

GUYS IN SUITS: ON A MISSION

OK, they may look like accountants, but this team of government lawyers is a key cog in the war on terror

By Chitra Ragavan

Just a few weeks ago, Kenneth Wainstein, the Justice Department's new national security chief, received a book in the mail, a memoir titled *Secrets*. Its author, Daniel Ellsberg—the former Defense Department analyst who was prosecuted for leaking the Pentagon Papers to the *New York Times* 36 years ago—sent the book to Wainstein after a spirited exchange with him during a recent panel discussion about prosecuting leakers. “Dear Ken,” Ellsberg inscribed in the book, “I shared your revulsion against all leaks until some years ago.”

Prosecuting those who leak classified information is just a small part of Wainstein's controversial portfolio. As the assistant attorney general for the National Security Division, created last summer, Wainstein has been handed most of the department's hot-potato issues and has at his disposal some of the government's most secret, powerful, and criticized investigative tools. Just recently, President Bush decided not to reauthorize the National Security Agency's controversial warrantless electronic surveillance program but to place it under a special court—the Foreign Intelligence Surveillance Court—that oversees government surveillance in intelligence investigations. The revamped program will now be under Wainstein's purview. Look for civil-liberties groups and the new Democratic majority in Congress to keep a close eye on his every move.

The career federal prosecutor seems unfazed by the prospect of such scrutiny. In an interview, Wainstein, 45, said that he is used to making difficult decisions based on the facts and the law. “But with national security being a hot politi-

cal issue, it's natural for people to scrutinize our big prosecution decisions through the prism of politics,” says Wainstein. “Because it's important that we maintain public confidence, we're careful to both make and to announce our decisions in an apolitical way.”

Sounds good. But in coming months, Wainstein, a Senate-confirmed presidential appointee, will have to contend with a host of lingering perception problems. “This administration has politicized almost every part of the Justice Department,” says Kate Martin, director of the Center for National Security Studies, a civil-liberties group. “We need congressional oversight to prevent this key division from being similarly politicized.”

If anyone can serve as an apolitical gatekeeper for the department's professional ranks, friends and colleagues say, it's Wainstein. He was exposed to the trapdoor world of national security issues early in life,

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thanks to his parents, who both spent their careers in military intelligence. His dad, Leonard, worked for a nonprofit group that advised the Joint Chiefs of Staff. His mother, Eleanor, who died last December, wrote a number of prescient studies for the Rand Corp. in the 1970s on terrorism, Islamic fundamentalism, and corporate kidnappings. “There was a lot of talk about terrorism back then,” says Wainstein. “It's just different predators [today].”

Gorilla. A former U.S. attorney for Washington, D.C., Wainstein spent most of his career putting drug dealers, murderers, and crooked politicians behind bars. He later picked up his national security credentials at the FBI, where he served as general counsel and chief of staff to Director Robert Mueller. “You need somebody who can balance the in-

telligence imperatives with the law-enforcement imperatives,” says Chuck Rosenberg, a U.S. attorney in Virginia. “Sometimes they are in conflict, and you need someone to sort that out.”

One of Wainstein's tougher tasks will be to make sure the FBI's often complex counterterrorism and intelligence investigations are conducted appropriately. “I think he's strong enough to say ‘No’ when ‘No’ must be the answer on something,” says former deputy attorney general James Comey. “But he's also creative enough, and enough of an agent's prosecutor, that if there's a legal way to get to ‘Yes,’ he will try to.”

The National Security Division (proposed fiscal year 2008 budget: \$78 million; 346 employees; 236 lawyers) resulted from a key recommendation of the presidential commission investigating the



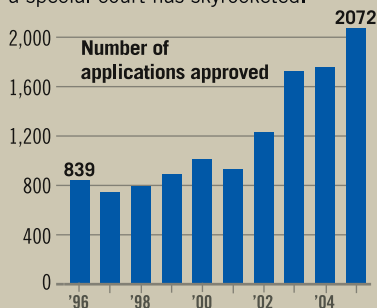


Leaders of the Justice Department's new National Security Division: (from left) Brett Gerry, Ken Wainstein, Matt Olsen, and Charles Steele

CHARLIE ARCHAMBAULT FOR USN&WR

FOREIGN INTELLIGENCE SURVEILLANCE COURT

As concern over terrorism has increased, the number of intelligence surveillance applications approved by a special court has skyrocketed.



Source: U.S. Department of Justice

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intelligence failures prior to the war in Iraq. The division brings together the Office of Intelligence Policy and Review, a previously stand-alone entity in the department—whose lawyers draft the arcane foreign intelligence court surveillance applications—with the prosecutors in the counterterrorism and counterespionage sections, previously located in the Justice Department's Criminal Division. Sounds like routine bureaucratic shuffling, but it's not; that presidential commission decided the reorganization could bring much greater coordination to the Justice Department's national security efforts. Long before the commission threw its weight behind the idea, senior justice officials, like Comey and OIPR chief James Baker—now on leave at Harvard—pushed for a one-stop shop for national security matters. "There were certain difficulties with

respect to the old structure," Baker says. "It was more complex, you had more players, and there were more disparate interests. It's already complicated. Why make it more complicated?"

There were lots of other reasons the idea made sense, says Comey, now general counsel and senior vice president of Lockheed Martin. After the 9/11 attacks, Comey says, the "constant drumbeat" from counterterrorism investigations turned counternarcotics, corruption, fraud, and important other criminal priorities into "stepchildren" of the Criminal Division. "It's hard enough to manage the Criminal Division when you *don't* have a 600-pound gorilla of counterterrorism sitting on your desk every day," Comey says. "Now that gorilla is sitting on Ken Wainstein's desk."

Changing a hidebound bureaucracy

like that of the Justice Department is anything but easy. "I think a concern of people who were working counterterrorism criminal cases and the people in OIPR was that one was going to swallow the other," says Comey. "And I spoke to both groups and assured both groups that nothing like that was going to happen."

Winners and losers. Wainstein, friends say, has the natural ease and grace needed to salve some of the "bureaucratic tenderness" that inevitably results from such structural change. "That's important in a new bureaucratic organization where there have been winners and losers," says former justice official Daniel Levin. "He won't rub people's noses in it."

Among the ranks of the career prosecutors, Justice Department officials say, there's a certain measure of relief that "one of their own" will oversee the big terrorism and spy cases because neither Attorney General Alberto Gonzales, Deputy AG Paul McNulty, nor the head of the Criminal Division, Alice Fisher, has any front-line prosecutorial experience. And although McNulty is respected, both Gonzales and Fisher are viewed by some inside and outside the department as political actors committed primarily to Bush's war-on-terror agenda.

In its temporary second-floor offices at Main Justice—as the department's headquarters in Washington is known to insiders—the new National Security Division is starting to settle into a rhythm. Wainstein and his team of career prosecutors, including Chief of Staff Charles Steele, described to *U.S. News* how they are engaged in a top-to-bottom retooling of the department's national security mandate.

One of the top priorities is dealing with the Foreign Intelligence Surveillance Court. Established under 1978's Foreign Intelligence Surveillance Act, the court comprises 11 sitting judges, each chosen by the chief justice of the Supreme Court. FISA Court judges take turns reviewing surveillance applications.

Civil libertarians and many defense attorneys view the court, which meets in a secure conference room at Main Justice, as a rubber stamp because there is no opposing counsel present and because it has approved all but four of the nearly 12,000 applications for FISA warrants over the past decade. But the court has

asked for numerous modifications of applications over the past few years, and rejected four of them in 2003, blaming numerous FBI errors. A year later, several FISA Court judges expressed their anger—and one resigned in protest—after Bush, arguing that he needed "speed and agility" in the war on terrorism, bypassed the court entirely and issued an executive order authorizing the National Security Agency—without the benefit of a court order—to listen in on and record international communications by U.S. residents with known or suspected ties to terrorist groups. President Bush's recent decision—after sustained pressure from

agility" that Bush complained was missing from the approval process. For the past three months, Matthew Olsen, who now oversees OIPR, says he has been "looking behind the curtain," reviewing more than 50 cases and meeting individually and as a group with all the FISA Court judges. Olsen wants to make whatever changes may be necessary in the new system before inertia sets in. "It's sort of a one-time window, and we should take advantage of it," he says. "And so far, the response has been positive."

The National Security Division's law and policy chief, Brett Gerry, has been working on proposed legislation to modernize the FISA statute. "One of the fundamental changes needed," says Gerry, "is changing the definition of electronic surveillance in the statute" to ensure that the law reflects the revolution in telecommunications.

That's going to be a tough fight on Capitol Hill, where similar legislation fizzled last year because of suspicions that the Justice Department was trying to use the proposed changes as a smokescreen to allow more warrantless wiretapping.

Keeping terrorism on the front burner remains the top priority, however, says J. Patrick Rowan, who heads the counterterrorism and counterespionage sections in the new division. But the big terrorism cases—like the prosecution of Zacarias Mousaoui and shoe-bomber Richard Reid—have been few and far between. Wainstein and his colleagues say that's evidence the Justice Department's counter-

terrorism efforts are working. But civil-liberties groups have criticized what they say are penny-ante prosecutions of small-time wannabe terrorists, relying on ancillary charges, instead of the more difficult antiterrorism statutes.

With the passage of time since the 9/11 attacks and the absence of any big new terrorism prosecutions, at least some prosecutors, says Rowan, are refocusing their efforts on potentially more rewarding public-corruption cases. "We went out as a department and really got ready for battle in the world of national security and counterterrorism," says Rowan. "We can't assume our readiness level now is really where it was in 2004. Between turnover and the natural tendency of good prosecutors to go where the cases are, we've got to stay on top." A tall order, to be sure. And everyone will be watching. ●

A major challenge is selling a suspicious Congress on the need to update the wiretap laws.



Justice's investigative methods are under scrutiny from Senate Judiciary members (from left) Arlen Specter, Edward Kennedy, and Patrick Leahy.

Congress and civil-liberties groups—to place the NSA program under the FISA Court means the issue now resides, along with that other 600-pound gorilla, right on Wainstein's desk.

Since the 9/11 attacks, the number of FISA applications presented to the court has skyrocketed, and the new NSA program is only going to add further to the workload—and the scrutiny. "We don't know enough about what is really going on," says Caroline Fredrickson of the American Civil Liberties Union, "to know if, in fact, the new program complies with the law."

Wainstein says he's comfortable with the legal theory behind the program to seek surveillance warrants from the FISA Court. The OIPR has streamlined its operations and reduced FISA processing delays, he says, to allow for that "speed and