IN HOFFA'S SHADOW

A STEPFATHER, A DISAPPEARANCE IN DETROIT, AND MY SEARCH FOR THE TRUTH

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the White House and Central Intelligence Agency, since the ongoing program had been previously legally vetted and was deemed vital. The reaction to my legal decisions about interrogation paled next to the reaction to my conclusion that parts of the warrantless surveillance program were legally flawed and needed to cease. This decision led to historical constitutional clashes with Vice President Cheney, Alberto Gonzales, and other senior Bush officials—clashes that played out in the White House and at the foot of Attorney General John Ashcroft's bed in the intensive care unit at the George Washington University Hospital. It was by far the most difficult and stressful period of my life.

Throughout this ordeal I thought a lot about Chuckie and began the jagged process that would lead me to seek his forgiveness. An important step in the process was my accidental encounter with *O'Brien v. United States* from the Justice Department perch that I had reached only because I had renounced Chuckie. When I was a teenager, Chuckie had harshly criticized Attorney General Robert Kennedy for his abusive prosecutions and surveillance tactics against him, Jimmy Hoffa, Chuckie's mother, and his organized crime friends. He claimed that the Justice Department Kennedy ran was a self-serving institution staffed by Ivy Leaguers who under the guise of enforcing the law often broke it in secret and without consequence. As a teenager I swallowed this story whole. But in law school I had dismissed it as the baseless musings of a criminal.

Eight weeks into my job at OLC, I began to think that Chuckie's description of the early 1960s Justice Department was a generally apt description of the post-9/11 Justice Department. (I would later learn that his take on RFK also had a large element of truth.) I was knee-deep in a controversial government surveillance program that was difficult to square with congressional restrictions on government action but that was shielded from public view because the executive branch preferred it that way.

I had also just read an old Supreme Court decision that had vindicated Chuckie's claim of secret governmental overreaching not unlike what I was witnessing up close myself. It turned out that the Justice Department, as Chuckie had always said, was a dangerously powerful institution with surveillance and prosecution powers that, in pursuit of a righteous cause, were

Dorfman and his mob associates enjoyed virtually unfettered control over loans." The sharpest irony of RFK's crusade against Hoffa is that it opened the door for the mob to infiltrate and leech off the union like never before.

RFK's drive against Hoffa also had unfortunate legal and political consequences. His targeting of Hoffa is the paradigmatic case in American history of wielding prosecutorial power to destroy a person rather than pursue a crime. Under RFK's command, the Department of Justice determined that the evil Hoffa needed to be brought down and then conducted a comprehensive inquisition into every aspect of his life in order to pin on him a crime, any crime, using every tool of governmental coercion. It also used the same tools against his colleagues and associates in an effort to undermine Hoffa. Even RFK loyalists in the Justice Department who otherwise defended his extreme tactics acknowledged that he veered toward persecution and vendetta in the inordinate focus and resources he allocated to nailing Hoffa.

One need not be naïve about criminal justice to agree with this assessment. Prosecutors have deployed "pretextual prosecutions" against the Mafia since at least 1931, when the federal government put away Al Capone not for his bootlegging endeavors or frequent murders, but rather for income tax evasion. The ideal of prosecuting the crime and not the man is just an ideal. Despite Robert Jackson's warnings, our system of justice has long tolerated flexible uses of the government's manifold legal tools to put away dangerous criminals.

But RFK's relentless, very public, and obviously vengeful campaign to put away a single man at any cost was alarming precisely because the same techniques could be used to destroy just about any citizen who draws the ire of the state. It also belied the appearance of evenhanded justice that is so crucial to the legitimacy of prosecutorial power, especially since RFK was the brother of a president who had pledged to put Hoffa away. It is impossible to assess RFK's actual impact on public perceptions of future Justice Department actions. But his "Get Hoffa" campaign was widely invoked (or decried) as a precedent in the two subsequent notorious instances of prosecutorial excess—Ken Starr's pursuit of Bill Clinton in the late 1990s and John Ashcroft's pursuit of Islamist terrorists in 2001–2002.

It is easier to trace the pernicious effects of the Kennedy brothers' reorientation of the IRS for political ends. Earlier administrations had some-

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SURVEILLANCE BACKUP

MY BOSS FOR A YEAR in the Department of Justice, Attorney General John Ashcroft, was as unlike his predecessor Robert Kennedy as Kennedy was unlike Jimmy Hoffa. Ashcroft was a country boy from a family of modest means that lacked political connections. He began his career in public office as Missouri state auditor and slowly worked his way up the Missouri political ladder as a social and fiscal conservative to become governor and senator before George W. Bush nominated him for U.S. attorney general in January 2001. Though he attended college at Yale University, Ashcroft, like Hoffa, had a natural mistrust of Ivy Leaguers, especially of the progressive variety.

And yet after the attacks of September 11, 2001, Ashcroft modeled his

approach to defeating terrorists on Robert Kennedy's approach to defeating Jimmy Hoffa and organized crime. "Forty years ago, another Attorney General was confronted with a different enemy within our borders," Ashcroft told a gathering of U.S. mayors in October 2001. "Then, as now, the enemy that America faced was described bluntly—and correctly—as a conspiracy of evil," he added, using Kennedy's phrase to describe Hoffa's Teamsters. Ashcroft praised Kennedy's aggressive use of "all of the available resources in the law to disrupt and dismantle organized crime networks." A month later, Ashcroft spoke at the ceremony to dedicate the Justice Department building to RFK. Ashcroft's first note of praise was for Kennedy's "extraordinary campaign against organized crime that inspires us still today in the war against terrorism."

Ashcroft deployed the Kennedy model aggressively to find and incapacitate the 9/11 enemy. The Justice Department he led took hundreds of undocumented immigrants from the Middle East and South Asia off the streets for immigration violations. It deployed criminal laws to jail or hold "material witnesses," usually with little proof of terrorist ties. It approved aggressive interrogations bordering on torture. And it signed off on the legality of Stellarwind, President George W. Bush's post-9/11 surveillance program that intercepted the telephone calls and email messages of Americans and collected metadata in bulk.

President George W. Bush secretly approved Stellarwind in the Oval Office on the morning of October 4, 2001. According to an official government report, a few hours later the legal authorization for the program was "pushed in front of" Ashcroft by an unnamed person "and he was told to sign it." Ashcroft had not been "read in" to the classified program before October 4, and he had done no research on its legality.

Three weeks earlier, on the morning of September 12, President Bush had interrupted the first National Security Council meeting following the 9/11 attacks and looked at Ashcroft. "Don't ever let this happen again," Bush said, appearing to place responsibility for the most devastating terrorist attack in U.S. history on his attorney general. Ashcroft took this remark "personally" and made it his "guidepost" in the war on terrorism. Years later he would invoke the president's words in urging me to go as far as the law would

allow in approving aggressive counterterrorism actions. I imagine that he had this guidepost in mind when he dutifully signed the papers for Stellarwind after being told that the program was "critically important" to keeping Americans safe.

Ashcroft's signature on the authorization was critically important as well. The intelligence bureaucracy charged with executing Stellarwind had good reason to worry that it violated criminal restrictions on domestic surveillance. Ashcroft's sign-off solved that problem. As a practical matter, Justice Department approval of an intelligence operation precludes the Department from prosecuting anyone involved in implementing it, even if the program is later deemed to violate the law. It's an extraordinary power.

It's also another example of what Chuckie—who knows nothing about surveillance law but a lot about government double standards—calls "backup": the government's ability, in secret, to determine the limits on its actions and thus to skirt legal rules that bind everyone else. Surveillance backup did not begin with John Ashcroft's signature on the Stellarwind authorization. For the six decades prior to 9/11, presidents and attorneys general, under pressure to find and defeat various "enemies" in American society, had secretly blessed surveillance practices that would be declared illegal when they came to light years later. One such illegal surveillance program took place during Bobby Kennedy's tenure as attorney general and would ensnare Chuckie, Anthony Giacalone, Sylvia Pagano, and perhaps Jimmy Hoffa.

ON JULY 26, 1917, the godfather of the American surveillance state, the twenty-two-year-old J. Edgar Hoover, joined the Department of Justice. It was a disquieting time, three months after the United States entered World War I and four months before the Bolsheviks' October Revolution. The patriotic Hoover quickly ascended to the head of the Department's Alien Enemy Bureau and spent World War I and its aftermath zealously hunting for the thousands of anarchists, communists, disloyal citizens, and other enemies of the state that he and his subordinates would round up and incapacitate. Hoover had a conspiratorial bent and was a master at using the many secrets he amassed to enhance his power. He became director of the Justice Depart-

warrant by a secret court for electronic surveillance even of foreign agents. This was the law that I would confront a quarter century later, when I began poring over cases and documents related to the two-year-old Stellarwind program.

"TAKE A LOOK at this!" an agitated Jim Baker said as he handed me a piece of paper with scribbled signatures on it. It was an early December afternoon in 2003 in my Justice Department office. Baker was in charge of an office that sought national-security-related warrants from the secret court in accordance with the 1978 FISA law. He was an expert on surveillance law and one of the most outstanding government lawyers I knew—smart, careful, fair-minded, and perpetually worried. As he walked into my office, Baker's face expressed more unease than usual under his close-trimmed, fast-graying beard.

At the time, I was trying to figure out whether I could approve Stellarwind. Baker had learned about the program a month after it began, and he didn't like it. The basic problem was that it authorized surveillance activities by the National Security Agency in the United States against suspected terrorists and citizens without the judicial warrants that FISA, on pain of criminal penalty, required. The program had been approved by Attorney General Ashcroft in October 2001 and by my predecessors in OLC every six weeks or so since the fall of 2001. But it was hard to square with the law.

The paper Baker handed me was a memorandum, dated October 7, 1963, for Attorney General Robert F. Kennedy from FBI director J. Edgar Hoover. The subject line read: "Martin Luther King, Jr., Security Matter—Communist." Hoover wrote that King was a "wholehearted Marxist" in addition to his position as president of the Southern Christian Leadership Conference. "In view of the possible communist influence in the racial situation," Hoover wrote, "it is requested that authority be granted to place a technical surveillance on King" at his office and anywhere else, for an unspecified period of time. Robert Kennedy's signature appears in the approval line of the document, dated October 10, 1963. At the time I was amazed to learn

that Kennedy had authorized Hoover to wiretap King, without a warrant and without limit, based on a factually unsupported link between King and communists, the "enemy within" that preceded gangsters and terrorists.

"*This* is why we have FISA," Baker explained, jabbing his finger into the document. He saw the King surveillance as a cautionary warning about abuses of secret unilateral electronic surveillance. "If they think FISA is cumbersome or too slow, we can get rid of it," he said, referring to the law's requirement of judicial approval before surveillance. "But do we really want to go back to these days?"

I certainly didn't want to go back to those days. But I also didn't cherish upending a vital intelligence program at a time when everyone in the government feared another attack. I was bound by a presumption that my predecessors' legal judgments were sound, and I could find no example in American history in which the attorney general or his delegate (which is what I was) had withdrawn legal support for an intelligence program in the middle of a war. And yet in March 2004, I concluded that the Stellarwind legal opinions contained fatal legal flaws, rested on a misunderstanding of how the program worked, and couldn't be squared with FISA and other laws. I disapproved parts of the program for which I could find no plausible argument and upheld the parts I thought could be supported by plausible ones.

Ashcroft and his deputy, James Comey, agreed with my analysis, and agreed that the Justice Department could not reauthorize Stellarwind when it came up for renewal on March 12, 2004. The White House disagreed. "If you rule that way, the blood of the hundred thousand people who die in the next attack will be on your hands," shrieked David Addington, Vice President Cheney's counsel, in a White House meeting about a week before the next approval for the program was due. White House counsel Alberto Gonzales, though calmer, was also unhappy. These were understandable reactions, since the Justice Department had signed off on Stellarwind for years.

What followed was a series of now-famous events. Ashcroft was stricken with severe gallstone pancreatitis and would be heavily sedated for the next few days as the doctors waited for the inflammation in his pancreas to subside before operating on him. In several meetings, White House and senior

intelligence officials, and Vice President Cheney, sought unsuccessfully to change my mind and Comey's, or at least delay our decision, until Ashcroft was well. When that tack failed, I witnessed Gonzales and White House chief of staff Andrew Card approach a weak and heavily sedated Ashcroft, in his intensive care hospital room a few hours after gallbladder surgery, only to be rebuffed by Ashcroft. President Bush then decided to continue Stellarwind without Justice Department approval. But he changed his mind the next day and accepted our legal objections and proposed constriction of the program after learning that many of his senior officials were on the verge of resigning.

President Bush's last-second decision averted a historic constitutional crisis and executive branch meltdown. The episode showed that while the president has the legal authority to overrule his attorney general on a matter of law—as Roosevelt had done in overruling Jackson at the dawn of World War II—his ability to effectuate his legal interpretation depends on the willingness of subordinates to carry out his wishes (as Jackson had done when Roosevelt overruled him). "Your office is expert on the law and the president is not," then FBI director Robert Mueller told me at the time, explaining why he had threatened to resign rather than abide by the president's overruling of my decision.

For the unprecedented steps I took in narrowing Stellarwind and in standing up to the White House, I would later be hailed a "hero" in some quarters. In other quarters I was censured as "political" or "opportunistic" for not having the courage to support the president across the board. And critics on the other side complained about the parts of Stellarwind I had reapproved. They accused me of contorting the law and even committing a crime. There was no perfect solution to the mess I faced, but after thinking about it for fifteen years I'm still not sure I should have done anything differently.

I did not fully realize it at the time, but the efforts I made to uphold parts of the program were not unlike the ones made by past attorneys general and their advisors who, faced with enemies within, approved and sometimes expanded ongoing surveillance programs to meet the threat. This was especially true in the part of my ruling that made an alternative argument to support continued warrantless wiretapping based on the president's war and