

Oregon BENCHMARKS

THE U.S. DISTRICT COURT OF OREGON HISTORICAL SOCIETY NEWSLETTER

Famous Cases: Surveillance!

The Foreign Intelligence Surveillance Act and Court

By William Long

On Thursday September 25, a wide array of distinguished and talented lawyers discussed the Foreign Intelligence Surveillance Act (FISA) and Court (Court) before a crowd of more than 140 at the Hatfield Courthouse. One of the visiting attorneys, Mr. James Baker, the federal government's chief FISA expert, said that he thought it was the most knowledgeable panel he had seen assembled to discuss this important topic.



Charles Groder

Though the published program called for four speakers on the FISA and the Court, two additional important visitors made their presence known in the days before the event and added significantly to it. First on the published program was Mr. Charles Gorder, Assistant U.S. Attorney, who discussed the origin of the FISA and compared the warrant requirements for searches or wiretaps under regular criminal law with the showing necessary to secure a FISA order from the Court. (Please note the chart on p. 3.) His major point was that though the requirements differ in certain particulars, there was a similarity in a probable cause finding, so that the differences between the FISA and criminal statutes should not cause constitutional problems.

Judge Harold Baker, Senior U.S. District Court Judge from the Central District of Illinois and Judge from the Court, next spoke. Judge Baker's extensive experience in government intelligence issues, beginning with his appointment as senior counsel for the Rockefeller Commission in 1974, informed his spirited presentation on why the procedures proposed by Attorney General John Ashcroft on the gathering of foreign intelligence information were largely rejected by the Court in May 2002. The Court held that these procedures would eliminate the "wall" between the intelligence-



Judge Baker



Judge Leavy

gathering and criminal prosecution work of the FBI and the U.S. Department of Justice that the Court said was statutorily required.

Judge Edward Leavy then spoke. He has served as a member of the Foreign Intelligence Surveillance Act Court of Review for about two years and was on that three-judge panel when the decision reached by Judge Baker's Court was appealed in the summer of 2002. The Court of Review reversed the Court. Rather than rehearsing all the reasons for that rehearsal, Judge Leavy emphasized that the tightly interlocking nature of the definitions in the FISA stressed the dual purpose of the act—intelligence gathering as well as criminal law enforcement. Because there never appeared to be a "wall" between these two functions in the statute, the Court of Review discarded twenty years of judicial opinions to the contrary and upheld the new information-sharing procedures proposed by the Attorney General.



John Cline

The last speaker on the regular program was Mr. John Cline, an attorney in private practice in Albuquerque. His interest and expertise in the issue stems from having written the amicus brief on behalf of the National Association of Criminal Defense Lawyers before the Court of Review as well as the petition for certiorari before the United States Supreme Court after the Court of Review's decision. Mr. Cline skillfully presented a series of figures showing that in the history of the Court, the U.S. Government has almost a 100% success record in securing orders for surveillance. He argued that the statute "stacks the deck" against defendants and that certain procedures, especially regarding motions to suppress and making the FISA applications available to criminal defendants, ought to be front and center

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President's Message



We had a very successful picnic in early August at the Leavy family hop farm, and this year, the weather cooperated. Special thanks go to **Judge Leavy** and his family for once again generously letting us use their farm, and to **Jenifer Johnston** and the special events committee for their hard work in organizing the picnic. The picnic provides a wonderful opportunity for members of the bar, the Court, the Court staff, and their families to get reacquainted with old friends and make new ones (*See photos on page 5*). This event would not have been possible without the sponsorship of the **Federal Bar Association** and the **Attorney Admission Fund**.

For those of you who have not been attending our Society's ongoing series of presentations on famous cases and other matters of significance to our federal court system, you have been really missing out on remarkable presentations (and CLE credits). They are the best in-depth law-related presentations you will find anywhere. The most recent of these presentations, *Surveillance! The Foreign Intelligence Surveillance Act and Court*, was outstanding. Our society brought together members of the Foreign Intelligence Surveillance Court of Review, the Foreign Intelligence Surveillance Court, the head of the Justice Department Office of Intelligence Policy and Review, U.S. Attorney's Office, the lawyer representing the amicus National Association of Criminal Defense Lawyers, and the drafter of the Foreign Intelligence Surveillance Act for a presentation on this timely topic. (A videotape is available. Contact me.) Incidentally, had it not been for the California recall election case, our presentation would have been broadcast by C-SPAN.

Special thanks for this unique presentation to **Bill Long** who developed and organized the program, to **Leah Lively** who handled publicity, and to **Jenifer Johnston** who assisted with the program and publicity.

As we approach year end, we are leading a special membership drive. In the next few months, look for renewal letters and letters asking you to solicit new members.

John Stephens

Do You Know the Judge?

By Leah Lively



This judge played football and tennis in high school. His favorite movie is Stanley Kubrick's *Paths of Glory*. His favorite TV show is *Are You Hot?* His favorite book is *Ivanhoe* by Sir Walter Scott, and one of his favorite songs is *He Stopped Loving Her Today*, by George Jones. His favorite album is *Abba Gold*. He has followed horse racing for many years and picked Funny Cide to win the 2003 Kentucky Derby. Conversely he lost an entire week's paycheck 40 years ago on a horse named Mighty Choo Choo. If he was not a judge, his dream job would be to become the announcer for the Boston Red Sox (or to announce at the ballroom dancing competitions shown on Oregon Public Broadcasting and at the Westminster dog show—he is sure that the same person announces both events). His favorite spot to visit is Herbert Hoover's boyhood home in Newburg.

Do you know the judge? (*Answer on page 6*)

Gordon Dodds, Northwest Historian

By Dr. David A. Johnson

Family, friends, colleagues, and students mourn the death on August 29 of Gordon B. Dodds. Dodds retired in 2000 as Professor of History at Portland State University, after 34 years as a member of the faculty. He was the inaugural recipient of the University's highest academic honor, the Branford Price Millar Award, in 1979, and in 1998 the PSU Alumni Association conferred on him its Distinguished Faculty Award.

The "Dean" of Pacific Northwest history, Dodds was a Harvard graduate who received his Ph.D. from the University of Wisconsin. Before joining the PSU faculty, he taught at Knox College in Illinois. At PSU Dodds was the author or editor of numerous books, articles, and book reviews that established his reputation as a foremost interpreter of Western American and, particularly, Oregon and Pacific Northwest history. His book, *Oregon: A Bicentennial History*, remains essential reading for anyone interested in the history of the state and concerned about its future. His last book, *The College That Would Not Die: The First Fifty Years of Portland State University, 1946-1996*, is a virtuoso chronicle of the university's origins and development, and a profound contemplation about the ways in which PSU stands as one of this city's foremost accomplishments as well as its greatest continuing challenge to urban greatness.

In addition to the wide admiration he enjoyed among scholars, Gordon was a legendary teacher to generations of students, undergraduate and graduate, who marveled at the depth of his knowledge, his sparkly wit, and his abiding sense of the paradoxical and often troubling legacies found in the



history of Oregon. He seemed to show his understanding of those paradoxes in the title *Varieties of Hope* for an anthology of Oregon prose that he edited. He was especially helpful and supportive of the early organization of the U.S. District Court of Oregon Historical Society. As a teacher and scholar—and, no less, a citizen of the university and a genuine public scholar known throughout the region for his addresses and assistance to libraries, museums, and cultural institutions—he set an enduring standard of excellence, commitment, and collegiality, an inspiring legacy to all who knew him.

Dr. David Johnson is a professor of history at Portland State University and Managing Editor of the Pacific Historical Review.



The Foreign Intelligence Surveillance Act and Court *continued*

for Congress as it revisits the statute.

During the week before the program, two other people emerged, and we invited them to share their expertise briefly at the program. First, **Prof. William Funk**, of Northwestern School of Law, Lewis & Clark College, spoke for a few minutes about his experience working for the U.S. Department of Justice and staffing the House Permanent Select Committee on Intelligence during the hearings/negotiations before the passage of the FISA. One of the points he made in his presentation was that the original purpose of the FISA was to deal only with foreign intelligence information gathering, and that the references to the criminal law in the FISA, to which Judge Leavy made reference, were added at the behest of the ACLU in order to protect criminal defendants. Now, in a series of cascading ironies, the statute seems to be used for the opposite, he observed.

Finally, **Mr. James Baker**, Counsel for Intelligence Policy, Office of

SUMMARY OF STANDARDS FOR GOVERNMENT SEARCHES AND ELECTRONIC SURVEILLANCE IN INTERNATIONAL TERRORISM MATTERS

Prepared by AUSA Charles F. Gorder, Jr.

CRIMINAL SEARCH WARRANT (Federal Rule of Criminal Procedure 41)	CRIMINAL WIRETAP ORDER (18 U.S.C. § 2518)	FISA COURT WIRETAP OR SEARCH ORDER (50 U.S.C. §§ 1805, 1824)
Issued by Federal Magistrate Judge	Issued by Federal District Judge	Issued by Federal District Judge (FISA Court)
1. Probable Cause Federal Crime Has Been or Is Being Committed	1. Probable Cause Certain Federal Crimes Have Been or Are Being Committed	1. Probable Cause Target Is an Agent of a Foreign Power
2. Probable Cause Evidence or Fruits of the Federal Crime Exists	2. Probable Cause Conversations Which Are Evidence of the Federal Crimes Will Be Intercepted	2. For U.S. Persons (citizen, resident alien), Probable Cause that Agent of a Foreign Power is Committing Certain "Foreign Intelligence" Crimes
3. Probable Cause Evidence Will Be Found at Premises to Be Searched, e.g., at a residence	3. Probable Cause that the Conversations Will Be Intercepted on a Particular Facility, e.g., phone line	3. Probable Cause Agent of Foreign Power is Using the Facility to be Intercepted or Searched, e.g., a phone line
4. N/A	4. Necessity (Failure of Other Law Enforcement Techniques)	4. Necessity (Can't Be Obtained by Normal Techniques)
5. Notice to Owner of Premises (possible reasonable delay approved by court)	5. Delayed Notice to Targets (90 Days After Wiretap Ends, with reasonable extension approved by court)	5. No Notice, Unless Used in Evidence in Future Criminal Case
6. Approved by AUSA	6. Approved by AUSA and Assistant Attorney General	6. Approved by Attorney General (or Deputy Attorney General) and FBI Director (Significant Purpose Test)
7. Seizure of Evidence Listed in Warrant	7. Minimization (Generally Real Time)	7. Minimization (Generally After the Fact)
8. Warrant Good for 10 Days	8. Order Good for 30 Days (With Extensions)	8. Order Good for 90 Days (With Extensions)

Intelligence Policy and Review, U.S. Department of Justice, and chief expert for the United States on the FISA, was present and spoke briefly. Mr. Baker's office prepares all of the more than 1,000 FISA applications to the Court each year. These applications must show meticulous research and bear the certification of the highest level officials in the FBI and the Justice Department before being submitted to the Court for an Order. He stressed the importance of the careful gathering of foreign intelligence data for the security of the country, especially in the wake of the September 11 attacks.

Several questions from audience members concluded the program. There was the general feeling among many after the meeting that what we had experienced that Thursday afternoon late in September was a quite unique event, whose echoes will reverberate in our minds for many days to come.

William R. Long, M. Div., Ph.D., J.D. is an adjunct professor of law at Willamette University College of Law and chair of the Famous Federal Cases Committee of the Society. The author or editor of eight books, his most recent is *A Tortured History: The Story of Capital Punishment in Oregon*.



The Majesty of the Law: Reflections of a Supreme Court Justice

By Sandra Day O'Connor and Craig Joyce. Published by Random House, 2003.

Reviewed by Mary Ellen Farr

Justice Sandra Day O'Connor's book, *The Majesty of the Law: Reflections of a Supreme Court Justice*, reflects on the meaning of democracy in the world. She hopes "that the historical themes explored in this book, and the reflections expressed here, will help the reader better understand our own system, and also why and how the Rule of Law offers the world its best hope for the future." She ends her book with one of the few personal reflections in the text, expressing her optimism about the world her granddaughter may find. This unquenchable optimism defines Justice O'Connor's reflections.

Justice O'Connor frames her reflections in six loosely organized topics: "Life on the Court," "A Bit of History," "People Who Have Helped Shape the Court," Women and the Law," The Legal Profession and the Courts," and "The Rule of Law in the Twenty-first Century." Within these topics, Justice O'Connor sets out three basic principles for stable democracy.

The first principle is an independent judiciary, deriving its independence from positions secure from pressure from other branches of government, and from the expectation that compensation will remain stable and "beyond the reach of outside forces." Justice O'Connor underscores many times the need for true independence as the means to achieving legitimacy of judicial decision.

Second is a free press: "Only an independent and vigorous and responsible press permits democratic institutions to correct themselves through the powerful forces of informed debate and public opinion." While acknowledging that many countries continue to oppress and control the press, Justice O'Connor finds

optimism for world democracy in increased public access to information through technological advances. At the same time, she laments the lack of understanding among the American public of their legal and political systems.

Third is (emphasis from Justice O'Connor) "The principle that *certain fundamental rights, to which every citizen is entitled, must be placed outside the reach of political exigency.*" Some of Justice O'Connor's most interesting passages embody her reflections about the fundamental tension between the concept of democracy as a majoritarian system and the need to protect civil and human rights from the will of the majority.

Within these three larger principles, Justice O'Connor examines factors which contributed to these principles of democracy. One of those factors, examined in "A Bit of History," is the effect that America's specific history has had on the development of the "Rule of Law," the concept "that laws should be enacted by democratically elected legislative bodies and enforced by independent judiciaries" which she calls the "greatest contribution from the legal systems of Great Britain and the United States toward peace in the world."

Justice O'Connor sees collegiality and respect among the judiciary as a cornerstone of the legitimacy of the Supreme Court and courts in general. In "Life on the Court," the Justice offers glimpses into that closed environment of nine justices and their clerks:

There is one custom we have on the Court that was a pleasant surprise to me and that I treasure. Each day when there is oral argument, just before we go out on the bench, and each day before we confer, every Justice shakes

the hand of every other Justice. To an outsider, this may seem baroque and unnecessary, but you must realize we are a very small group. We see and interact with one another often, and we all know we will continue to do so for the rest of our professional lives. It is important that we get along together so we can go along together.

Justice O'Connor examines at length the process of creating legitimacy for the courts, including a fascinating discussion of the value and history of the use of dissent in judicial opinions, a practice which early Chief Justices prohibited because they believed the Court could only achieve legitimacy through unanimity. Disagreeing with these early views, Justice O'Connor sees dissent as useful to litigants because dissents may help to predict future decisions. More important, she believes that dissent within the Court actually bolsters legitimacy.

Another factor Justice O'Connor sees as framing American democracy and its Rule of Law, and certainly a factor that has framed her own life, is the opening of opportunities for women and racial minorities. She speaks with deep respect of the development of case law which provided opportunities for her and for others. In this discussion she provides another of her rare personal comments, noting that she received only one job offer after she graduated at the top of her class at Stanford, that of legal secretary, and yet she became a Supreme Court Justice. She speaks passionately about the people who brought about these changes in society, including Justices Marshall and Burger.

Justice O'Connor recognizes the importance of individual leadership in the history and development of the American judiciary. She highlights a number of leaders of the Court in "People Who Have Helped Shape the Court," While her selection is somewhat surprising, it provides insight into what she considers important: She chooses Oliver Wendell Holmes for the development of theories of individual rights, William Howard Taft

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THE USDCOHS ANNUAL PICNIC IS FUN FOR ALL



District Judge Panmer and Circuit Judge O'Scamlain.



Bankruptcy Judge Allen, Circuit Judge Leavy, and District Judge Brown.



Kelly Zussman, Bill Long, District Judge Marsh and Sherry Marsh.

A FAMILY HOP FARM BY ADAIR LAW



On Sunday, August 3, over 200 members and families of the USDCOHS and the Federal Bar Association enjoyed an afternoon of barbecue, music, games, and chatting. There is always good food and conversation at this event and lots of fun and games. There is also a silent yet stunning partner, which is the hop farm owned by Judge Edward Leavy's family. Judge Leavy was happy to talk about the history of this family farm.

Judge Leavy's father Patrick emigrated from Ireland to the United States in the 1880s. He came to Oregon after 1900 and started out with a dairy in Sylvan. In

1910 he bought the first pieces of property that would grow to become the 193-acre family farm. Patrick Leavy and his wife, Ella O'Brien who was 20 years his junior, had 10 children, 9 of whom grew to adulthood. Born in 1929 when his father was in his 60s and his mother in her 40s, Judge Leavy was the youngest of the family and the first to go beyond high school in his education.

When his father died in 1941, Judge Leavy's brother, Joe, who was 14 years older, took over the farm. The farm continued to grow hops along with some hazelnuts, grass seed, and some cannery crops (cauliflower, broccoli and beans). As a young boy, Judge Leavy recalled hauling flax to the Oregon State Prison, which was then processed and woven into linen. On the death of his brother Joe in 1977, the running of the farm passed on to Judge Leavy's son Patrick who had spent summers on the farm with his uncle Joe. Just 23 and a recent University of Oregon graduate with a degree in finance, Patrick continued his work on the family farm and went on to become chairman of the Oregon Hop Commission. The majority of the Leavy hop crop goes either directly to Anheuser-Busch (who then brew it into Budweiser beer) or to a German buyer who sells the hops on the world market. Patrick also raises hops for Anheuser-Busch for experimental purposes.

As the Leavy farm moves toward a century of family ownership, we extend our thanks to Judge Leavy and his family for sharing the farm and its history with us for a fine August picnic.

Special thanks to Owen Schmidt for his photographs.



Multnomah County Circuit Judge Ellen Rosenblum and Judge Galton.



A lovely day at the hop farm.



Pony rides for the children.

The Majesty of the Law

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for his concern for the importance of unanimity, Charles Evans Hughes for standing firm against President Roosevelt's court-packing legislation, Thurgood Marshall for his dedication to racial equality and human rights, Warren Burger for his dedicated stewardship of the Court, and Lewis Powell for his decency and kindness. Each of these men demonstrates the principles which Justice O'Connor sees as essential for democracy to flourish.

Justice O'Connor's book centers on the fundamental issues which confront America and the world today as they have always confronted us and expresses a cheerful and reassuring respect and optimism for the fundamentals of the American legal system. However, the book is somewhat disappointing precisely because of that optimism. While the Justice raises important questions about the expansion of the Rule of Law, she provides few answers. If one agrees with Justice O'Connor that democracy, with its Rule of Law is the greatest contribution that America can make to world peace, one is left wondering how Justice O'Connor envisions that contribution being offered or accepted and why that contribution is not being more actively accepted in the

world. If one agrees with Justice O'Connor that America developed its contribution through its own peculiar history and that foreign legal systems have much to offer the American judiciary (which she acknowledges), one is left wondering how the American Rule of Law can be exported without destroying those aspects of legal systems which may have something to offer us. Aside from pointing out the good (and the bad) of the American judicial system, Justice O'Connor simply retreats behind her optimism, concluding her book with:

I will tell [my granddaughter] how lucky she is to inherit a world in which all children, no matter what color, national origin, or economic background, taste freedom and enjoy equality. I will tell her how fortunate she is to come of age in an era when countries in Europe, Africa, and Asia, as well as America, are more democratic and just than when I was born.

Nonetheless, Justice O'Connor is to be congratulated for trying to put into words what it means to be a part of America's extraordinary legal system. Perhaps it is sufficient for her to open ideas, express her opinion, and to leave it to future generations to continue the process of which Justice O'Connor considers herself only a small part.

C. Ashmanskas

Donald Magistrate Judge? *Who is the Judge?*

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