

It was not until November 2002 that the FISA Court of Review – the never-before-used appellate body created by the statute – issued an opinion overruling the FISC’s decision. Thanks to the Court of Review holding, the law thus stands today where Congress *intended* it to stand on October 26, 2001: there is no restriction upon coordination between law enforcement and intelligence organs in connection with FISA surveillance or physical searches, and such activity can lawfully be undertaken even if *primarily* done with prosecutorial intent, provided that a “significant” intelligence purpose remains.¹¹¹ Given its erratic and reflexive behavior after September 11, how faithfully the FISC actually applies this standard to individual FISA requests remains to be seen.¹¹² Provided that the FBI can persuade its NSLU attorneys to *learn* FISA law

¹¹¹ Ironically, the law stands here today even though the Court of Review held that before the USA PATRIOT Act there really was never any “dichotomy” between a FISA order’s “intelligence” and “criminal” purpose *in the first place*. As the Court of Review explained the law, under FISA as originally written, even a *wholly* prosecutorial purpose *should* have been acceptable – insofar as putting spies and terrorist behind bars and/or using the threat of prosecution to “squeeze” them for information *was* an entirely legitimate “intelligence” purpose. According to the Court of Review, the USA PATRIOT Act, by purporting to loosen a “purpose test” that Congress wrongly assumed to exist, actually *imposed* a balancing test between “criminal” and “law enforcement” purposes for the first time. The bottom line, however, is that FISA law today *actually* says what Congress *intended* it to say after the passage of the USA PATRIOT Act.

¹¹² There is some room for concern that the FISC’s legal instincts have become too congruent with the “Wall” mentality. As the Court of Review acidly suggested in a barbed footnote to its November 2002 opinion, some of the FISC’s eagerness to defend mistaken concepts of the “Wall” may have stemmed from the fact that an OIPR attorney closely associated with “Wall” thinking recently took up a position as FISA clerk to the federal district judges serving on the FISC. See Court of Review Opinion, *supra*, at 20 n.15. The attorney in question is Allan Kornblum, who achieved a degree of notoriety in FISA circles as the DOJ lawyer perhaps most personally responsible for the Department’s much-criticized interpretation of “probable cause” under the FISA statute during the Wen-Ho Lee affair. See Fred Thompson & Joseph Lieberman, transcript of press conference (August 5, 1999) (*available from* Federal News Service), at 2-3 (remarks of Senator Thompson describing OIPR’s “highly restrictive view of probable cause” as “a faulty interpretation”) & 4 (remarks of Senator Lieberman, noting that he “disagreed” with OIPR’s “judgment call”); Bellows Report, *supra*, at 482 (concluding that the Wen-Ho Lee FISA application indeed “established probable cause” and “should have resulted in the submission of a FISA application, and the issuance of a FISA order”).