought up. (Laughter.)

So that was the situation.

MR. TOSCAS: Jim, obviously there were examples before 9/11 where the wall didn’t happen success in certain cases. Can you give some examples and why you thought those cases succeeded despite some of the challenges we’re talking about here?

MR. BAKER: Sure. So – and I want to address some of what Pat talked about because what he dealt with was very real, and it also reflected I think the reality that I was talking about in terms of – well, let me just answer your question directly.
So, there are two – the two things that really jump out to my mind were the millennium crisis and the Hanssen investigation – Robert Hanssen, who was a spy for the Russians who worked for the FBI.

So, the millennium crisis, as you may recall, was exactly – you know, right before 9/11. There was a series of activities and arrests in Washington State, and then intelligence information with respect to a very real al-Qaida threat to the United States right before January first of 2000.

And so what happened there was, with the wall that Pat just discussed a second ago in full force, we nevertheless worked with – both in the United States and abroad, with intelligence officials and with law enforcement officials across the country and overseas to deal with and thwart that plot by al-Qaida. And it was successful. And it was successful because the things that I talked about before – the organizational culture and the management, the information sharing and the coordination – all of that worked in that period of time because everybody figured out, this is a very real threat, we need to get our act together and we need to deal with it.

And so these barriers and these restrictions and so on that got played out in other circumstances that Pat is describing, were dealt with by folks being completely transparent with each other, and importantly, to link it up to what I said before, the FISA Court having full and complete and real-time information about what was happening. And so the FISA Court was comfortable that it understood – the attorney general and the FISA Court were comfortable that they understood exactly what was going on in that crisis and how we were dealing with it and what the law enforcement aspects were and what information was being shared, and they were comfortable – and they were fine with it.

So that’s the – that’s the thing. It’s this issue of the interactions that Pat was describing that he would have thought would have been beneficial could have happened had there been an effective – a more effective mechanism for sharing that information back and forth – you know, sharing it with him – the intelligence information, and then having the information about what his activities were being shared with the FISA Court.

So, in the Hanssen case, that’s exactly what happened. We had close coordination between myself – it was a very close handled case, obviously – between myself and leaders of the Criminal Division and also the assistant U.S. attorney. And so we broke through and dealt with all of these kinds of issues that thwarted the government in these other cases because I think in part we were highly motivated and we knew what we were doing. And I was able to keep the FISA Court fully apprised of what was going on. So we were doing FISAs right up until the moments before he was arrested, so there was a clear understanding by all the participants of what was happening.

So it could work. It could work, but it was hard. And one of the things I was going to mention before was that – that impacted us was OIPR was – you have to understand – was an extremely small organization at the time. In 1996 – I’ve tried to remember – I think there were about 20 people, and we had about a $1 million budget. Right? So it was a very small operation
that couldn’t be deployed across the country in all the U.S. attorney’s offices trying to deal with all this.

MR. TOSCAS: Alice, you were at the time deputy assistant attorney general under Mike Chertoff, who was the AAG in the Criminal Division at the time of 9/11. Can you describe for us the impact of 9/11 on the Criminal Division, and what changes you saw after the November 2002 decision that Jim spoke of, upholding the constitutionality of the PATRIOT Act provision that said that a significant purpose standard could be used?

ALICE S. FISHER: Happy to, but first I have to just say I’m somewhat overwhelmed to see so many people here that I saw on 9/11, just in the audience, who worked 18 hours a day for so long, and that it’s just so moving that so many of you are still here working on counterterrorism. So I just thank all of you currently at NSD, but certainly all of you that were there back at the time as well. It’s just I feel blessed to have worked with you then.

I think on 9/11, coming at this from somebody that didn’t really have a good understanding of the wall like Pat did, it made no sense to me, and it’s so hard to think back and get my head around what was happening at the time. I do remember on 9/11 and the days just after that, being up on the seventh floor of the FBI and trying to work with everybody, trying to get grand jury subpoenas out and, you know, it was just so much activity.

And one of the things that somebody from a floor higher than mine at the time had asked me to do was to go get a list of all the files of individuals that we had on the intelligence side. It seemed like a very easy task. You know, I was there, absolutely going to go do it – could not do it. There was no way. And some of the people are smiling in this room because they kept trying to explain to me why I couldn’t do it, and I just was not willing to let that wall stand in front of me and I kept trying to push through.

And when you say wall, on the seventh floor of the FBI – the SIOC at the time, I don’t know if it’s still that name – but there was a room that Jim and other people from OIPR were working out of, working on FISAs. They were working frantically probably 20 hours a day. But literally there was basically a sign that said: Criminal Division, keep out. Like, literally, one of those tree houses where you say: Parents, keep out. You know? (Laughter.) It was just like you are not allowed in that room.

And one night –

MR. BAKER: We could hear you – we could hear you in the hallway.

MS. FISHER: Right. (Laughter.) One night, late at night, you know, somebody, like, opened the door and I just got my way through. It was very dark. And everybody – I mean, it was a gasp in the room. Like, what is she doing here? And of course, I was annoying everybody trying to get the list of files so we could figure out to share them with the people that were doing the grand jury subpoenas and make sure that we were coordinated.
So of course, I then learned a little bit more about the wall, and things got a lot better. And you had the ATAC set up in the field. And you had guidance from the attorney general. You can share this. And then the court opinion. And then the guidance that came after that, in 2002. Up until that time, people were working on coordinating the best they could. But after that decision, things, I think, really changed for the better. And despite the fact that there were obstacles and people were scared about how to interpret the opinion and make it work, people were sharing information. Better sharing with the field. Better sharing with the criminal and intelligence.

And I think a really important point to note is that the grand jury information could also be shared with intelligence. So the information sharing really went both ways. And people were then able to sit in a room and talk about things. And it had results. I remember one of the early cases was the case up in Buffalo, with the Lackawanna Six, as they were called at the time. And that had started because this group of individuals had gone over to Afghanistan in the summer of 2001, and come back to the United States. And at the time, there was an intelligence investigation and a criminal investigation.

And after information sharing was relaxed, and the guidance and the opinions came out, finally those two FBI squads were allowed to talk with each other about that case, and it eventually resulted in, you know, getting those people off the streets, as well as, I’m sure, a lot of intelligence that came through it. So, you know, people absolutely had the right mission. They absolutely wanted to do everything that they could to work together. But there were these bureaucratic obstacles.

And it took a long time. It wasn’t 9/11, where everybody said, OK, now we can share. It was, you know, working with Jim, working with the court, working with the guidance up until December of 2002, I think is when that final guidance came out. I could be misremembering a little bit, but it took a long time.

MR. TOSCAS: Yeah. It’s fascinating to have you both here – actually, all three of you – who were on the ground dealing with not only these legal and policy changes, but the culture of the different offices that, you know, had to start changing right then. And that doesn’t happen overnight. And obviously a long period of time has passed and the culture has changed. So it’s fabulous to have the insight from that time.

Pat, at the time of 9/11 you had just been sworn in as U.S. attorney in Chicago. I remember right after 9/11 sitting at FBI SIOC with you, talking and going through some of the materials at the time. But as you made the transition from New York to Chicago post-9/11, what was your experience in what we call the field, in the U.S. attorney’s offices? What was your experience in the field as these new policies and practices were implemented? And can you give us an example of a prosecution that benefitted from these post-9/11 policies and practices as they unfolded?

MR. FITZGERALD: Sure. The wall didn’t come down at once. And Jim said it exactly, it’s both a legal issue and a cultural issue. So when the Patriot Act was passed – if you tell people, to explain the wall, when people say we ended it they’re ready to applaud. If you say the
Patriot Act did that, they sort of stop and sort of say I’m not so sure about the Patriot Act, because it became this vessel that had so much electricity around it that was there. But when the Patriot Act was passed, and the wall – you know, the policies came out. There was a FISA Court.

I think as Alice said, it took a while. There had to be a memo coming from the FBI. So just to tell an FBI agent it’s OK to share, there’s a new law on the books, it was like, no, I want to see a memo from the director. And then a memo came from the director, and it was still unclear. I remember people calling up nervously sort of saying: I don’t want to get in trouble. I think there’s something you need to know, but I’m not sure I’m allowed to tell you. And it was genuine – it’s just a hard area for people to sort out.

Over time, when it got sorted out, we had to sort of rules of the road between the field and main Justice, first the Criminal Division and the national security division. And that wasn’t easy, because if you’re a prosecutor in the field and you do organized crime work, going after the local organized crime family is very field-centered. And you, frankly, don’t want to get too hamstrung by people in Washington. And that’s your mentality.

MS. FISHER: Nothing personal, when he pointed at me, I’m sure. (Laughter.)

MR. FITZGERALD: Nothing personal. No, no. Washington, pointing, the city.

No, but you’re – like, but in the terrorism arena, you have the same instinct, but you also recognize that people in Washington are coordinating between agencies. So having a bunch of people in New York and Chicago or Virginia or California doing their own thing doesn’t work. And folks need to be able to coordinate across agencies internationally. But the effort there was to put rules of the road in place that didn’t recreate the wall by a series of giant speedbumps that de facto slowed down information sharing, but didn’t have us going off uncoordinated. And that took a while.

But I will tell you what struck me vividly was 2008, so seven years later, when the Headley case arose in Chicago – and Headley was involved – as it turns out, he was being investigated for a possible terrorist plot. It turned out he was part of a plot to go over to Copenhagen or Denmark and take over a building or a newspaper, and behead the editor and cartoonist because of offensive cartoons. And then after he was arrested, we learned he had been involved in surveillance for the Mumbai plot where, like, 160-plus people were killed.

When that first arose in Chicago, before we know precisely who we had, I was stunned to see how seamless it was, and how the information flowed, how the prosecutors and investigators were sitting down together. And it was just watching a car go so much faster. And having been out of the loops of day-to-day terrorism stuff – we did a fair amount in Chicago, but I wasn’t like the people in Washington living and breathing – it was striking how much more efficient the system was.

We definitely had the one huddle rule after a couple of years, where you’d sit down in a room and you’d have the prosecutors and agents together and sort of say: Who are we looking
at? How concerned are we? How dangerous are they? Why do we think they’re dangerous? What are we doing? Should we be doing more? Should we be doing more on the criminal front or the national security front? But it was just a relief to know that anyone you knew to ask about, you could ask about. And so I think it was much more gradual, you know, in fits and starts. But I think the relationship got ironed out under a new regime when the law was changed.

MR. TOSCAS: And being in Chicago for so long, as the U.S. attorney, and seeing the evolution of the joint terrorism task forces, which obviously incorporate, along with the Bureau, all other federal agencies and state and locals, can you comment on information sharing and the benefits of the JTTFs and the information sharing procedures, how it may have affected those relationships?

MR. FITZGERALD: Sure. It was critically important to share with local law enforcement both ways, because they were the eyes and ears. And I think the bottom line is when we first started to have joint terrorism task forces be more robust and ATACs be more robust I think the locals assumed that the feds had such a vast array of critical information that they were sitting on. And finally you worked out the procedures and the clearances that you let them in the door, and then they realized we had a lot less—we were holding back a lot less because we had a lot less.

And that wasn’t for lack of trying, but you’re sometimes chasing shadows. And I think they got to appreciate—there was more of a level of trust. And I think in the field the good leaders would let people know, hey, this is a real sensitive case. There’s stuff I can’t share with you. And they would understand that. And over time, they would share more and more with permission from Washington. But otherwise when they told someone we don’t have anything we’re not sharing with you, this is it, they came to trust it.

So I think there was a little bit of bumpiness at the beginning that they thought there was the motherlode being hidden. And then over time I think it became a very good working relationship. And that was critical to get the information they had and pass it back to D.C., and to return.

MR. TOSCAS: It’s sort of a side point, but just want to note it—using your huddle analogy. Having everyone in that one huddle, obviously from law enforcement and on the intelligence side is valuable. But over the years—and I think you can attest to this—having state, locals, and other federal agencies in that huddle provides a totally different perspective. They could sometimes have information and see behavior and certain criminal activity from a perspective we just don’t have. And I know that you have, and as we have seen across the country, it’s just been such a valuable partnership throughout law enforcement.

MS. FISHER: It’s critical, yeah.

MR. FITZGERALD: Information and trust, so that there’s working relationship. If something does happen, people will pull together and know the rules of the road. That was a real plus.
MR. TOSCAS: Jim, what were the challenges in OIPR as our division, the National Security Division, was stood up? And at the time those discussions began, if you’re willing to share with us, were you a proponent of the reorganization and the new division?

MR. BAKER: OK. So I was a proponent of the new division, even though I knew I’d be putting myself out of a job, because it was inevitable that the counsel foreign intelligence policy position would disappear, and some – an AIG for the National Security Division would emerge. And so I thought it was a – I thought it was a good idea. And, I mean, David Kris and I started talking about it having lunch at Au Bon Pain, you know, before 9/11 and talked about it afterwards, and talked about it for years to try to think about how this could – how this could come about.

I remember when now-FBI Director Comey was the DAG and my boss, he sent a memo to all the heads of components, of which I was one, saying: What are your top priorities? What do you think the department’s top priorities should be for the coming year? Think this was ’04. And I said the number one priority would be the creation of a National Security Division. And I think this was ever before Judge Silverman’s report came out. So, yeah, so I was a proponent of it, and thought it would be a good idea to try to address some of the organizational cultural issues, the management issues that we’ve talked about here, because I thought it would be more effective, especially after the wall came down. So anyway, so I was a proponent of it.

And so, you know, I think – you know, frankly, and some of my colleagues here – who are here who were in OIPR in the day – back in the day may disagree with me here or think about it differently – but, you know, we were so damn busy that – with doing – keeping up with all the FISA materials that we had to keep up with, that I’m not sure people were overly anxious about the creation of it. And it kind of just happened. And then, you know, Ken came in and his team, and they built it from there.

So, you know, I think we didn’t spend a lot of time before that trying to figure out exactly how it was going to be operationalized within OIPR. There was a huge debate within the department about – especially, I think, after Judge Silverman’s report came out recommending the creation of an NSD – you know, with Alice, with a whole team of people discussing: Does this make sense? Are there other options? Could we do other things? And all of that was discussed and debated. But at the end of the day – because it was a significant loss, I guess you would say, for the Criminal Division because two very important parts of the Criminal Division were being moved out and moved to another division. So that was something you didn’t want to do lightly. So there was vigorous discussion and debate about it. But at the end of the day, people concluded it was the right thing to do.

MR. TOSCAS: Alice, when you were asked to be the assistant attorney general for the Criminal Division, how and when did you learn that you would not be responsible for national security because that would be handled by this new division that was being stood up? And if you can, comment on the coordination between – we heard from Ken Wainstein earlier today, who talked about the great coordination – but personally, your efforts in easing that transition. But from your view, how was the coordination between Crim and NSD and what challenges did you face in that process?
MS. FISHER: So, I think when I came in, in late August or September of 2005, the decision had pretty much been made. And then it was just about how is it going to work? But I think, although there were papers being circulated about different structures and things like that, I think the decision had basically been made. And then it was a year before it was actually implemented and, you know, Ken was confirmed and we had a new division.

So I think there was a lot of angst within people in the Criminal Division, and counterterrorism, and other national security roles, about whether that was going to erect another bureaucratic obstacle to information sharing and other things, because here you were, setting up another government bureaucracy. And was that going to slow things down? It was like a startup, you know? Was there going to be gaps in how things got handled? Were we going to be able to cover all the tracks with the field and have the same relationships with the U.S. attorneys and things like that? So there was a lot of angst about how it was going to work.

But the decision was made. And then it was almost a year before it actually took off. And so there was a lot of work being done, as far as resourcing and spaces and things like that. And Ken got there with lots of others still in this room. And it was right down the floor. You know, the Criminal Division, the National Security Division, on the same floor, lots of the same people, you know, resources. We pushed over secretaries, computers, coffee – like, everything that the National Security Division needed, we made sure that they had. And Ken was great. And I don’t remember any disagreement on anything. They may have gone on; I may not have known about it. But no significant turf disagreement, anything like that, between the Criminal Division and the National Security Division.

I am a huge believer. I think that it was absolutely the right decision. I think the National Security Division was – has a mission, and it’s doing a great job, and has coordinated really well with the criminal division. I didn’t see information hording. I saw only collaboration and sharing, which I know is even better today because, again, a lot of people that were in the Criminal Division were in the National Security Division. And John, and so many of his team, have been, you know, national security experts for so many years – you know, 15 or more. And it’s just fabulous to see so many people continuing in public service in that way.

MR. BAKER: It reminds me, Ken owes me big time because when I got the plans for the skiff for the front office of the National Security Division, I was responsible for designing that. And I saw this budget item for, like, spending thousands and thousands of dollars for the bathroom in the skiff. And I said, no way. That’s, like, an inspector general investigation waiting to happen. So I cut the budget for the bathroom, and saved the taxpayers a lot of money with that one. So, anyway. (Laughter.)

MR. TOSCAS: Not going to touch that. (Laughter.)

MR. BAKER: So that was the level of detail we had to deal with.

MR. TOSCAS: I will say, just to add a little more detail, in the weeds, I was the beneficiary of Alice’s graciousness in transition. On one day, I came into work and I was a
senior counsel to Alice. And on the next day, or sometime that afternoon or late evening when Ken was sworn in, I became senior counsel to Ken. And those of you who may not know, at main Justice there’s very limited space in the building. It’s at a premium. And Alice allowed me to stay in her workspace, right down the hall from our front office in NSD. And I can tell you that across the board people made themselves available to all of the folks in NSD who needed to ask questions on a daily basis: How do you do that? How did you track this? How should we go about that? What are the pros and cons of that particular issue, or this particular procedure? And couldn’t ask for better partners in transition, and even after transition. It’s just been a great relationship with the Criminal Division.

Pat, I know we have to stop –

MS. FISHER: Because it says stop right there. (Laughter.)

MR. TOSCAS: Because the sign says stop. And I’m going to follow the instructions. But I’d like to just let you finish with, if you could, since the stand up of NSD, how has that impacted the prosecutors out in the U.S. attorney’s offices? If you could share that with us, because the relationship we have with the U.S. attorney’s offices is something that’s very, very important to us.

MR. FITZGERALD: If I sat where Alice sat back in 2005, I would have been very concerned that creating another division would create another impediment in terms of information sharing. And I don’t remember whether I had that thought back then, or whether I was invested in whether there was a new division or not. In the field, I don’t recall anyone saying, gee, the creation of a new division created some impediment. I think the field was much more concerned with the policies and practices of sharing with the FBI, sharing with main Justice, sharing with locals. And that got sorted out.

I don’t recall – I recall that relationship being very good then with Washington. The issue of whether it was done within the auspices of Criminal or National Security Division, no one ever carped in the field that that made life worse. I think the culture developed between the folks in the field and main Justice and the National Security Division in particular. I think there was very good, close coordination, and people felt like there was no agenda other than doing the right thing. And there’s a lot of people in this room who went about that. I’ll shout out Kelly Shackelford and others. But I just think is a great working relationship over time as the division got stood up. And that came from the leadership level and the working level.

MR. TOSCAS: As we wrap here, let me just say, obviously as a colleague over the many years, it’s been great working with all of you. But as a citizen, just want to thank you for your service. All of you are outstanding public servants. And the country’s lucky to have folks like you that step up and serve in these important positions. So thank you.

MS. FISHER: Well, likewise, George. And happy birthday, NSD.

MR. TOSCAS: Thank you. (Applause.)