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Peter Margulies

Roger Williams University School of Law

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Justice Department Inspector General's Report Raises Troubling Questions About FBI's Role in FISA Cases

By Peter Margulies Thursday, December 12, 2019, 3:04 PM

Privacy Paradox: Rethinking Solitude

Despite the conclusion of Justice Department Inspector General Michael Horowitz that the FBI's initiation of the Russia probe met legal standards, the report issued Monday by the Office of the Inspector General (OIG) strongly criticized the FBI's handling of one aspect of the probe: the request for a Foreign Intelligence Surveillance Act (FISA) wiretap of ex-Trump campaign foreign policy adviser Carter Page and subsequent renewals of the FISA. The OIG report concludes that FBI agents who provided information to senior FBI and Justice Department officials in support of the FISA request misled their superiors on three key issues: Page's prior work with another (unnamed) U.S. government intelligence agency (apparently the Central Intelligence Agency); his denials of involvement with specific Russian intelligence operatives; and the reliability of ex-British spy Christopher Steele, of "Steele dossier" fame, a key source for the FISA request. Indeed, according to the OIG report, the serious nature of these errors and FBI senior officials' failure to detect and remedy them over time raised "significant questions" about the effectiveness of the FBI "chain of command's management and supervision of the FISA process" (p. 378).

By way of background, here is a brief overview of the FISA process. FISA's procedural framework requires that Justice Department lawyers applying for FISA warrants make *ex parte* (i.e., without notice to the proposed target of the request) submissions to the Foreign Intelligence Surveillance Court (the FISC), a tribunal composed of a rotating group of life-tenured federal district judges chosen by the chief justice of the U.S. Supreme Court. The FISC then decides whether the submission merits granting of approval for the surveillance. To obtain an order from the FISC authorizing surveillance, the government needs to show probable cause that the target is an agent of a foreign power, which could include a state such as Russia or a nonstate actor such as ISIS or al-Qaeda.

As former senior Justice Department lawyer David Kris has explained, the FISC is not a rubber-stamp for government surveillance requests. In approximately 20 percent of cases, the court seeks additional information from the government prior to approving a request. Yet, the FISC is not the only barrier to FISA approval. Before FISA requests make it to the court, the FBI sends them to Justice Department lawyers for review and these lawyers ultimately submit requests to the FISC. As the OIG report notes, to do its job, the FISC requires that these lawyers fulfill a "gatekeeper" function, ensuring that only requests that are reasonably close to the legal standard get to the court. Because of the sheer volume of FISA requests, department lawyers cannot adequately compile and verify the factual predicate for each request. FBI agents fill that gap. Under FBI guidelines, agents must ensure that information in FISA requests is complete and "scrupulously accurate." The FISC hears only from the government, never from a proposed search's target, so this gatekeeping function is particularly important in ensuring rigor in the process.

To perform that gatekeeper role, Justice Department lawyers depend on line-level FBI agents, who must provide the lawyers with two vital kinds of data: (a) information supporting the proposed surveillance request and (b) reasonably available information that the proposed request is either unfounded or unnecessary to obtain information that Congress designed the FISA process to obtain. If a request is based on unreliable sources or the government has other less intrusive means to obtain the information sought, surveillance triggered by the request would be an inappropriate and perhaps even illegal impingement on individual privacy. That second privacy-protective bucket of information thus guards against excessive government surveillance and the targeting of innocent U.S. persons by hostile or heedless public officials. The OIG report concluded that the gatekeeping function failed in the Carter Page FISA request, which the FISC granted in 2016 and then renewed several times through much of 2017.

Before going further, it's important to disaggregate the government's handling of one investigative tool in the Russia probe from the propriety of the probe itself. The OIG report, as Benjamin Wittes has observed, concluded that the probe itself was justifiably predicated on clear evidence provided by a "friendly foreign government" (apparently Australia) of Russian meddling in the 2016 election, based on comments made to an official from that government by another ex-Trump aide, George Papadopoulos, who mentioned that the Russians were inviting Trump campaign assistance. The Mueller report documents the vast scale of Russian interference, highlighting that the counterintelligence concerns that prompted the probe were well-founded. The legal threshold for initiating a probe is low; and according to the OIG report, the "predication" (i.e., support) for the probe easily met this relatively undemanding standard. In this sense, the OIG report does not jibe with the longtime claims of President Trump and his supporters that political concerns motivated the opening of the investigation. (For a contrary view, see the Dec. 9 statements by Attorney General William Barr and U.S. Attorney for the District of Connecticut John Durham, Barr's choice for a separate Justice Department investigation into the Russia probe.)

However, the OIG report features detailed discussion of omissions and mischaracterizations in the original Carter Page FISA request and subsequent requests to renew that surveillance authority.

Bear in mind that Page himself, an energy consultant with wide experience in Russia who graduated from the U.S. Naval Academy and subsequently earned two master's degrees and a doctorate, has never been indicted, let alone convicted. One justification for the FISA request was Page's contact with Russian intelligence officials. However, merely meeting with another country's intelligence officials is not against the law. Indeed, as Inspector General Horowitz confirmed at the Senate Judiciary Committee hearing on Dec. 11, the FBI now understands that Page was not an agent of a foreign power during the period covered by the requests.

The OIG report also explained that FBI agents compiling data for the Carter Page FISA request knew that Page had been a source for another U.S. intelligence agency (identified by the New York Times on Tuesday as the CIA) during the relevant time period. Stuart Evans, a senior Justice Department lawyer involved in the Russia probe, told the OIG that this information would surely have been relevant to the Page FISA application. Nevertheless, FBI agents did not include it in the initial FISA request and only later checked with Page's CIA handler, who informed them that Page had been candid in describing his interactions with Russian intelligence officials, including one interaction that overlapped with the subject of the FISA request.

Evans's caution was prudent: As the OIG report observed, a proposed target's work on behalf of another U.S. agency supplies an alternative explanation for a person's foreign contacts that might otherwise raise suspicion. In fact, work for another U.S. agency raises questions about the very core of the surveillance request; rather than being an agent of a foreign power, as a surveillance target must be under FISA, the putative target might actually be a U.S. agent. Justice Department lawyers needed that information to adequately perform their vital gatekeeping role. The OIG found, however, that FBI agents had misled department lawyers about Page's role, erroneously claiming that Page had been a U.S. source much earlier and on matters unrelated to the Russia probe. According to the OIG, FBI agents in fact knew that Page's time as a U.S. source had overlapped with the time covered by the Russia probe and concerned matters linked to the Russia investigation. Indeed, the OIG report asserts that one mid-level FBI lawyer altered a document (a possible felony now under investigation) to conceal information from other government officials about Page's other work (pp. 254-255).

FBI agents had also failed to tell Justice Department lawyers that, in interviews with the bureau, Page had denied reports that he had met with certain Russian intelligence officials. This denial might not have dissuaded lawyers from seeking a FISA order or—had lawyers included Page's denial in their court papers—might not have impelled the FISC to deny the surveillance request. But Page's denial would have been evidence relevant to the Justice Department's deliberations about the request's framing. As the OIG report indicated, under government guidelines FBI agents should have given Justice Department lawyers all the information needed for the department to weigh whether to make a FISA request. Instead, the OIG report concluded, FBI agents "improperly substituted their own judgments" for the assessment that the FISC expects from the department (p. 377).

The OIG also criticized FBI agents' initial failure to fully disclose material information regarding Christopher Steele, a key source for the Page FISA request. Until late in the preparation of the initial FISA request in October 2016, the FBI did not disclose that Steele had been paid by candidate Trump's political opponents to conduct opposition research. That disclosure resulted from repeated questions by Evans. (I discussed the initial FISA request's handling of Steele's links to Trump's opponents here, although my earlier work did not have the benefit of the OIG's assessment.) At Evans's insistence, the Page FISA request included this evidence of Steele's potential bias.

However, an inflated claim about Steele's work nonetheless found its way into the FISA request. Based on material given to the Justice Department from FBI agents, the request wrongly asserted that information from Steele had been corroborated and used in other "criminal proceedings." The OIG noted that FBI agents had found corroboration for only some of Steele's claims—and some of this corroborating evidence was ultimately found to be from sources prone to embellishment—and that none had been used in legal proceedings such as trials, judicial motions or the like. FBI agents sending data to Justice Department lawyers apparently assumed that the government had previously used Steele's information in proceedings but had failed to check. Justice Department lawyers and more senior FBI officials, who depend on FBI line agents as the FISC depends on Justice Department lawyers, did not independently confirm these claims. That omission, like the other errors discussed in the OIG report, may not have violated the Constitution or any surveillance statute—the OIG report does not address constitutional or statutory questions directly. However, as Charlie Savage explained and Inspector General Horowitz's Dec. 11 testimony confirmed, the OIG report is clear that the omissions and misrepresentations by FBI agents working on the requests clashed with the procedural safeguards that both the FISC and the Justice Department have established to curb excessive surveillance. Particularly given the ex parte nature of FISA requests, those safeguards serve to ensure compliance with the statute and with the Fourth Amendment's prohibition on unreasonable searches and seizures.

The OIG report does not opine on the materiality of the FBI agents' omissions and misrepresentations. Would the Justice Department or the FISC have reached a different result if FBI agents had (a) included material they omitted on Page's work as a U.S. government source and denials of meetings with certain Russian officials and (b) avoided inflating the value of Steele's previous revelations? The OIG is silent on these questions. Given the urgency of the Russia investigation and the other evidence of Russia's efforts, the department might still have requested a FISA warrant, which FISC may well have approved. However, that is not a foregone conclusion.

As the OIG report noted, the intrusive nature of a FISA warrant should spur questions about the underlying necessity for the intrusion. Recall that Justice Anthony Kennedy, in his concurrence in *Ashcroft v. al-Kidd*, noted that in considering a government request to detain a material witness, the government should consider whether the subject of the request was "willing to testify if asked" (p. 745). The analogy between forced witness detention and FISA surveillance is far from perfect, but Kennedy's logic highlights the importance of pursuing voluntary cooperation before taking more intrusive investigative steps. In Page's history as a U.S. government source and in his media appearances since the FISA request became public knowledge, Page has been talkative to a fault. Particularly since Page had already demonstrated a willingness to work as a U.S. government

source, a Justice Department lawyer might have recommended that agents ask again for Page's cooperation before seeking a FISA warrant. A FISC judge might have had a similar reaction before approving a government surveillance request that fully disclosed Page's past cooperation. Perhaps the FISC would have sought additional information about Page's past work with the CIA. The OIG believed that FBI agents staffing the investigation should have provided Justice Department lawyers with information about Page's past work, to equip the lawyers with the information needed to properly assess whether a FISA request was necessary. That view seems consistent with sound practice.

For the OIG, the repeated failures of FBI line agents staffing the preparation of the Page FISA request ultimately raised "significant questions" about the FBI's entire chain of command. Isolated failures can be written off as the by-products of bad apples. But repeated failures, including those in the renewed FISA requests submitted to and granted by the FISC, cannot be dismissed so readily. The FBI is a hierarchical organization. Most agents do excellent work in trying circumstances. Despite that record, the OIG report noted that persistent failures may point to leadership problems and structural flaws. These deficits do not reflect the overt political bias or the elaborate "deep state" conspiracy that President Trump and his allies flag as driving forces in the Russia probe. The OIG report found no evidence to support these claims. Nevertheless, the institutional issues that the OIG report found are worthy of substantial concern.

FBI Director Christopher Wray has taken the OIG's critique to heart. In an appendix to the OIG report and a letter released on Dec. 9, Wray acknowledged the OIG's recommendation that the FBI stress the need for agents to provide senior FBI officials with all information relevant to FISA requests. To that end, Wray has ordered more comprehensive use of checklists and other simple but effective devices that will highlight all evidence, not just evidence favoring a FISA request but also information tending to show that a FISA request is unnecessary. As the OIG suggested, both kinds of information are essential if the FISA process is to function as Congress intended.

While the FBI director's response apparently did not go far enough for President Trump, who had hoped for a broader condemnation of the entire Russia probe, Wray wisely tailored his comments and remedies to address the flaws that the OIG report identified. In addition to the measures outlined above, Wray agreed with the OIG's recommendation to require senior Justice Department officials' approval in order to open investigations that could implicate First Amendment interests, such as probes of national political campaigns. Though Wray did not mention this particular reform, Congress may also wish to consider wider authorization for appointment of amici curiae or special public advocates in FISA cases to provide a perspective distinct from the government's stance, as in legislation proposed by Sen. Richard Blumenthal. The FISC has already used amici to assist the court in addressing novel issues. Along with the record of Russian election interference compiled in the Russia probe, such institutional reforms will be a valuable legacy of the investigation.

Topics: Federal Law Enforcement, FISA

Peter Margulies is a professor at Roger Williams University School of Law, where he teaches Immigration Law, National Security Law and Professional Responsibility. He is the author of *Law's Detour: Justice Displaced in the Bush Administration* (New York: NYU Press, 2010).