# JOHN DURHAM MAY HAVE MADE IGOR DANCHENKO “AGGRIEVED” UNDER FISA

In substantiating the case that Carter Page was wrongly aggrieved under FISA thanks to rumors passed along by Igor Danchenko, Durham appears to have similarly made Danchenko aggrieved himself. And that may help him defend himself in ways that would not otherwise be available.

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# THE TWO NEW MATERIAL ERRORS ARE THE NEWS FROM THE IG REPORT ON WOODS FILE ERRORS

DOJ IG released another of its reports on FISA, showing that for 2.6% of FISA applications, the FBI didn’t have any Woods file attesting to the accuracy of discrete factual claims in the application. But while the report shows far more substantive issues that need to be addressed with the FISA process, it doesn’t acknowledge that those substantive issues are more important to the integrity of the process than Woods files.

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# TUCKER CARLSON BURNS FBI OR NSA INTERCEPTS REGARDING HIS 30-MONTH PURSUIT OF FACE-TIME WITH VLADIMIR PUTIN

Tucker Carlson's seeming explanation for the claim he had been surveilled by the NSA is that for the past thirty months he has had secret communications with Russian agents trying to set up a meeting with Vladimir Putin.

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# PCLOB: THE ESSENTIAL OVERSIGHT LINK DESIGNED TO BE INADEQUATE

Last year, there were a couple of measures that purported to respond to the problems with the Carter Page FISA application but which would not have helped him at all. In February, House Judiciary Committee rolled out a bill to replace the now-lapsed Section 215 of FISA that included a Privacy and Civil Liberties Oversight Board review of the impact that tradition FISA had on First Amendment Activities.

> SEC. 303. REPORT ON USE OF FISA AUTHORITIES REGARDING PROTECTED ACTIVITIES AND PROTECTED CLASSES.
>
> (a) REPORT.—Not later than one year after the date of the enactment of this Act, the Privacy and Civil Liberties Oversight Board shall make publicly

> available, to the extent practicable, a report on—
>
> (1) the extent to which the activities and protected classes described in subsection (b) are used to support targeting decisions in the use of authorities pursuant to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.); and
>
> (2) the impact of the use of such authorities on such activities and protected classes.

As I noted at the time, because PCLOB's mandate is limited to counterterrorism, it would not be able to look at counterintelligence targeting. This is not the first time that PCLOB's mandate made its work less useful than it could be. Because its Section 702 report was necessarily limited to the counterterrorism uses of the law, PCLOB's report did not address problems with the cybersecurity and counterproliferation uses of Section 702, both of which have far more unexpected impact on US person's privacy than the counterterrorism use.

Then, in May, PCLOB's Chair, Adam Klein, announced PCLOB was going to review traditional FISAs.

> Adam I. Klein, the chairman of the privacy board, said that the issues Horowitz surfaced were precisely those that the board was established to examine.
>
> "This is at the heartland of our jurisdiction," said Klein, a lawyer and prominent researcher of FISA and other national security laws. "The IG found systemic compliance problems. At a minimum, we have a duty to inform ourselves."

I again noted that PCLOB's mandate would limit

the value of such a review, and indeed, would prevent PCLOB from even reviewing the precipitating application, Page's counterintelligence application.

Last week, Klein released the results of that review, billed and released not as a PCLOB report, but as a Chairperson's White Paper (Klein has said he'd step down once Joe Biden replaced him). He makes clear,

> I provide several observations and recommendations based on this review. These views are provided in my individual capacity as Chairman and should not be attributed to the Board as a whole or to other members of the Board.

Its recommendations are not obviously supported by the described scope of the review. His White Paper generally argues for more efficiency, a recommendation that conflicts with virtually all other conclusions that came out of the Carter Page review (though some of his recommendations to achieve efficiency, such as making the authorization period for non-US person FISA applications one year, make sense). He makes two recommendations (that the Woods file not require repeated documentation for repeated facts and that DOJ distinguish between information known at the time and information learned subsequent to an initial application) that would undercut some of the results of the DOJ IG Report on Carter Page.

Klein's White Paper does recommend that a summary memo submitted with the application which highlights novel privacy, legal, or technological issues. If the FBI Director or his delegate were required to sign off on that summary as well as the current certification (that doesn't address the probable cause content of the application in the least), it might provide a level of accountability that (Congress doesn't yet understand) FISA currently lacks. Other than that, Klein's White Paper reads as

much like a valedictory trying to guide future PCLOB plans as it does a report to improve FISA. Almost two pages of the 26-page report constitutes a recommendation to reauthorize Section 215 of FISA.

But, as predicted, the review did not consider anything remotely pertinent to what happened to Carter Page.

To conduct its review of applications themselves, PCLOB asked for and received the subset of the 29 FISA files that DOJ IG is conducting a review of that pertain to counterterrorism as well as the backup exchange between FBI and DOJ regarding those applications. That included:

- 19 total applications (out of 29 reviewed by DOJ IG)
- All counterterrorism targets
- Most located in United States at time of targeting

These details help us understand the two reports DOJ IG wrote about the full set of 29 files, which I wrote about here. Of the 29, ten must be counterintelligence files like Carter Page's.

Because PCLOB did not review the counterintelligence applications, it only reviewed one of the two for which DOJ IG found a material error. The second was a CI application that showed a worse error rate than the Carter Page file (which was measured using a different methodology than the Carter Page one).

It also didn't review any Sensitive Investigative Matters — applications which, like Carter Page's, involve someone who is a political, journalistic, or religious figure whose targeting should get extra scrutiny. That seems to suggest that DOJ IG did not include any counterterrorism applications targeting SIMs in its review (it would seem SIMs would be more likely to be targeted on the counterintelligence side, but we know of religious and political

figures targeted under counterterrorism FISA applications). These would be the applications that pose the greatest privacy and civil liberties concern.

In lieu of that, FBI Office of General Counsel provided PCLOB with,

> The number of "sensitive investigative matters" pertaining to U.S. persons in which FBI sought a FISA probable cause order in each year between 2015 and 2019, a summary of each matter (including the type of investigation and the features resulting in its classification as a "sensitive investigative matter"), and whether each request was granted.

That's presumably how PCLOB learned that there aren't all that many SIMs targeted under FISA.

> [I]nformation received by the Board indicates that relatively few FISA applications are obtained each year in SIMs.

Still, this is the core of what you'd need to review to serve the function of PCLOB. Klein even appears not to have reviewed Page's significantly declassified public applications, which would have been simple to do, would have provided him something to compare the counterterrorism applications he reviewed with, but which would have been outside the scope of PCLOB's mandate.

This matters because PCLOB has been reasonably effective. Indeed, in a book published in April in recognition of the 50th Anniversary of the Pentagon Papers, Lisa Monaco (in a contribution submitted before she became Deputy Attorney General) pointed to PCLOB's contributions after the Snowden releases as an important way forward to balance security and secrecy in the age of mass leaks. Monaco even recommended that PCLOB consult with the Director of National

Intelligence prior to the implementation of certain policies. (Director of National Intelligence Avril Haines also contributed a chapter to the book, which was far more intriguing that Monaco's.)

> Another would be to institute a practice of DNI consultation with the PCLOB before the adoption of certain collection programs. The PCLOB served an important function after disclosures precisely because it is charged with considering privacy and civil liberties implications as well as the national security implications of counter-terrorism programs.82 It could be a valuable addition to the consideration and review of some intelligence programs for a standing body with the infrastructure to handle classified information to work with privacy officers in each agency to assess privacy concerns and conduct privacy impact assessments that are reported to the DNI.

But as noted above, even PCLOB's Section 702 review suffered because it couldn't look at several of the applications of 702, applications implicated by the Snowden releases.

Last year, I was told that efforts to expand the jurisdiction of PCLOB would be a poison pill to any bill to which they were attached. I can only assume that means the Executive doesn't want to expose to scrutiny they kinds of practices that were central to the Carter Page application.

But if Lisa Monaco believes PCLOB has a role to play in balancing national security and secrecy, she should ensure its mandate is sufficiently broad to do that job.

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# SOME PERSPECTIVE ON THE POLITICIZED LEAK INVESTIGATION TARGETING ADAM SCHIFF

Now that Adam Schiff has learned that “it’s just metadata” doesn’t rule about abuse of surveillance powers, maybe we can have a broader discussion about how the government uses metadata?

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# WELCOME TO LISA MONACO’S DOJ, E JEAN CARROLL LAWSUIT EDITION

Lots of observers are asking how Merrick Garland could make such a horrible decision as to sustain DOJ’s defense of Trump against the lawsuit brought by E. Jean Carroll. They might be better served by — finally — considering what Lisa Monaco’s background suggests she will do at DOJ.

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# INSURANCE FILE: GLENN GREENWALD’S ANGER IS

# OF MORE USE TO VLADIMIR PUTIN THAN EDWARD SNOWDEN'S FREEDOM

As Edward Snowden's utility in inspiring further leaks diminishes, Glenn Greenwald's tirades have become more valuable to Russian than Snowden himself.

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# THE GEORGE NADER PROBLEM: NSA REMOVES THE CHILD EXPLOITATION CONTENT FROM ITS SERVERS

Among the more baffling details in the recently released Section 702 reauthorization is the description of the approach NSA has chosen to take evidence of child exploitation off its servers.

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# THE RICKETY 702 SYSTEM: WHY IT CONTINUES TO FAIL

Since the beginning, the yearly review of FISA 702 has separated the abstract legal analysis from the actual state of the implementation. And that has allowed one after another FISA judge to

approve 702 with no real evidence it complies with the Fourth Amendment.

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# FISC SUSPECTS JOHN RATCLIFFE OF RELAXING RULES FOR UNMASKING OF FISA MATERIAL

In addition to the problems regarding still unresolved problems with FBI back door searches, the recently released FISA opinion suggests that as Director of National Intelligence, John Ratcliffe approved a step that might make it easier to unmask US person identities in FISA reports.