# THE DOJ IG REPORT ON CARTER PAGE: POLICY CONSIDERATIONS

Before and continuing into the holiday break, I wrote a slew of posts on the DOJ IG Carter Page Report. Those are:

## Overview and ancillary posts

DOJ IG Report on Carter Page and Related Issues: Mega Summary Post

The DOJ IG Report on Carter Page: Policy Considerations

Timeline of Key Events in DOJ IG Carter Page Report

Crossfire Hurricane Glossary (by bmaz)

Facts appearing in the Carter Page FISA applications

Nunes Memo v Schiff Memo: Neither Were Entirely Right

Rosemary Collyer Responds to the DOJ IG Report in Fairly Blasé Fashion

## Report shortcomings

The Inspector General Report on Carter Page Fails to Meet the Standard It Applies to the FBI

"Fact Witness:" How Rod Rosenstein Got DOJ IG To Land a Plane on Bruce Ohr

Eleven Days after Releasing Their Report, DOJ IG Clarified What Crimes FBI Investigated

## Factual revelations in the report

Deza: Oleg Deripaska's Double Game

The Damning Revelations about George Papadopoulos in a DOJ IG Report Claiming Exculpatory Evidence

A Biased FBI Agent Was Running an Informant on an Oppo-Research Predicated Investigation—into Hillary—in 2016

The Carter Page IG Report Debunks a Key [Impeachment-Related] Conspiracy about Paul Manafort

The Flynn Predication

Sam Clovis Responded to a Question about Russia Interfering in the Election by Raising Voter ID

The IG Report made nine recommendations, which FBI largely accepted with implementing plans. Those recommendations focus on the paperwork side of FISA applications and the protections against purported politicization. Most of those recommendations (save, especially, the one suggesting Bruce Ohr be punished for sharing national security threat information) are worthwhile. But they are inadequate to ensuring similar problems don't recur. Moreover, there are questions that should be asked even before we get to "fixing" FISA.

This post attempts to ask some of those questions.

## What should FBI have done when faced with a credible allegation Trump's associates had advance knowledge of a hostile attack on our elections?

This is a question I've asked over and over of Republicans, but I've never got an answer.

Three of four people who were original subjects of this investigation covered up their actions. There are outstanding questions about all four and there were ongoing investigations into at

least Paul Manafort and Mike Flynn when Mueller closed up shop. And a fifth Trump associate — Roger Stone — was found guilty of hiding details of how he tried to optimize the fruits of the Russian attack, without yet revealing what it is that he was hiding. So there's no question the investigation was merited.

So what should the FBI have done when it got the tip from Australia? The IG Report raises questions about whether FBI should provide defensive briefings in this situation, but not how to conduct an investigation at a time when our country and elections are under active threat.

## In retrospect, was the decision not to use other legal process the best one?

Peter Strzok famously lost a fight to investigate more aggressively, the true meaning of his "insurance file" comment. As a result, the FBI did not use any overt methods during the election.

Significantly, that means they didn't get call records that would have provided a ready explanation for how Papadopoulos had learned Russia wanted to dump emails (particularly in conjunction with what he told CHS 3 about Mifsud). Doing so might have confirmed Carter Page's claim that Paul Manafort never returned his emails. And it would have identified that Konstantin Kilimnik (who could be targeted under 702) had a suspicious record of communications with Manafort.

Rather unbelievably, FBI may not have asked Apple or Google for Carter Page's app download history, which is how they usually find out if someone is using encrypted messaging apps (they did not learn what he was using until April 2017).

Particularly given all the chatter about the subjects of investigation, and given that three

of them — Page, Manafort, and Papadopoulos — were "fired" from their free campaign jobs because of their ties to Russia, was that really the right decision? And given how successful FBI is at obtaining gags on legal process, was using FISA with Page really that much less invasive or was FISA used simply because his sustained ties to Russian intelligence officers meant FISA was the appropriate framework?

## Why did FBI forgo a Section 215 order on Page?

Nothing in the public record suggests FBI got a Section 215 order before they obtained traditional FISA (including physical search) against Page. That's true, even though the predication for 215 is lower (just talking to an agent of a foreign power, which Page had long been doing, is enough). This would have been a way to obtain the call records and download history that might have indicated that Papadopoulos was a more urgent target than Page, lessening the urgency to get a FISA targeting Page. If FBI in fact did not obtain that 215 order before the content order (once he was approved for the content order, the 215 order would have been presumptively approved), why not, and should they have? Past IG Reports have said the process of applying for a 215 is onerous enough that Agents often forgo it; is that what happened here?

## Does the public agree with the FBI about the intrusiveness of informants?

One of the disconcerting aspects of the IG Report is its treatment of informants (Confidential Human Sources, or CHS, in the report). It spends a long time assessing whether the use of informants against Carter Page, Sam Clovis, and George Papadopoulos had the requisite oversight, ultimately concluding FBI

followed the rules but the rules *for politically exposed people* should be more stringent.

Along the way, it revealed that the FBI:

- Happened to have an informant on the books (Stefan Halper) with existing ties to three of the subjects of the investigation
- Managed to convince someone Papadopoulos trusted (CHS 3) to report on him and used an accelerated process to open him or her as an informant, and tried but failed to get at least two other people to report on him
- Had five other people in Trump's orbit who were informants (Felix Sater might be one of these)
- Accepted information obtained voluntarily from one of those informants
- Had used informants to targeted the Clinton Foundation during the election period and at least some of those informants were handled by an Agent who wanted her to lose

That's probably on top of Patrick Byrne, if indeed his claims to have been tasked against Clinton and Maria Butina in 2016 are true.

That's a lot of informants situated to report on very powerful people.

Trump's supporters have declared all this proof that they were "spied" on (ignoring the targeting against Hillary). Meanwhile, the FBI has pointed out that they more than complied with FBI's rules on using informants, though there was less discussion in the IG Report about the fact that per its Domestic Investigations and Operations Guide, FBI could have used these informants at lower levels of predication. Before the IG Report recommended rules about heightened review (much of which would have been satisfied in this case anyway), we might ask whether we, as the public, agree that the use of informants is really as unintrusive as FBI thinks. And does it involve tradeoffs as compared to other methods? For example, which would have been preferable, getting Papadopoulos' call records (which would have shown his ties to Mifsud), or throwing a series of informants at him?

## Is the consideration of least intrusive means adequately reviewed?

The DIOG requires that FBI agents at least consider whether the "least intrusive" means of investigation will be an appropriate investigative step. The IG Report reviews this requirement, which is meant to ensure FBI agents balance privacy considerations with the import of the investigation, but never comments on whether the review here was correct. Moreover, it seems that there's a rule that lowers this consideration significantly when a matter is deemed to pertain to national security (as this would have been).

I've long wondered whether FISA process in general gets adequate review on whether it's really the correct least intrusive means judgment.

## Is the FBI Director

## declaration regarding other investigative techniques adequately reviewed?

FISA requires that the FBI Director or his designee certify that the information the FISA application wants to obtain, "cannot reasonably be obtained by normal investigative techniques." The IG Report notes this, largely because that's what Jim Comey and Andrew McCabe reviewed the Page applications for, not probable cause. But it did not discuss how this determination is made, and I would bet a lot of money that this is an area where FISA could use more review.

Particularly given the use of gags in so much criminal process and the widespread availability of fairly exotic surveillance techniques, what is the measure for this declaration?

## Does FBI conduct certain investigative techniques using FISA to keep them secret?

I noted that the FBI was close to concluding they didn't need another FISA on Carter Page, but then learned he had used some encrypted app, and so got another FISA. This supports my suspicion that the FBI will use certain surveillance techniques under cover of FISA they otherwise would eschew just to keep it secret. There may be good reason for that (indeed, it might ensure that the most exotic surveillance only gets used with much closer District Court judge review than magistrates normally give warrant applications), but it would also skew the incentives for using FISA. While policy makers may not need to know *what* those techniques are, they deserve to know if FISA makes certain otherwise unavailable techniques available.

## Why do we need FISA?

I don't mean to be glib. Since the IG Report came out, a lot of people who've used it have said we need to preserve this ability. But they're not explaining why. That's a two-fold question. First, why does FBI need a different probable cause standard for foreign intelligence (the likely and noncontroversial answer is, spying on a lot of people, including diplomats, who haven't committed an obvious crime). But the other question is, why can't that level of secrecy and court review be accomplished at normal district courts? In the wake of 9/11, most courts (especially most courts that will regularly have FISA cases, like DC, NY, VA, and CA) have sophisticated court security procedures that would seem to accomplish much of what FISA was originally intended for. Having normal district judges — even if only a subset of them — review FISA applications might inject more viewpoints onto the Fourth Amendment review. Furthermore, it would ensure that more judges reviewing such applications are also seeing the kinds of criminal cases that might arise from them (something that I've argued was useful with Michael Mosman, who ironically was the judge that approved Page's second FISA application).

In recent years, the FBI has devolved its FISA process to its field offices; why can't that happen in the courts, as well?

## Is relationship between lawyers and FBI agents on FISA too attenuated?

The explanation the IG Report used for blaming the FBI agents for all the missing information in FISA applications stems from the more attenuated involvement of National Security Division lawyers (Office of Intelligence, or OI here) in warrant applications than happens in traditional criminal investigations.

> NSD officials told us that the nature of

> FISA practice requires that 01 rely on the FBI agents who are familiar with the investigation to provide accurate and complete information. Unlike federal prosecutors, OI attorneys are usually not involved in an investigation, or even aware of a case's existence, unless and until OI receives a request to initiate a FISA application. Once OI receives a FISA request, OI attorneys generally interact with field offices remotely and do not have broad access to FBI case files or sensitive source files. NSD officials cautioned that even if 01 received broader access to FBI case and source files, they still believe that the case agents and source handling agents are better positioned to identify all relevant information in the files.

From that the IG Report decides that the problems in the Page applications arose through sloppiness or worse from the agents. But perhaps this is entirely the wrong conclusion. Perhaps, instead, the problems arose from OI lawyers having less ownership of what happens downstream from a FISA application than normal prosecutors would have, meaning they're outsourcing more decision-making about relevance to agents whose motivations are at odds with that kind of decision-making. In other words, the remedy for this may not be instituting more checklists (which is what DOJ IG recommended and FBI has committed to), but changing the relationship between OI lawyers and the FBI agents applying for FISA?

## Is there any legitimate reason to withhold review from defendants?

When Congress passed FISA, it envisioned that at least some defendants would review their FISA applications, but that hasn't happened, at all.

In the interim, the "wall" between FISA and criminal prosecutions has come down, making it more likely that FISA collection will end up as part of a criminal prosecution. Indeed, former NSD AAG David Kris suggests defendants *should* get review, which would mean that agents would know that any given FISA application might get shared with a defendant if it turned into a criminal case. At the very least, it seems that FBI and NSD should explain to Congress why they shouldn't be asked to do this.

One of the problems may be with the definition of "aggrieved" under FISA. That includes both the target and those subject to collection under a FISA order. For example, Carter Page would have been aggrieved in Victor Podobnyy's FISA order (which is probably where the reports that he had been collected under FISA in the past came from), and Mike Flynn would have been aggrieved under a FISA application targeted at Sergey Kislyak. Normally, only the target of a criminal warrant would get to challenge it. Effectively, one way the government is likely using FISA is to find out what Americans are talking to suspected spies, so the FBI would not want to reveal that use. (Though one of the problems likely arises from how the government defines "facilities" that can be targeted, because they don't have to be owned by the person being targeted.)

Perhaps, then, one way to extend review to the actual defendants who were the targets of FISA surveillance would be to change the definition of aggrieved party, but along the way to change how searches on already collected FISA data are conducted.

## What are the boundaries between FISA's agent of a foreign power, 18 USC 951's Agent of a Foreign Power,

## and FARA?

As I noted, the entire DOJ IG Report may suffer from a misunderstanding about what crime(s) FBI was targeting. Until 11 days after the report was released, it appeared to believe that Trump's aides were only being investigated for FARA, which is basically unregistered political influence peddling. That appears to have been true, but it's almost certainly not true of Page, against whom there was already an investigation into his willingness to share non-public economic information Russia's spies ask for. If that's true that the entirety of the First Amendment analysis in the report is superfluous, because Page — the only Trump aide targeted under FISA — had already met the standards for targeting under the First Amendment before FBI turned to his political speech in August 2016. That is, because Page was already being investigated for sharing non-political stuff with Russian spies , there should never have been a First Amendment question.

Particularly given the different status of FARA in 1978 when FISA was passed, its virtual lapse for years, followed by a recent focus on it in recent years (at a time when there are fewer protections against foreign influence peddling). it seems vitally important for Congress to demand an understanding of how these three statutory regimes intersect, and — hopefully — provide some clarity on it for everyone else.

Update: Added the question about various Foreign Agent designations.