FREEDOM WATCH

Boston judge Mark Wolf is determined to plumb the depths of the government's deception in a number of big mob trials. But the Justice Department has a plan to keep him — and the public — in the dark.

FBI lies

BY HARVEY SILVERGLATE

THE FRONT PAGES of Boston's dailies have been trumpeting the approaching showdown for weeks. On one side is US District Court Judge Mark L. Wolf. On the other is the US Department of Justice and its investigative arm, the FBI. They've been at odds since Wolf learned that he'd been misled by the government, and became determined to discover the extent to which FBI agents (and possibly federal prosecutors) lied to federal judges in order to obtain warrants for electronic-eavesdropping devices. What he finds could easily unravel a number of big-name Mafia cases dating back to the 1980s, and might even mean criminal charges for federal investigators or prosecutors.

What's been missed in all the coverage, however, is that the government has its own strategy for thwarting Wolf's effort to learn the truth. Right now Wolf seems to be ahead on points, but the Justice Department's plan may give it a technical knockout before the fight has gone the full 15 rounds — and before all the facts are known.

Frank" Salemme, Robert DeLuca, and Stephen "The Rifleman" Flemmi. At the center of the prosecution's case are tapes of conversations made secretly in the 1980s, including a now-famous recording of a 1989 Mafia-induction ceremony, complete with blood oath, conducted in Medford.

Federal agents aren't allowed to conduct that kind of eavesdropping without a warrant. And before they're given such a warrant, they need to convince a judge that the invasion of privacy is called for. They need to demonstrate both that they have good reason to suspect illegal activity, and that they have no other means — such as an informant — to obtain the evidence.

In this case, prosecutors and FBI agents did obtain electronic-surveillance warrants. But in doing so, they failed to tell the judges who approved the warrants and who later admitted the tapes as evidence at Mafia trials — including Mark Wolf — that the government already had

Wolf's courtroom as quickly as possible. The Justice Department, which is responsible for prosecuting criminals in federal court, realizes Wolf is no pushover. In fact, he is himself a former high-level federal prosecutor. So he knows the game from the inside, and though he's a tough law-and-order judge, he takes seriously the obligation of government officials to tell the truth to federal judges.

What the Justice Department hopes to do is move the case into the hands of Wolf's bosses, the judges on the US Court of Appeals for the First Circuit, who sit in the same building Wolf does. (Wolf, at the district-court level, is a federal trial judge; the circuit court, a level higher, handles appeals from district courts.) If history is any indication, the appelate judges will be much more lenient with the feds.

The current brouhaha has arisen in the Justice Department's planned prosecution of what are billed as the last members of the old-line Massachusetts Mafia leadership, including Francis P. "Cadillac Angelo "Sonny" Mercurio, and Bulger's partner Flemmi.

CHARLES SADLER

Suddenly the feds' reputations — and perhaps their careers — are potentially at stake. One of the prosecutors involved was Diane Kottmyer, who presented and defended the apparently misleading applications before the federal judges. Kottmyer is now a sitting Massachusetts Superior Court Judge, and Judge Wolf is in the remarkable position of having to decide what Kottmyer knew and when she knew it.

TO SOME, such a lapse on the government's part may seem trivial. It isn't. The Fourth Amendment, after all, protects us from unreasonable searches, including wiretaps and microphones and bugging devices. That's why warrants for their use are issued not by the police who want to do the bugging, but by neutral and independent judges. With the government's modern-day electronic sophistication, if agents and prosecutors are allowed to lie to judges to obtain those warrants, our lives will be that much closer to George Orwell's *1984*. And beyond that, it corrodes our justice system in a dozen ways if agents and prosecutors are allowed to lie to judges — and juries — without risking any repercussions.

This issue now rests in the courtroom of Judge Wolf. And Wolf is on the warpath. Wolf himself is one of the judges who was lied to, in connection with the 1989 Patriarca crime-family case. But long before that, he was cutting his prosecutorial teeth as an aide to US Attorney General Edward H. Levi, whose job was to clean up the Justice Department after Watergate.

That era saw Richard Nixon's attorney general, John N. Mitchell, as well as plenty of lesser lights within the Department of Justice, serve prison sentences for a variety of felonies and misdemeanors — including obstruction of justice. Wolf's main task was to institute new rules at the Justice Department aimed at reforming its practices, as well as the FBI's.

This means Wolf, quite literally, wrote the book governing FBI conduct. And his interest in the feds' behavior is clear from his handling of the current mob hearings. What's being decided in these hearings is whether or not the bugging tape is admissible as evidence. But in a written opinion this month, Wolf indicated that he's at least as interested in FBI and Justice Department misconduct as he is in the admissibility of the tape. When he ordered Seth Waxman, the acting deputy attorney general at the Justice Department, to disclose the identity of the government's confidential informants, he wrote that Waxman's refusal to make those disclosures "invites the court, at a minimum," to exclude the induction-ceremony tape from the trial. But he also wrote that the refusal has "the potential to impede the hearings necessary to determine whether members of the Department of Justice engaged in serious misconduct."

The Justice Department claims that disclosing the facts would place the lives of its informants in danger. But that isn't the whole story.

That misconduct, concludes Judge Wolf, may be grave enough for him to dismiss the indictment outright. Read between the lines, and Wolf seems to be saying that Waxman's continued stubbornness would make it impossible for Wolf to get to the bottom of a substantial corruption of justice within the DOJ and FBI. The *Boston Globe*'s federal courthouse reporter, Patricia Nealon, reported that during a recent hearing Judge Wolf "pounded his fist and bellowed, 'This whole case is about the credibility of what the US government tells federal judges.' " In the words of Bob Dylan, you don't have to be a weatherman to know which way the wind is blowing.

WHY IS the Justice Department refusing to disclose its information? The DOJ claims that such disclosure would place the lives of its informants in danger. That may or may not be true, but it certainly isn't the whole story.

We know it's not because of a man named Robert Donati. For some time, the DOJ's Waxman stonewalled on the subject of Donati, refusing to tell Wolf whether or not Donati had been an FBI informant. In this case, Wolf was understandably skeptical that the FBI was really keeping silent to protect its informant, because Robert Donati was already dead.

So was it the informants the Justice Department was trying to protect, or was it the agents and prosecutors who'd made sworn statements to several judges denying the existence of those informants? Or was it their supervisors in Washington? At the eleventh hour, in the face of Wolf's increasingly threatening posture, Waxman relented and answered his question about Donati, denying that Donati had been an FBI informant.

Clearly, the targets of Wolf's wrath are sweating as these extraordinary hearings continue. He has proved particularly zealous in his effort, but surely many federal judges are more or less aware, and have been for decades, of at least some of the more obvious deceptions practiced by the Department of Justice and the FBI: evidence concocted, exculpatory evidence hidden, confessions invented, witness statements spun. (Revealingly, the FBI has a formal policy under which agents

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will refuse to conduct an interview if the subject of the interview produces a tape recorder of his own. In such a situation, both agents present — and such interviews are routinely done by two agents — will leave rather than proceed with the interview.)

NOW COMES the government's strategy. The Justice Department's Waxman has proposed a course of action under which Wolf would terminate the present hearing, and, on the basis of what the FBI has already admitted, declare the electronic-surveillance tapes inadmissible at the upcoming trial. The Justice Department would then pursue an appeal to the next highest court, the US Court of Appeals for the First Circuit, seeking to overturn the exclusion of evidence.

If the government wins that appeal — that is, if the appellate court decides that the bugging warrant was valid despite the government's failure to disclose information to the judge who issued it — then any further hearings by Wolf would be irrelevant. Wolf would, therefore, never get to the question of who knew what in the FBI and DOJ hierarchy, and when they knew it. Thus would the hides of the higher-ups be protected.

On the other hand, if the government were to lose that appeal — which it has good reason to feel won't happen — it could always abandon the prosecution rather than give Wolf the opportunity to resume his hearings. For the Justice Department prosecutors, what it boils down to is this: as long as they can get their case out of Wolf's courtroom, they'll be able to avoid Wolf's efforts to probe prosecutorial misconduct. More likely than not, the circuit court would play along with the government's plans, for over the years that court has proven itself adept at overlooking, rather than uncovering and punishing, prosecutorial misconduct.

AS FAR BACK as 1984, in a case litigated by my partners, colleagues, and me, the circuit court ruled that protecting the identities of confidential informants is a sufficient reason for federal prosecutors to cut corners.

In that particular case, the government sent an informant to infiltrate a meeting between lawyer and client in my law office. The court disapproved of this conduct in a footnote, but it didn't exclude the evidence, didn't dismiss the prosecution, and didn't order the prosecutors and agents investigated, much less disciplined.

Since that 1984 case, the membership of the First Circuit has changed somewhat. But if anything, the court has proven itself even more lenient toward police, agents, and prosecutors. One procedural barrier after another has been erected to impede lawsuits against police and prosecutorial abuse. Evidence that would have been thrown out on the basis of government misconduct two decades ago is now routinely admitted at trial. Allegations of misconduct that once would have seen agents and prosecutors dragged into district court under oath are now routinely dismissed as insufficient to justify holding a hearing.

In general, higher federal courts do tend to be more protective of prosecutors. Take a 1979 case decided by a neighboring federal appeals court — the Second Circuit, based in New York City. In that case, the Socialist Workers Party sued the government over years of FBI harassment. The then–attorney general, Griffin Bell, refused to turn over certain files for fear of compromising the identities of what he claimed were more than 1300 informants, including 300 members and 60 officers of the party. The district-court judge who presided over the case held Bell in contempt, but his order was quickly overturned by the Second Circuit Court.

The reason? In this situation, wrote the court, the party in contempt "is not simply an attorney but the chief law enforcement officer of the nation. . . . " Translated into blunter language, what the appeals judges were saying was that if a private lawyer or ordinary citizen lies to a judge, or withholds information, it's a punishable offense. But if a high government official does the same, it isn't. This attitude permeates the upper reaches of the federal judiciary today, and it often clashes with the feistier and more principled stands of some judges in federal district court — especially those, like Mark Wolf, who are imbued with an almost old-fashioned moral rectitude.

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Thus, while some exceptional and determined federal trial judges do sometimes try to uncover the truth about particularly egregious government deceptions, the higher appellate courts — from the circuit courts to the Supreme Court itself — have proven themselves much more likely to avert their eyes, bury the facts, and resort to various procedural end-runs.

Federal courts have the awesome power to convene hearings on the conduct of government officials. Wolf, for instance, has threatened to hold Seth Waxman himself in contempt for refusing to disclose the status of certain suspected FBI informants. But the federal appellate courts have by and large made it very difficult for defendants to invoke that power — to subpoena secret documents, recalcitrant witnesses, and high government officials, and force them to reveal what they know.

And so the game of cat-and-mouse continues. The federal prosecutors will continue to joust and parry, in the hope of finding a procedural opening that will allow them to bring the case abruptly up to the circuit court and obtain an order terminating Wolf's hearings. Wolf, now showing the instincts of the proverbial junkyard dog, with his teeth sunk deep into the DOJ's leg and eyeing the jugular, will attempt not only to keep the matter in his courtroom until the bitter end, but to the bottom of both issues that he views as being before him — the legality of the Mafia bugging, and the propriety and even the legality of the government's conduct.

The government's strategy appears to be its only hope of unlocking Wolf's jaws. The Justice Department will seek any opening, or any error committed by Wolf, to get to the appellate court as soon as possible. Wolf, on the other hand, to judge by the orders and opinions he's written in the case thus far, seems acutely aware of the government's strategy; he's doing everything he can to avoid giving the DOJ an opportunity to escape his courtroom prematurely.

Of course, it may be that Wolf has already succeeded in making the case too high-profile for that to happen. Squarely in the glare of the national media spotlight, with intense public interest aroused by this extraordinary glimpse into the dark underbelly of the federal law-enforcement establishment, even the subservient court of appeals may be hesitant to do the Justice Department's bidding this time. ■