# AMID DISCUSSIONS OF FISA REFORM, JAMES BOASBERG PUSHES FOR GREATER REFORM

It’s not entirely clear what will happen in a few weeks when several existing FISA provisions expire; there are ongoing discussions about how much to reform FISA in the wake of the Carter Page IG Report. But before anyone passes legislation, they would do well to read the order presiding FISA Judge James Boasberg issued yesterday.

On its face, Boasberg’s order is a response to DOJ’s initial response to FISC’s order to fix the process, Amicus David Kris’ response to that, and DOJ’s reply to Kris. The order ends by citing In re Sealed Case, the 2002 FISCR opinion that limited how much change the FISA Court can demand of DOJ, and “acknowledging that significant change can take time, and recognizing the limits of its authority.” By pointing to In re Sealed Case, Boasberg highlights the limits of what FISC can do without legislation from Congress — and, importantly, it highlights the limits of what FISC could do to improve the process if Bill Barr were to convince Congress that DOJ can fix any problems itself, without being forced to do so by Congress.

After invoking In Re Sealed Case, Boasberg orders reports (due March 27, May 4, May 22, June 30, and July 3) on the progress of a number of improvements. He orders that any DOJ or FBI personnel under disciplinary or criminal review relating to work on FISA applications may not participate in preparing applications for FISC, and he requires additional signoffs on applications, including Section 215 orders, which currently don’t require such affirmations.

## Boasberg recognizes that DOJ, not just FBI, needs to change

Remarkably, Boasberg notes what I have — the IG Report provides evidence, its focus on FBI notwithstanding, that some of the blame for the Carter Page application belongs with DOJ, not FBI.

> According to the OIG Report, the DOJ attorney responsible for preparing the Page applications was aware that Page claimed to have had some type of reporting relationship with another government agency. See OIG Rpt. at 157. The DOJ attorney did not, however, follow up to confirm the nature of that relationship after the FBI case agent declared it "outside scope." Id. at 157, 159. The DOJ attorney also received documents that contained materially adverse information, which DOJ advises should have been included in the application. Id. at 169-170. Greater diligence by the DOJ attorney in reviewing and probing the information provided by the FBI would likely have avoided those material omissions.

As a result, Boasberg requires the DOJ attorney signing off on a FISA application to attest to the accuracy of it as well. He also suggests DOJ attorneys "participate in field-office visits to assist in the preparation of FISA applications."

## Boasberg recognizes that DOJ's existing plan doesn't address

# any root cause

Similarly, Boasberg recognizes that if the real problem with the Carter Page FISA applications involved information withheld from the application, improving the Woods procedure won't fix the problem. In an extended section on oversight, Boasberg strongly suggested that DOJ needs to review whether information was withheld from the application.

> *Amicus* agrees that reviews designed to elicit any pertinent facts omitted from the application, rather than merely verifying the facts that were included, would be extremely valuable, but also recognizes that such in-depth reviews would be extremely resource intensive. See Amicus Letter Br. at 12. He thus recommends that such reviews be conducted periodically at least in some cases and, echoing Samuel Johnson, advises that selection of cases for such reviews should be unpredictable because the possibility that any case might be reviewed "should help concentrate the minds of FBI personnel in all cases." Id. In its response, the government advised that "it will expand its oversight to include additional reviews to determine whether, at the time an application is submitted to the FISC, there was additional information of which the Government was aware that should have been included and brought to the attention of the Court." Resp. to Amicus at 13. DOJ advised, however, that given limited personnel to conduct such reviews, it is still developing a process for such reviews and a sampling methodology to select cases for review. ld. The Court sees value in more comprehensive completeness reviews, and random selection of cases to be reviewed should increase that value. As DOJ is still developing the necessary process

> and methodology, the Court is directing further reporting on this effort.
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> Amicus also encouraged the Court to require a greater number of accuracy reviews using the standard processes already in place. See Amicus Letter Br. at 12. He believes that the FBI and DOJ have the resources to ensure that auditing occurs in a reasonable percentage of cases and suggested that it might be appropriate to audit a higher percentage of certain types of cases, such as those involving U.S. persons, certain foreign-agent definitions, or sensitive investigative matters. Id. The government did not address Amicus's recommendation that it increase the number of standard reviews.
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> Even though accuracy reviews are conducted after the Court has ruled on the application in question, the Court believes that they have some positive effect on future accuracy. In addition to guarding against the repetition of errors in any subsequent application for the same target, they should provide a practical refresher on the level of rigor that should be employed when preparing any FISA application. It is, however, difficult to assess to what extent accuracy reviews contribute to the process as a whole, partly because it is not clear from the information provided how many cases undergo such reviews. The Court is therefore directing further reporting on DOJ's current practices regarding accuracy reviews, as well as on the results of such reviews.
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> Finally, the FBI has directed its Office of Integrity and Compliance to work with its Resource Planning Office to identify and propose audit, review, and compliance mechanisms to assess the

> effectiveness of the changes to the FISA process discussed above. See OIG Rpt. app. 2 at 429. Although the Court is interested in any conclusions reached by those entities, it will independently monitor the government's progress in correcting the failures identified in the OIG Report.

Again, as I already noted, Boasberg himself found DOJ's oversight regime inadequate in a 702 opinion written last year. He *knows* this is insufficient.

But as noted above, all Boasberg can do is order up reports and attestations.

At a minimum, Congress should put legal language behind the oversight he has now demanded twice.

A far better solution, however, would be to provide the oversight on FISA applications that other criminal warrant applications receive: review by defense attorneys in any cases that move to prosecution, which by itself would build in "unpredictabl[y] because the possibility that any case might be reviewed."

James Boasberg, the presiding judge of the FISA court, issued an order in the middle of a debate about reform that points to several ways FISA should be improved, ways that the he can't do on his own.

Congress would do well to take note.