

December 11, 2019

The Honorable Lindsey Graham
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510



RE: “Examining the Inspector General’s Report on Alleged Abuses of the Foreign Intelligence Surveillance Act” Hearing

Dear Chairman Graham and Ranking Member Feinstein,

National Political
Advocacy Department
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Washington, D.C. 20005
aclu.org

Susan Herman
President

Anthony Romero
Executive Director

Ronald Newman
National Political
Director

On behalf of the American Civil Liberties Union (“ACLU”), we submit this letter for the record in connection to the committee’s upcoming hearing “Examining the Inspector General’s Report on Alleged Abuses of the Foreign Intelligence Surveillance Act,” which will examine the Department of Justice (DOJ) Inspector General’s (IG) report, *Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation*.

While the IG report concluded that there was proper purpose and initiation of the investigation into Trump campaign ties to Russian efforts to interfere with the 2016 election, many of its findings are alarming.¹ The IG report underscores the lack of basic safeguards to protect Americans against unwarranted surveillance and intrusive investigative techniques. Among other things, these include the failure of DOJ guidelines to require a sufficiently high factual predicate prior to initiating or continuing an investigation, as well as insufficient safeguards for sensitive investigations that implicate First Amendment activity. These deficiencies have long contributed to improper surveillance and targeting of Muslims, racial minorities, and activists.

There are numerous important findings in the report. However, we write specifically to highlight portions of the report that reveal deficiencies with existing foreign intelligence surveillance practices. These findings are particularly relevant given the upcoming expiration of Patriot Act provisions on March 15, 2020, which provides a unique opportunity for Congress to enact broad and meaningful surveillance reforms.

The IG found that there were a litany of inaccuracies and omissions in the initial Carter Page surveillance application and subsequent renewal application. Even more, these problems went largely unchallenged by the Foreign Intelligence Surveillance Court (FISC) – and would likely have never been revealed but for the significant attention this investigation has received by the IG and members of Congress.² In light of these findings, the ACLU urges the committee to enact legislation to enhance accountability, oversight, and transparency within the FISA process by:

- Requiring a FISA court amicus to participate in cases involving sensitive matters, such as the targeting of political campaigns;
- Ensuring individuals who are prosecuted with the aid of FISA surveillance have the opportunity to access and review the government’s surveillance applications and orders;
- Strengthening existing laws to ensure US persons targeted by FISA surveillance are provided appropriate notice following termination of surveillance;
- Strengthening existing First Amendment protections in FISA;
- Requiring declassification of novel or significant FISA court opinions; and
- Requiring the government to adopt procedures to ensure that irrelevant information is promptly purged.

The IG Report & the FISA Process

The IG report found that there were a series of inaccuracies and omissions in the initial Carter Page surveillance application and subsequent renewal applications—yet these problems went largely undiscovered and unchallenged as part of the secret, one-sided FISA process.³ Among other things, the initial application relied on representations by former British intelligence officer Christopher Steele, but mischaracterized his background and excluded facts relevant to his reliability.⁴ In addition, the initial application failed to accurately reflect Page’s prior relationship with another government agency—despite the fact that “Page’s status with the other agency overlapped in time with some of the interactions between Page and known Russian intelligence officers that were relied upon in the FISA applications.”⁵ These and several other significant errors were repeated in three subsequent renewal applications.⁶ These problems are particularly striking given that the Page surveillance applications received *more* scrutiny within DOJ than typical FISA

¹ OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF JUSTICE, REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI’S CROSSFIRE HURRICANE INVESTIGATION (December 2019) at ii (concerning Crossfire Hurricane operation).

² *Id.* at 229.

³ *Ibid.*

⁴ *Id.* at 130.

⁵ *Id.* at xi (explaining that renewal applications “[o]mitted Page’s prior relationship with another U.S. government agency, despite being reminded by the other agency in June 2017, prior to the filing of the final renewal application, about Page’s past status with that other agency,” and that “instead of including this information in the final renewal application, the OGC Attorney altered an email from the other agency so that the email stated that Page was ‘not a source’ for the other agency”).

⁶ *Id.* at 197.

surveillance applications.⁷ As the IG observed, “That so many basic and fundamental errors were made by three separate, hand-picked teams on one of the most sensitive FBI investigations that was briefed to the highest levels within the FBI, and that FBI officials expected would eventually be subjected to close scrutiny, raised significant questions” about the FISA application process.⁸

As the IG report shows, the secretive, one-sided nature of FISA proceedings before the FISC allowed the errors within the Page application to accumulate and continue largely unchallenged. In most cases, including Page’s, there is no entity within the FISA court charged with challenging government claims, or raising potential civil liberties concerns. Targets of FISA surveillance are almost never notified, even after surveillance has been concluded, insulating the FBI from scrutiny in cases where surveillance is unwarranted or otherwise raises constitutional concerns. And, the vast majority of surveillance applications and orders are never declassified, which dramatically limits even after-the-fact scrutiny. For example, press reports in 2015 revealed that five prominent Muslim Americans, including individuals who served in the Bush administration, were targeted by FISA surveillance. To date, the applications and orders related to this surveillance have not been declassified, nor has the public received an explanation as to why these individuals were targeted.⁹

Even in cases in which individuals are criminally prosecuted with the aid of FISA surveillance, the government has used secrecy to thwart any meaningful scrutiny. Defense attorneys have been unable to challenge the accuracy or completeness of the government’s surveillance applications—as the Inspector General did here—because they have never been granted access to underlying FISA court applications and orders. Since FISA was enacted in 1978, the government has successfully opposed disclosure of FISA applications, orders, and related materials in every single criminal case in which a defendant has sought to challenge the surveillance used against him. As a result, important questions about the constitutionality of novel forms of FISA surveillance have not been subject to adversarial process, in violation of defendants’ right to a meaningful opportunity to seek suppression. Moreover, individuals are unable to challenge potential government errors and omissions, which may be analogous to the errors and omissions in the Page applications.¹⁰ The IG report shows that the FISC cannot identify every inaccuracy or abuse on its own, in part because it relies so heavily on one-sided government submissions. And defendants cannot meaningfully challenge errors in FISA applications they have not seen.¹¹

⁷ *Id.* at 375.

⁸ *Id.* at xiv.

⁹ Glenn Greenwald and Murtaza Hussain, *Meet the Muslim-American Leaders the FBI and NSA Have Been Spying On*, *The Intercept* (July 9, 2014), <https://theintercept.com/2014/07/09/under-surveillance/>.

¹⁰ See *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F.Supp.2d 611, 620 (FISC 2002) (describing 75 FISA applications containing misstatements and omissions of material facts).

¹¹ See *United States v. Daoud*, 755 F.3d 479, 490-96 (7th Cir. 2014) (Rovner, J., concurring) (calling on Congress to consider reforms that would “function as a check on potential abuses of the warrant process in FISA cases,” consistent with defendants’ Fourth Amendment and due process rights).

ACLU Recommendations

In order to address these deficiencies, Congress should pass legislation to enhance accountability, oversight, and transparency within the FISA process. Among other things, the ACLU recommends that such legislation include reforms:

- Requiring a FISA court amicus, tasked with raising potential civil liberties concerns, to participate in cases involving sensitive matters, such as the targeting of political campaigns, or cases involving other heightened constitutional concerns. Pursuant to the *USA Freedom Act*, the FISA court has the discretion to appoint an amicus in “novel and significant” cases. However, the Carter Page FISA application did not meet this threshold and an amicus was not appointed. If an amicus had been appointed, it is possible the application would have received additional scrutiny within the FISC, and that certain of its deficiencies would have been detected sooner. The IG report’s findings illustrate why existing law should be expanded to require the appointment of an amicus in cases involving sensitive targets or raising heightened constitutional concerns. The current amicus provision should also be strengthened to permit the amicus to recommend a case for higher review in cases where they believe the FISC has reached an erroneous conclusion.
- Ensuring individuals who are prosecuted with the aid of FISA surveillance have the opportunity to access and review the government’s surveillance applications and orders. The government’s blanket secrecy shrouding its FISA surveillance is at odds with due process and criminal defendants’ Fourth Amendment rights. Individuals who are prosecuted with the aid of FISA surveillance must have the opportunity to review the government’s FISA applications and orders for inaccuracies, exaggerations, or material omissions. Americans subjected to FISA surveillance generally do not have the benefit of presidential intervention or an investigation by DOJ’s inspector general to uncover any misrepresentations. The IG report shows why that is a very real problem—and why Congress should legislate to require disclosure of FISA materials to defendants and their counsel, pursuant to appropriate security procedures.
- Strengthening existing laws to ensure that, absent appropriate cause, US persons targeted by FISA surveillance are provided notice following termination of the surveillance. Numerous laws, including the Wiretap Act, require notice to targets once surveillance has terminated, unless the government obtains a court order permitting delayed disclosure. This notice is critical, as it facilitates additional scrutiny of surveillance decisions and permits those impacted to raise challenged in cases where their rights may have been violated.
- Strengthening existing First Amendment protections in FISA to prohibit targeting of US persons in cases where either the purpose of the investigation or the factual predicate for the surveillance is First Amendment protected activities. Under existing law, the government is prohibited from targeting an individual under FISA based “solely” on First Amendment protected activity. This language is insufficient for several

reasons.¹² One, it fails to address circumstances in which the government may be targeting someone in part based on constitutionally protected conduct, but may be able to manufacture a second legitimate purpose. Two, it fails to make clear that, regardless of the purpose, the government cannot initiate surveillance where the factual predicate is based substantially on First Amendment protected activity.

- Requiring declassification of all novel or significant FISA court opinions to give the public and Congress a better understanding of how surveillance laws are being interpreted. Under the USA Freedom Act, the government is required to declassify all novel and significant FISA court opinions.¹³ However, the government has applied this requirement only to opinions issued after May 2015. Congress should make clear that this requirement applies to decisions issued prior to 2015 and, should further require additional declassification of underlying FISA applications.
- Requiring the prompt purging of information collected pursuant to FISA authorities, unless the government affirmatively determines that it is evidence of a crime or foreign intelligence. FISA surveillance can often sweep in large swathes of sensitive information, including information that raises pronounced privacy and constitutional concerns. In light of this, we urge Congress to ensure that information is promptly purged within a specific timeframe, unless the government make an affirmative determination that it is foreign intelligence or evidence of a crime.

The IG report should serve as a wake-up call and prompt urgent action from Congress to reform our intelligence laws and practices. Thus, we urge the committee to advance the reforms highlighted above as part of the ongoing debate over provisions of the Patriot Act set to expire on March 15, 2020.

If you have questions, feel free to contact Senior Legislative Counsel, Neema Singh Guliani (nguliani@aclu.org).

Sincerely,



Ronald Newman
National Political Director



Neema Singh Guliani
Senior Legislative Counsel

cc: Members of the U.S. Senate Committee on the Judiciary

¹² 50 U.S. Code § 1881b(c)(2).

¹³ USA Freedom Act of 2015 § 402, 50 U.S. Code § 1872.