

JAN 23 2020

LeeAnn Flynn Hall, Clerk of Court

UNITED STATES  
FOREIGN INTELLIGENCE SURVEILLANCE COURT  
WASHINGTON, D.C.

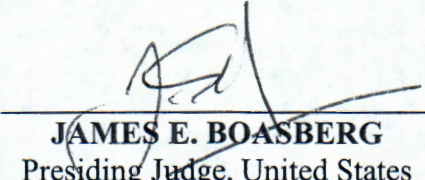
IN RE CARTER W. PAGE,  
A U.S. PERSON

Docket Nos: 16-1182, 17-52, 17-375,  
17-679

**SCHEDULING ORDER**

On January 23, 2020, the government contacted the Court's chambers to orally request additional time to respond to the Court's Order Regarding Handling and Disposition of Information that was issued on January 7, 2020. The government's request is hereby granted and the new deadline for submission shall be February 5, 2020.

ENTERED this 23<sup>rd</sup> day of January 2020.

  
**JAMES E. BOASBERG**  
Presiding Judge, United States  
Foreign Intelligence Surveillance Court



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Filed  
United States Foreign  
Intelligence Surveillance Court

JAN 07 2020

UNITED STATES

LeeAnn Flynn Hall, Clerk of Court

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE CARTER W. PAGE,  
A U.S. PERSON

Docket Nos: 16-1182, 17-52, 17-375,  
17-679

**ORDER REGARDING HANDLING AND DISPOSITION OF INFORMATION**

Thanks in large part to the work of the Office of the Inspector General, U.S. Department of Justice, the Court has received notice of material misstatements and omissions in the applications filed by the government in the above-captioned dockets. See Docket No. Misc. 19-02, Order (Dec. 17, 2019; DOJ OIG, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation* (Dec. 2019 (revised))). DOJ assesses that with respect to the applications in Docket Numbers 17-375 and 17-679, "if not earlier, there was insufficient predication to establish probable cause to believe that [Carter] Page was acting as an agent of a foreign power." *Additional Rule 13(a) letter regarding applications submitted to the Court targeting Carter W. Page in Docket Numbers 2016-1182, 2017-0052, 2017-0375, and 2017-0679* (Dec. 9, 2019), at 19 ("December 9, 2019 Letter").

The government further reports that the FBI has agreed "to sequester all collection the FBI acquired pursuant to the Court's authorizations in the above-listed four docket numbers targeting [Carter] Page pending further review of the OIG Report and the outcome of related investigations and any litigation." *Id.* at 19-20. The government has not described what steps are involved in such sequestration or when it will be completed. It has, however, undertaken to "provide an update to the Court when the FBI completes the sequestration" and to "update the Court on the disposition of the sequestered collection at the conclusion of related investigations and any litigation." *Id.* at 20. To date, no such update has been received.

The Court understands the government to have concluded, in view of the material misstatements and omissions, that the Court's authorizations in Docket Numbers 17-375 and 17-679 were not valid. The government apparently does not take a position on the validity of the authorizations in Docket Numbers 16-1182 and 17-52, but intends to sequester information acquired pursuant to those dockets in the same manner as information acquired pursuant to the subsequent dockets.

Title I of the Foreign Intelligence Surveillance Act, codified as amended at 50 U.S.C. §§ 1801-1813, governs electronic surveillance conducted for foreign intelligence purposes. It requires minimization procedures "that are reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning

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unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." 50 U.S.C. § 1801(h)(1). It also makes it a crime to "intentionally . . . disclose[ ] or use[ ] information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized" by FISA or another "express statutory authorization." § 1809(a)(2).

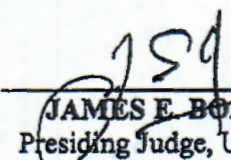
In order for the Court to assess whether the handling and disposition of the information acquired pursuant to the above-captioned dockets comport with these provisions of FISA, IT IS HEREBY ORDERED as follows:

1. By January 28, 2020, the government shall make a written submission regarding the FBI's handling of information obtained pursuant to the above-captioned dockets. That submission shall include:

- a. a detailed description of the steps taken or to be taken to restrict access to such information in unminimized form, including how many personnel have access and for what purposes they may examine or retrieve it;
- b. a detailed description of the steps taken or to be taken to restrict access to such information in any other form, including any information that may have been disclosed or disseminated to DOJ prosecutors or other persons outside of the FBI;
- c. to the extent applicable, a timetable for completing any such steps that have not yet been completed;
- d. explanations of the "further review of the OIG Report" and "related investigations and any litigation" that are referenced in the December 9, 2019, Letter as requiring the retention of such information, including copies of any orders of other courts relating to the preservation of, or access to, such information; and
- e. an explanation of why the retention of such information in the manner intended by the government, and any contemplated use or disclosure of it, comport with the above-referenced provisions of FISA; and

2. In order to facilitate consideration of whether the Court should publish this Order pursuant to FISC Rule of Procedure 62(a), the government shall, by January 21, 2020, complete a declassification review of this order and submit to the Court a copy of such order with any redactions it would propose in the event of publication.

ENTERED this 7<sup>th</sup> day of January 2020.

  
JAMES E. BOASBERG  
Presiding Judge, United States  
Foreign Intelligence Surveillance Court

I, Clerk, do hereby certify that this document is a true and correct copy of the original.

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~~Unclassified~~



UNITED STATES

JAN 17 2020

FOREIGN INTELLIGENCE SURVEILLANCE COURT

LeeAnn Flynn Hall, Clerk of Court

WASHINGTON, D.C.

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**IN RE ACCURACY CONCERNS REGARDING**

Docket No. Misc. 19-02

**FBI MATTERS SUBMITTED TO THE FISC**

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**SCHEDULING ORDER**

In its December 17, 2019, Order, the Court expressed serious concerns about the completeness and accuracy of information it receives in FBI applications and directed the government to explain how it intends to address those concerns. On January 10, 2020, the government timely submitted its *Response to the Court's Order Dated December 17, 2019*. That response describes measures that the government has implemented and plans to implement "to ensure the accuracy and completeness of applications submitted" by the FBI. Response at 2. Also on January 10, the Court appointed David S. Kris, Esq. to assist it in assessing the government's response. Mr. Kris submitted a letter brief on January 15, 2020, in which he concluded that the FBI's corrective actions are insufficient and proposed several additional corrective actions regarding standards and procedures, training, and audits and reviews, as well as measures "to restore and strengthen the FBI's organizational culture of individual responsibility for rigorous accuracy in this Court." Amicus Letter Brief at 3.

Because the government may have information relevant to the Court's consideration of the amicus's proposals, and in view of the need to act expeditiously to ensure the accuracy and completeness of submissions to the Court,

IT IS HEREBY ORDERED THAT, by January 31, 2020, the government shall submit any response it wishes to make to the amicus's proposals.

ENTERED this 17<sup>th</sup> day of January, 2020.

  
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**JAMES E. BOASBERG**  
Presiding Judge, United States Foreign  
Intelligence Surveillance Court



UNCLASSIFIED

JAN 15 2020

LeeAnn Flynn Hall, Clerk of Court

January 15, 2020

BY ELECTRONIC FILING

The Honorable James E. Boasberg

Presiding Judge

United States Foreign Intelligence Surveillance Court

Washington, DC

Re: *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*  
Docket No. Misc. 19-02

Judge Boasberg:

Undersigned *amicus curiae* submits this letter brief, as directed by the Court's order of January 10, 2020, in response to the government's submission of the same day in the above-captioned matter.

Introduction and Procedural History

On December 17, 2019, this Court ordered the government by January 10 to "inform the Court in a sworn written submission of what it has done, and plans to do, to ensure that the statement of facts in each FBI application accurately and completely reflects information possessed by the FBI that is material to any issue presented by the application." Order at 3-4. The Court's order responded to reports, including from the Inspector General of the Department of Justice (DOJ), that FBI personnel had "provided false information ... and withheld material information ... in connection with four applications to the Foreign Intelligence Surveillance Court (FISC) for authority to conduct electronic surveillance of a U.S. citizen named Carter W. Page." *Id.* at 1; see Office of the Inspector General, U.S. Department of Justice, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation* (Dec. 2019) (hereinafter Report or OIG Report). The Court further ordered that "[i]n the event that the FBI at the time of [its] submission is not yet able to perform any of the planned steps described in the submission, it shall also include (a) a proposed timetable for implementing such measures and (b) an explanation of why, in the government's view, the information in FBI applications submitted in the interim should be regarded as reliable." Order at 4.

On January 10, 2020, the government filed its response as directed by the Court. The response, which includes a declaration from FBI Director Wray, describes certain measures that the government has already adopted in its effort to ensure the accuracy of FBI FISA applications, several others that are in the process of being implemented, and a few additional possibilities that remain under consideration. On the same day as the Court received the

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government's response, it issued an order appointing the undersigned as *amicus curiae* pursuant to 50 U.S.C. § 1803(i). The appointment order directed the filing of this letter brief to "assist the Court in assessing the government's response" concerning the factual accuracy of FBI FISA applications. Appointment Order at 1.

As directed by the Court, this brief is limited to the question of ensuring factual accuracy in FBI FISA applications. It assesses the 12 "Corrective Actions" announced by Director Wray that pertain to FBI FISA accuracy, but it does not address more than 28 additional Corrective Actions that he announced, or any of the other issues reviewed or raised by the OIG Report. See Report at 425. Thus, for example, the brief does not discuss the definition of a "Sensitive Investigative Matter" (SIM) or the requirements for DOJ approvals of a SIM. It does not address training and best practices for the recruitment and handling of confidential human sources (other than as necessary to ensure FISA accuracy). And it does not consider the appropriate standards for conducting investigations of or defensive briefings for U.S. political campaigns. Rather, as ordered by the FISA Court, the sole question presented in this brief concerns the "critically important" but limited question of whether the 12 Corrective Actions and related measures proposed by the government are sufficient to provide assurance to the Court that "FBI applications accurately and fully reflect information known to the Bureau that is material to those applications." Appointment Order at 1. As detailed below, this brief argues that the FBI's proposed Corrective Actions are insufficient and must be expanded and improved in order to provide the required assurance to the Court.

The brief is based principally on a review of the OIG Report and related materials but is also informed by undersigned *amicus curiae*'s professional experience. This experience includes nearly two decades of study, teaching and writing about FISA and national security, including as co-author of a national security legal treatise first published in 2007; exposure to other examples of FBI failures and associated remediation as documented in and suggested by prior OIG reports; time spent reviewing and approving individual FISA applications, in both Republican and Democratic administrations, during the periods before, during, and after the September 11, 2001 terrorist attacks; two years as the Assistant Attorney General for National Security; efforts to implement reforms to FISA, including as necessary to address publicly-documented accuracy issues at the FBI in 2000, and later at other government agencies; lessons learned from litigation in the FISA Court and the Court of Review; work with the FBI as a trial and appellate prosecutor in criminal cases in Washington, DC and elsewhere; and more than a decade of combined experience in the private sector, as a general counsel, and as the chief ethics and compliance officer of a U.S. public company.

This brief also reflects more than a month of focused consideration of the question of FBI FISA accuracy, beginning when the OIG Report was issued on December 9, 2019, and including in connection with an essay of approximately 10,000 words published on December 23, 2019. See David S. Kris, *Further Thoughts on the Crossfire Hurricane Investigation* (Dec. 23, 2019), available at <https://www.lawfareblog.com/further-thoughts-crossfire-hurricane-report> (Crossfire Hurricane Essay). The government's rolling timetable for taking Corrective Actions calls for certain potentially significant measures to be undertaken or completed in the very near



term, some of which may serve as a foundation for future corrective activity. The brief is intended to aid the Court in timely evaluating this ongoing and potentially foundational activity, and undersigned *amicus curiae* is prepared to supplement the brief, if and when directed by the Court, as needed to address any newly-available information, materials or other actions taken by the government.

### Summary of Argument

The FBI is subject to an obligation of scrupulous accuracy in representations made to this Court. It breached that obligation through a series of significant and serious errors and omissions. Recognizing the need for reform, the government now proposes 12 individual Corrective Actions that fall into three broad categories: (a) FISA standards and procedures; (b) training; and (c) audits and reviews. These Corrective Actions point in the right direction, but they do not go far enough to provide the Court with the necessary assurance of accuracy, and therefore must be expanded and improved. This brief proposes for the Court's consideration several additional corrective actions in each of the three categories. It also proposes measures designed to restore and strengthen the FBI's organizational culture of individual responsibility for rigorous accuracy in this Court.

All of the proposals and recommendations in this brief are consistent with the separation of powers. There are limits on this Court's ability to dictate "the internal organization and investigative procedures of the Department of Justice," *In re Sealed Case*, 310 F.3d 717, 731 (FISC 2002), but as the Supreme Court has explained, "magistrates remain perfectly free to exact such assurances as they deem necessary ... in making probable cause determinations," *Illinois v. Gates*, 462 U.S. 213, 240 (1983). The Court has asked the government why its FISA applications should be trusted, and the government has answered with a proposal to implement various improvements over time, and a promise of further updates and continued cooperation. See Wray Declaration ¶¶ 14, 20. In that context, any specific separation of powers issue can be resolved if and when the Court determines that it must require a particular corrective action over the government's objection.

### Argument

#### 1. The Importance of Accuracy, the FBI's Failures, and the Need for Reform

This Court's order of December 17, 2019 explains the fundamental importance of scrupulous accuracy in FISA applications. As the Court stated (Order at 2, footnotes omitted, alterations in original):

Notwithstanding that the FISC assesses probable cause based on information provided by the applicant, "Congress intended the pre-surveillance judicial warrant procedure" under FISA, "and particularly the judge's probable cause findings, to provide an external check on executive branch decisions to conduct surveillance" in order "to protect the fourth amendment rights of U.S. persons." The FISC's assessment of probable cause can



serve those purposes effectively only if the applicant agency fully and accurately provides information in its possession that is material to whether probable cause exists. Accordingly, “the government ... has a heightened duty of candor to the [FISC] in *ex parte* proceedings,” that is, ones in which the government does not face an adverse party, such as proceedings on electronic surveillance applications. The FISC “expects the government to comply with its heightened duty of candor in *ex parte* proceedings at all times. Candor is fundamental to this Court’s effective operation ....”

The Supreme Court has also emphasized the importance of accuracy and candor in *ex parte* warrant proceedings.<sup>1</sup> As the Court put the matter in *Franks v. Delaware*, “[W]hen the Fourth Amendment demands a factual showing sufficient to comprise ‘probable cause,’ the obvious assumption is that there will be a *truthful* showing.” 438 U.S. 154, 164-165 (1978) (internal quotation omitted, alteration and emphasis in original). There can be no dispute about the legal, ethical, and practical reasons why the government must adhere to a strict duty of candor and accuracy before the Court.

Nor can there be any dispute that the government has profoundly failed to meet that duty. As the Court is well aware (Order at 2-3), the Inspector General’s report found “basic, fundamental, and serious errors during the completion of the FBI’s factual accuracy reviews ... which are designed to ensure that FISA applications contain a full and accurate presentation of the facts.” Report at 413. It concluded that the FBI “failed to comply with FBI policies, and in so doing fell short of what is rightfully expected from a premier law enforcement agency entrusted with such an intrusive surveillance tool.” *Id.* at 414. As this Court stated in its Order (at 3), the “FBI’s handling of the Carter Page applications, as portrayed in the OIG report, was antithetical to the heightened duty of candor described above.”

The government cannot, and does not, dispute either its duty or its failures. Director Wray’s declaration provides (¶ 20, emphasis added): “The FBI has the utmost respect for this Court, and deeply regrets the errors and omissions identified by the OIG. The OIG Report and the affiliated Rule 13(a) letters describe conduct that is unacceptable and unrepresentative of the FBI as an institution. FISA is an indispensable tool in national security investigations, and in recognition of our duty of candor to the Court and our responsibilities to the American people, the FBI is committed to working with the Court and DOJ to ensure the accuracy and completeness of the FISA process.” See also OIG Report at 424-25 (letter to the Inspector General from Director Wray). There is no room for disagreement on these foundational points.

## 2. Separation of Powers

None of the proposals and recommendations set forth below is prohibited by the separation of powers. The government does not resist this Court’s authority to demand

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<sup>1</sup> Whether or not FISA orders are technically “Warrants” under the Constitution, the need for accuracy and the scope of proper judicial inquiry under FISA are properly informed by Fourth Amendment standards. See, e.g., David S. Kris & J. Douglas Wilson, *National Security Investigations and Prosecutions* (3d ed. 2019) §§ 11:2 et seq. (NSIP).



assurances of ongoing accuracy. Nor could it. Judges retain substantial discretion when reviewing the sufficiency and credibility of an affidavit submitted in support of a warrant. As the Supreme Court put it in *Illinois v. Gates*, 462 U.S. 213, 240 (1983), “magistrates remain perfectly free to exact such assurances as they deem necessary ... in making probable cause determinations.” See also *Franks*, 438 U.S. at 164-65 (1978); Abraham S. Goldstein, *The Search Warrant, the Magistrate, and Judicial Review*, 62 NYU L. Rev. 1173, 1188-94 (1987). The government represents that it “is committed to working with the Court” to improve the accuracy of its FISA applications. Wray Declaration at ¶ 20. Separation of powers doctrine does not prevent that vital work from being done.

To be sure, as the FISA Court of Review has recognized, there are limits on this Court’s ability to dictate “the internal organization and investigative procedures of the Department of Justice” and the FBI. *In re Sealed Case*, 310 F.3d 717, 731 (FISCR 2002). These limits are important, but they are very likely at or near their lowest ebb when it comes to measures designed to ensure the basic factual accuracy and integrity of FISA applications. Moreover, even if the Court cannot dictate a particular measure directly to the executive branch, it clearly enjoys discretion to reject FISA applications that it reasonably deems to be less than credible, and its assessment of credibility may reasonably be informed by the accuracy measures used (and not used) by the government in preparing the application.

In any event, no specific question of separation of powers is presented here and now. The Court has asked the government why its FISA applications should be trusted, and the government has answered with a proposal to implement various Corrective Actions and other measures over time, and a promise of further updates and continued cooperation. See Wray Declaration ¶¶ 14, 20. Any specific separation of powers issue can be resolved if and when the Court determines that it must require a particular additional measure over the government’s objection.

### 3. The FBI’s Proposed Corrective Actions Are Insufficient

To restore this Court’s confidence in the accuracy of its FISA pleadings, the FBI has proposed 12 Corrective Actions, as described in the Wray Declaration (¶ 4), the government’s January 10 Response, and Director Wray’s letter of December 6, 2019 to the Inspector General (Report at 424-434). To assist the Court in assessing these 12 Corrective Actions, they are presented and reviewed below in three functional categories: (a) FISA standards and procedures; (b) training; and (c) audits and reviews. The FBI’s proposed Corrective Actions will be helpful to an extent, but they do not go far enough, and accordingly the discussion below proposes several additional corrective actions for the Court’s consideration. Thereafter, the brief discusses the importance of cultural reform at the FBI.

#### a. FISA Standards and Procedures

The FBI reports that it is expanding the information required by the Request Form used by agents to request FISA surveillance, “emphasizing the need to err on the side of disclosure”



when it comes to information “relevant to the consideration of ... probable cause,” and including “all information ... bearing on the reliability” of a confidential human source (CHS) for the FISA declaration. Wray Declaration ¶ 4 (Corrective Actions 1-2); see OIG Report at 428-429. Director Wray reports that the Request Form “has been finalized” and will be used beginning February 14, 2020, “following a brief period of training.” Wray Declaration ¶ 6. Information about confidential human sources will be captured in a special “CHS Questionnaire,” to be used as an addendum to the Request Form, but Director Wray does not know when the questionnaire will be completed or ready for use, and he “proposes to update the Court on the status of the implementation of this Corrective Action by February 28, 2020.” *Id.* ¶ 7.

The government’s Response (at 11) also explains that it is working on a separate “checklist to be completed by FBI personnel during the drafting process to ensure that all relevant information regarding a source’s reliability, including the bias or motivation of the source, as well as the accuracy or basis of a source’s reporting, is provided to OI [the Office of Intelligence within the National Security Division (NSD) at DOJ].” The government does not appear to have committed to a timeline for completing this checklist or for reporting on the status of its efforts to the Court. It should be directed to do so. To the extent that it is not already required, this checklist should ensure and document a rigorous inter-agency check for sources that have relationships with other U.S. government agencies.

Director Wray has also required “formalization of the role of FBI attorneys in the legal review process for FISA applications, to include” specification of supervisor roles and “the documentation required for the legal reviewer.” Wray Declaration ¶ 10; see *id.* ¶ 4 (Corrective Action 7). This formalized role for FBI attorneys is intended to “encourage [FBI] legal engagement throughout the FISA process, while still ensuring that case agents and field supervisors maintain ownership of their contributions.” *Id.* ¶ 10. Implementation of this action will require changes to the FISA Verification Form by February 20; as to other aspects, Director Wray proposes to update the Court by March 27, 2020. *Id.*

In connection with factual verification of FISA applications, as described by Director Wray, the FBI is requiring agents and supervisors to confirm that OI has been advised of “all information that might reasonably call into question the accuracy of the information in the application or otherwise raise doubts about the requested probable cause findings or the theory of the case,” and is adding a checklist to aid supervisory review and approval. Wray Declaration ¶ 4 (Corrective Actions 5-6). The Response (at 11) similarly describes the changes to the Request Form (Corrective Action 1) as “designed ... to elicit information that may undermine probable cause.” These changes are to be implemented by February 14, 2020. See Wray Declaration ¶¶ 6, 8.<sup>2</sup>

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<sup>2</sup> The government also reports that it is revising its prior guidance “that mandated specific practices and documentary requirements to ensure accuracy of facts in FISA applications, certain procedures that should be followed during the drafting of FISA applications to ensure accuracy, and the parameters of subsequent reviews for accuracy by OI personnel.” Response at 6. The Response reports that the Court will be advised “when the revised memorandum has been issued.” *Id.* at 13.



The FBI is also formalizing the requirements to reverify facts presented in prior FISA applications and make any necessary corrections, and to retain (serialize) forms over time, and is expanding the requirement to document verification of CHS information. Wray Declaration ¶ 4 (Corrective Actions 3-4 & 9); see OIG Report at 428-29. This includes a requirement “to confirm that any changes or clarifying facts, to the extent needed, are in the [next] FISA renewal application,” and “[i]mproving the FISA Verification Form by adding a section devoted to” confidential human sources. Wray Declaration ¶ 4 (Corrective Actions 3-4). Director Wray reports that these changes are to be implemented by February 14, 2020. *Id.* at ¶ 8. DOJ also apparently plans to continue the practice under which OI “attorneys are expected to look for errors and omissions in prior submissions to the Court, and, if any are found, to correct the non-material errors or omissions in the subsequent renewal application and to bring any material misstatements and omissions immediately to the attention of the Court.” Response at 10. The practice at DOJ is to “err in favor of disclosing information that OI believes the Court would want to know.” *Id.* The Court should require the government formally to document and commit to this practice, rather than leaving it as a matter of executive branch discretion.

Finally, the FBI is planning to make certain technological improvements. Wray Declaration ¶ 4 (Corrective Action 11). The government’s submissions do not reveal the precise nature of these measures, but they are described generally as both “short- and long-term technological improvements, in partnership with DOJ, that aid in consistency and accountability.” Wray Declaration ¶ 12. The one specific example described by Director Wray is that the FBI “is considering the conversion of the revised FISA Request Form into a workflow document that would require completion of every question before it could be sent to OI.” *Id.* Director Wray proposes to report to the Court on technological issues by March 27, 2020. *Id.*

Given its failures as documented by the Inspector General, the FBI’s focus on improving FISA standards and procedures is understandable. The FISA process is complex, geographically dispersed, high-volume, and often time-sensitive. It requires regular order. As the Inspector General explains in his report, the FBI depends on “adherence to detailed policies, practices, and norms” to do its best work. Report at 410. In general, the various proposed modifications to FISA request forms, checklists, verification forms, CHS questionnaires, supervisor forms, field guidance, and related documents point in the right direction. Given the lessons of the OIG Report, for example, it makes sense to emphasize the “need to err on the side of disclosure,” to “elicit information that may undermine probable cause,” and to provide “all information ... bearing on the reliability” of a confidential human source. These reforms are not alone sufficient, but reforms of this sort are clearly necessary.

As the new forms and other materials are finalized and implemented, the Court should require the government to demonstrate that they are both well-designed and functioning as designed. Thereafter, the Court should also require the government to review, reassess and report periodically on possible improvements to FISA standards and procedures in light of ongoing experience. Regular and proactive improvement in standards and procedures that averts a crisis is vastly preferable to reactive improvement compelled by a crisis.



Using technology to automate FISA processes has the potential to help significantly. Some years ago, in response to findings by the Inspector General of misuse of National Security Letters, the FBI improved its compliance using similar technological means. See Office of the Inspector General, U.S. Department of Justice, *A Review of the Federal Bureau of Investigation's Use of National Security Letters*, Appendix, FBI Letter to Inspector General at 3-5 (re-released February 2016). The Court should carefully monitor the FBI's progress and require regular updates on technological developments. Technological developments may also be relevant to the use of field agents as FISA declarants, as discussed below.

The focus on specific forms, checklists, and technology, while appropriate, should not be allowed to eclipse the more basic need to improve cooperation between the FBI and DOJ attorneys. Historically, the FBI has not always worked cooperatively with DOJ, especially in foreign intelligence and national security matters (as opposed to ordinary criminal cases). See NSIP § 2:17. As noted above, the Inspector General found significant failures of cooperation and coordination, in which the FBI did not advise DOJ of relevant facts. In evaluating the FBI's Corrective Actions, therefore, the Court should focus on whether and how they further what the government describes as the "iterative process" for preparing FISA applications, in which "attorneys and supervisory attorneys in OI work closely with the case agent or agents ... to elicit, articulate, and provide full factual context." Response at 9. This iterative process is essential to avoiding errors in the first instance, rather than merely detecting them after the fact. It puts primary responsibility on the parties most knowledgeable about the relevant facts and therefore best equipped to prepare a complete and accurate FISA application. For this reason, it is capable of preventing both errors of commission (materially false assertions in an application) and of omission (failing to include material information in an application). As discussed below, the government concedes that errors of omission currently cannot be detected reliably in after-the-fact accuracy reviews conducted by OI. See *id.*

The single most significant process issue that is not addressed in the government's submission concerns the possibility of using field agents, rather than headquarters agents, as declarants in FISA applications. This would represent a major change in practice, with potentially profound consequences, because it would tend to shift responsibility away from FBI Headquarters in particular cases. See NSIP § 6:3. It therefore should not be undertaken lightly.

The FBI's recent failures, however, are egregious enough to warrant serious consideration of significant reform. Using field declarants at least arguably accords with the lessons of experience extending back to the last major crisis in FBI FISA accuracy from the year 2000, need not conflict with the appropriately centralized aspects of the FISA program, and should be newly practicable in light of technological developments in the intervening two decades (possibly including certain of the technological measures involved in Corrective Action 11). See Crossfire Hurricane Essay, *supra*. Of course, even if field agents serve as the FISA declarants, agents at FBI Headquarters would continue to have an important role in coordinating and verifying the accuracy of FISA applications as to matters within their purview.



Even if field agents do not serve as declarants in some or all FISA applications, the Court should require them in appropriate cases to sign or otherwise attest to the Court directly with respect to asserted facts within their purview. On this approach, the headquarters agent would remain the declarant, but the results of the FBI's verification of accuracy by field agents would become visible to the Court and would be made directly to the Court. These attestations of accuracy to the Court could also include more detail, such as statements that the declarants are not aware of any material facts that have been omitted from the application, and other assertions that correspond to the requirements of the updated FISA Request Form (discussed above). This transparency would help reinforce for all of these declarants the importance of scrupulous accuracy and completeness. It would also aid the Court in later holding appropriate parties accountable for any failures. Requiring such verification directly from field agents falls comfortably within the Court's authority to demand appropriate "assurances" of accuracy. *Gates*, 462 U.S. at 241-42. The Court should order the government to address promptly these possibilities concerning the role of field agents in FISA applications and expanded attestations by declarants.

#### b. Training

Director Wray reports that the FBI is developing two new training modules. The first is a "case study" based on the OIG Report, for training agents on proper FISA procedures "so that mistakes of the past are not repeated." Wray Declaration ¶ 4 (Corrective Action 8). As further described by Director Wray, the case study will be "based on the OIG Report findings, wherein FBI personnel will be instructed on the errors and omissions that were made in the Carter Page FISA applications and associated processes, and taught the updated procedures, policies, and protocols designed to avoid similar mistakes in the future." *Id.* ¶ 11. This case study training, which will include testing to verify student knowledge, is to be completed by April 30 for FBI divisions and by June 30 for all other operational personnel. *Id.*

The second FBI training module, focused on "FISA process," is described as "new training focused on FISA process rigor and the steps FBI personnel must take, at all levels, to make sure that OI and the FISC are apprised of all information in the FBI's holdings at the time of an application that would be relevant to a determination of probable cause." Wray Declaration ¶ 4 (Corrective Action 10). This training is to be completed on the same schedule as the "case study" training – by April 30 and June 30 for FBI divisions and other operational personnel, respectively. Wray Declaration ¶ 11.<sup>3</sup>

At the conceptual level, the two training modules are both sensible. A case study approach should allow agents to experience and learn about accuracy standards in context. This

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<sup>3</sup> Director Wray has also required certain "interim training" in the period before the two permanent training modules are used. This interim training will include training on how to use the revised FISA Request Form and checklists as described above, and will also "include an overview of lessons learned from the FISA applications and associated FBI actions examined in the OIG Report, with an emphasis on the critical importance of ensuring accuracy, transparency, and completeness in all FISA applications." Wray Declaration ¶ 9.



may be especially valuable for newer agents who have less experience handling actual matters. It can be easier to describe high standards of accuracy in the abstract than it is to apply them in practice, and a case study helpfully focuses on the latter challenge. It should also serve as an important part of acknowledging past errors and learning from them. Failures often provide better learning opportunities than successes. If and when the Court reviews the case study module, it should do so with these two points in mind (the value of context and of learning from failure). As to the FISA process module, a key element is the requirement to share information with OI, because one of the main failures described in the OIG Report concerned such information-sharing, and because cooperation between FBI and OI is a central element of the important "iterative" FISA process described above. The Court should keep this in mind if and when it reviews the process training module. Moreover, absent a compelling reason, the Court should generally require that OI attorneys participate along with FBI personnel in conducting all FBI training on FISA. This will help ensure a shared understanding of requirements between OI and the FBI.

A separate line of training is conducted by OI attorneys when they visit FBI field offices to conduct accuracy reviews. This training, too, has been updated, and the updated version was apparently first used the day before the government's Response was filed. See Response at 12 & n.10. This training is said to address "the need to bring inconsistent details, the full context of relevant conversations or correspondence, and relevant information from other law enforcement or government agencies to the attention of OI in order to evaluate such information and bring all relevant information to the attention of the Court." *Id.* Training is also planned in January 2020 for "all OI attorneys responsible for preparing FISA applications to be submitted to the Court." *Id.*

Over time, the Court should require the government to report on the training, including participation rates, and the results of testing of student knowledge. It could, for example, require quarterly reporting on these data. Depending on the results of that reporting, the Court can take additional action. The Court should also (absent extraordinary circumstances and a sound explanation) forbid agents who have not successfully completed the training from serving as FISA declarants or factual verifiers.

#### c. Audits and Reviews

The FBI proposes to "identify and propose audit, review, and compliance mechanisms to ensure the above changes to the FISA process are effective." Wray Declaration ¶ 4 (Corrective Action 12). Additional detail is not provided, and Director Wray proposes to update the Court on this effort by May 22, 2020. *Id.* ¶ 13. It therefore appears that the FBI does not yet have a well-developed plan for enhanced auditing. The Court should inquire skeptically as to why this is the case, and take appropriate action based on what it learns.

At present, OI "conducts oversight reviews," which are after-the-fact reviews, "at approximately 25-30 FBI field offices annually." Response at 7. Some of these oversight reviews



also include "accuracy reviews ... to ensure compliance" with the FBI's verification of accuracy procedures. *Id.* In particular, under current standards, accuracy reviews cover four areas:

(1) facts establishing probable cause to believe that the target is a foreign power or an agent of a foreign power; (2) the fact and manner of FBI's verification that the target uses or is about to use each targeted facility and that property subject to search is or is about to be owned, used, possessed by, or in transit to or from the target; (3) the basis for the asserted U.S. person status of the target(s) and the means of verification; and (4) the factual accuracy of the related criminal matters section, such as types of criminal investigative techniques used (e.g., subpoenas) and dates of pertinent actions in the criminal case.

*Id.* at 7 n.5. "During these reviews," the Response explains, "OI attorneys verify that every factual statement in [these four] categories of review ... is supported by a copy of the most authoritative document that exists or, in enumerated exceptions, by an appropriate alternate document." *Id.* at 8. Access to the identity of confidential human sources may be limited, either by redaction of identifying information from the relevant sub-file or (if necessary) by using an FBI intermediary to confirm the accuracy of source-related assertions. *Id.* at 8 & n.6. (If not already required, these FBI intermediaries should document and attest to the accuracy and completeness of their reporting to the OI attorneys.) Accuracy reviews are also conducted as a matter of practice in cases where information obtained or derived from FISA is to be used in a proceeding against an aggrieved party. *Id.* at 7.

DOJ is "considering whether to supplement its existing accuracy reviews with additional oversight measures designed to determine the completeness of applications subject to review." Response at 13. It promises to "provide a further update to the Court if such measures are implemented." *Id.* The Court should require an update whether or not such measures are implemented, including an explanation for any decisions made.

One of the most challenging aspects of the current accuracy reviews concerns their ability to detect errors of omission rather than commission in a FISA application (as discussed briefly above in connection with the "iterative" process for preparing FISA applications). The government's Response (at 9) describes this challenge as informed by the problems found in the OIG Report:

Admittedly, these accuracy reviews do not check for the completeness of the facts included in the application. That is, if additional, relevant information is not contained in the accuracy sub-file and has not been conveyed to the OI attorney, these accuracy reviews would not uncover the problem. Many of the most serious issues identified by the OIG Report were of this nature. Accordingly, OI is considering how to expand at least a subset of its existing accuracy reviews at FBI field offices to check for the completeness of the factual information contained in the application being reviewed. NSD will provide a further update to the Court on any such expansion of the existing accuracy reviews.



It is notable, and troubling in light of the Inspector General's report, that "accuracy reviews do not check for the completeness of facts included in the application." The difficulty appears to be that searching for errors of omission, in which the material facts were known but not documented in the FISA application or internal accuracy files, is extremely resource-intensive, particularly for reviewers who did not themselves participate in the underlying investigation. It may, for example, require interviewing FBI witnesses, some of whom may be geographically dispersed by the time of the review. But as the government concedes, and the Inspector General's report shows, this kind of in-depth review also detects errors that might otherwise go unnoticed. They are therefore extremely valuable. Even if in-depth reviews cannot be conducted in every case, the possibility that they may be conducted in any given case (unpredictably selected) should help concentrate the minds of FBI personnel in all cases. This is a necessary and desirable outcome in light of the failures documented in the OIG Report.

The Court should require the government to conduct more accuracy reviews, to expand those reviews, and to conduct a reasonable number of in-depth reviews on a periodic basis. The FBI and DOJ have vast resources, and they should dedicate significantly more of those resources to auditing, sufficient to ensure coverage in a reasonable percentage of cases, and perhaps a higher percentage of certain types of cases (e.g., those involving U.S. persons, certain definitions of "agent of a foreign power," and/or SIMs). The best approach to quantifying this effort will likely involve statistical analysis – e.g., conducting accuracy reviews as needed to ensure visits to field offices that together account for more than 80% or 90% of FISA applications. Notwithstanding the government's proposal to report in late May, the government should be directed promptly to submit a proposal for conducting additional in-depth and other accuracy reviews, with supporting analysis. The results of those reviews over time, and of the Inspector General's ongoing FISA audit (Report at xiv, 380), may inform appropriate future actions in this area.

#### 4. Cultural Reform

The Court's close review of the FBI's 12 proposed Corrective Actions should not obscure the larger issues presented. Standards and procedures, checklists and questionnaires, automated workflows, training modules, and after-the fact audits are all important. But they cannot be allowed to substitute for a strong FBI culture of individual ownership and responsibility for the accuracy and completeness of FISA applications. Without that, even the best procedures will not suffice; indeed, expanded procedures dictating multiple layers of review and approval could backfire, creating a kind of moral hazard, in which each layer believes, or assumes, that errors have or will be caught by the others. Organizational culture is paramount to real reform, and the Inspector General's report suggests that the FBI's culture of accuracy has suffered. The Court should keep organizational culture in focus through all aspects of its work with the government. A culture of operational personnel who feel checked and second-guessed by distant compliance officers is far less effective than a culture in which operators themselves are made to feel like compliance officers, with direct responsibility and accountability for following the rules.



A key method of improving organizational culture is through improved tone at the top, particularly in a hierarchical organization such as the FBI. Director Wray's statements recognize the very serious nature of the problems identified by the OIG Report. His letter to the Inspector General, included as Appendix 2 in the Report, acknowledges that FBI personnel

did not comply with existing policies, neglected to exercise appropriate diligence, or otherwise failed to meet the standard of conduct that the FBI expects of its employees – and that our country expects of the FBI. We are vested with significant authorities, and it is our obligation as public servants to ensure that these authorities are exercised with objectivity and integrity. Anything less falls short of the FBI's duty to the American people.

Report at 424-25 (emphasis added). Wray goes on to say that "the FBI accepts the Report's findings and embraces the need for thoughtful, meaningful remedial action." *Id.* at 425. In the government's January 10 Response, his declaration explains that the FBI "deeply regrets the errors and omissions identified by the OIG," and acknowledges that the Report and related materials "describe conduct that is unacceptable." Wray Declaration ¶ 20. Director Wray's statements compare relatively favorably, in their level of candor and acceptance of responsibility, to analogous statements made in response to prior reports by Inspectors General documenting significant failures by the FBI. See, e.g., U.S. Department of Justice, Office of the Inspector General, *A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006* at A-5 to A-12 (Mach 2008) (OIG NSL 2006 Report).

Director Wray has also taken some steps to communicate his views directly to the workforce. On December 9, 2019, the day the OIG Report was released, he distributed a video message to "all FBI personnel" on "the absolute need for accuracy and completeness in all FISA applications." Wray Declaration ¶ 18. The government's Response, filed on January 10, pledges in addition that the "FBI will communicate directly to the entire FBI workforce through a message from the FBI Director on January 13, 2020, describing [the corrective] actions [being undertaken in response to the OIG Report] and emphasizing both the importance of adhering to the accuracy procedures and the commitment of the FBI to ensure factual accuracy and completeness in all submissions to the Court." Response at 10. Wray also says that he expects these messages to be conveyed by others through "the [interim] training on new forms that will be provided virtually and at field offices" in January and February. Wray Declaration at ¶ 18. The two new permanent training modules will also address them.

These efforts are a reasonable beginning, but they are not sufficient and should be expanded and supplemented. Director Wray and other FBI leaders, as well as relevant leaders at the Department of Justice, should include discussions of compliance not only in one or two messages, but in virtually every significant communication with the workforce for the foreseeable future. Every time (or almost every time) Director Wray visits a field office in 2020, for example, his remarks should include appropriate references to the paramount and urgent



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need for accuracy and rigor in FISA applications. He should also require his subordinates to deliver similar remarks through their own formal and informal interactions with FBI employees, whether in regular staff meetings or otherwise. The message, and seriousness of purpose, should cascade through the FBI Deputy Director, Associate Deputy Director, Executive Assistant Directors, Assistant Directors, Deputy Assistant Directors, Special Agents in Charge, Assistant Special Agents in Charge, Section Chiefs, Unit Chiefs, and squad supervisors. Repeated and relentless communication is often required to convey a corrective message to an organization as large, dispersed, complex, and proud as the FBI. The Court should require the FBI and DOJ to document and report on the nature and extent of this communication; such a requirement to document and report communication may encourage the FBI and DOJ to conduct more of it.

Individual accountability and discipline are also critical to organizational culture. In 2000, in the face of significant accuracy failures, this Court publicly announced that it had barred an agent (whose name was not revealed) from appearing before the Court. See *Crossfire Hurricane Essay, supra*. This action by the Court contributed significantly to agents focusing intensely on accuracy immediately thereafter. Director Wray has pledged that "where certain individuals have been referred by the OIG for review of their conduct, the FBI will not hesitate to take appropriate disciplinary action if warranted at the completion of the required procedures for disciplinary review." OIG Report at 425. The Court should require the government to provide an appropriate briefing on these disciplinary reviews and results to ensure that Wray's pledge is carried out. This is essential in an effort to create compelling incentives for agents and other personnel to adhere to requirements (without unfair scapegoating). The Court also should not hesitate to take whatever additional action is appropriate under the circumstances, including once again barring agents from appearing in the Court. See also Response at 2 n.1.

In the meantime, and during the interim period in which many of the Corrective Actions are still being developed and implemented, the Court should, to the extent that it deems appropriate, consider holding hearings in a larger number of cases than usual. It should also consider involving field personnel in those hearings where feasible, either in person or using technology. This will be resource-intensive, but it offers an opportunity for the Court to interact with FBI and other personnel in small groups, to convey its concerns and expectations to those personnel, and to question and press them on their commitment to accuracy and their rigor in following procedures. This is one way that the Court can both assess and favorably influence the FBI's culture.

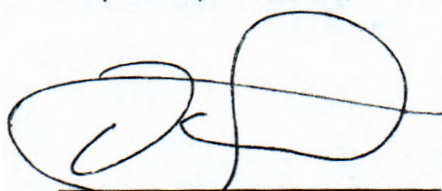
The government's efforts to reform, and the Court's insistence on scrupulous accuracy, must be ongoing. Culture is not a permanent fixture. It must be continually reinforced and modified to remain effective, especially in changing conditions. Apart from the timetable proposed by the government, the Court should be sure to revisit the question of accuracy on a regular basis and at appropriate milestones. Whether or not they recognize it, organizations like the FBI are constantly involved a kind of cultural anamnesis, simultaneously forgetting and recalling their past. It has been a nearly a full generation since the last major FBI FISA accuracy problem in 2000, and the present moment demands a renewed and ongoing commitment to accuracy, and more generally to the rule of law.



Conclusion

The Inspector General has described in a detailed and compelling manner the “FBI’s failure to adhere to its own standards of accuracy and completeness when filing [FISA] applications.” Report at 410. In response, this Court has rightly questioned whether it can continue to trust FBI affidavits, and demanded assurances of accuracy and completeness. The government has proposed 12 Corrective Actions which point in the right direction but do not go far enough. The many additional measures described above should also be considered and undertaken where deemed appropriate by the Court. Above all, however, the FBI must restore – and the Court should insist that it restore – a strong organizational culture of accuracy and completeness.

Respectfully Submitted,

A handwritten signature in black ink, consisting of a large, stylized 'D' and 'K' intertwined, with a horizontal line extending to the right.

David S. Kris  
Court-Appointed *Amicus Curiae*

Dated: January 15, 2020

cc: Gabriel Sanz-Rexach  
Acting Deputy Assistant Attorney General  
National Security Division  
U.S. Department of Justice



JAN 10 2020

UNITED STATES

LeeAnn Flynn Hall, Clerk of Court

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

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IN RE ACCURACY CONCERNS REGARDING

Docket No. Misc. 19-02

FBI MATTERS SUBMITTED TO THE FISC

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**ORDER APPOINTING AN AMICUS CURIAE**

By an order issued on December 17, 2019, in the above-captioned matter, the Court directed the government to make a “sworn written submission” by January 10, 2020, to “inform the Court . . . of what it has done, and plans to do, to ensure that the statement of facts in each FBI application accurately and completely reflects information possessed by the FBI that is material to any issue presented by the application.” Docket No. Misc. 19-02, Order at 3-4. If the FBI “is not yet able to perform any of the planned steps,” the submission “shall also include (a) a proposed timetable for implementing such measures and (b) an explanation of why, in the government’s view, the information in FBI applications submitted in the interim should be regarded as reliable.” *Id.* at 4.

It is critically important that FBI applications accurately and fully reflect information known to the Bureau that is material to those applications. In view of that significance, the Court, pursuant to 50 U.S.C. § 1803(i)(2)(B), finds it appropriate to appoint David S. Kris, Esq., to serve as amicus curiae to assist the Court in assessing the government’s response to the December 17, 2019, Order, and therefore

**IT IS HEREBY ORDERED THAT:**

(1) Mr. Kris is appointed to serve as amicus curiae in the above-captioned matter to assist the Court in assessing the government’s response to the December 17, 2019, Order;

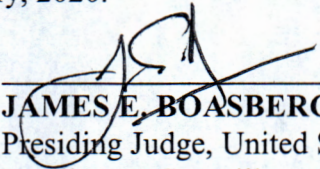
(2) The amicus curiae is invited to submit written views regarding the government’s submission by January 31, 2020; and

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(3) The attorney for the government in this matter shall ensure that the Attorney General receives a copy of this Order pursuant to the notification requirement at Section 1803(i)(7).

ENTERED this 10<sup>th</sup> day of January, 2020.



**JAMES E. BOASBERG**  
Presiding Judge, United States Foreign  
Intelligence Surveillance Court



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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

U.S. FOREIGN  
INTELLIGENCE  
SURVEILLANCE COURT  
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LEEANN FLYNN HALL  
CLERK OF COURT

(U) IN RE ACCURACY CONCERNS REGARDING FBI  
MATTERS SUBMITTED TO THE FISC.

Docket No. Misc. 19-02

**(U) RESPONSE TO THE COURT'S  
ORDER DATED DECEMBER 17, 2019**

(U) The United States respectfully submits this response to the Order of the Foreign Intelligence Surveillance Court (FISC or the Court) entered on December 17, 2019.

**I. (U) INTRODUCTION**

(U) The Court's December 17, 2019 Order responded to the findings of the Office of Inspector General's (OIG's) December 9, 2019, report, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation* (the OIG Report). The OIG Report and accompanying investigation concerned applications submitted to the Court targeting Carter W. Page (Page) in docket numbers 2016-1182, 2017-0052, 2017-0375, and 2017-0679.<sup>1</sup> The

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<sup>1</sup> (U) Prior to the issuance of the OIG Report, on July 12, 2018, the National Security Division (NSD) submitted a letter pursuant to Rule 13(a) of the FISC Rules of Procedure advising the Court of certain omissions that were identified by NSD's Office of Intelligence (OI) during the course of the OIG's investigation and which should have been brought to the Court's attention in connection with these applications. The Government filed a supplemental Rule 13(a) letter on December 9, 2019, describing additional omissions or misstatements in the above applications that NSD discovered as a result of the OIG's investigation.

(U) Additionally, on October 25, 2019 and November 27, 2019, the Government filed supplemental Rule 13(a) notices with the Court that provided details regarding information discovered during the course of the OIG's investigation. These notices discussed Page's prior reporting relationship with another U.S. government agency which was not included in the applications targeting Page, despite being known to a limited number of FBI personnel, as well as an FBI Office of General Counsel attorney's alteration of an e-mail message from that government agency to state incorrectly that Page was

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OIG Report found multiple omissions and misstatements regarding the applications filed in these docket numbers. The Court's December 17, 2019, Order directed the Government to identify actions that have been, or will be, taken to ensure the accuracy and completeness of applications submitted by the Federal Bureau of Investigation (FBI). The Court's Order also directed the Government to explain why the FBI's applications should continue to be regarded as reliable in light of the OIG Report, pending implementation of any remaining improvements.

(U) A declaration from Director Christopher A. Wray of the FBI ("the FBI Declaration") is attached to this filing as Exhibit A and identifies actions the FBI has taken, or plans to take, in order to address the findings of the OIG Report as they relate to the accuracy and completeness of factual assertions in applications submitted to the Court by the FBI. The FBI Declaration also provides a timetable for the implementation of the actions which the FBI will undertake. In addition, the Department of Justice (DOJ) is actively considering whether additional measures are warranted in light of the findings of the OIG Report and the corrective measures identified by Director Wray. DOJ will provide further updates to the Court on any such additional measures.

(U) The Government through this response and the attached FBI Declaration also sets forth the reasons why the Court should continue to have confidence in the reliability of information contained in applications submitted to the Court by the FBI.<sup>2</sup> In particular, the

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not a source for that agency. In connection with these notices, the Court issued an Order on December 5, 2019, requiring a written submission (1) identifying all other matters currently or previously before the Court that involved the participation of the FBI attorney; (2) describing any steps taken to verify that the Government's submissions in those matters completely and fully described the material facts and circumstances; and (3) advising whether the conduct of the FBI attorney has been referred to the appropriate bar association for investigation or disciplinary action. The Government's response to that Order was submitted on December 20, 2019.

<sup>2</sup> (U) The Court's Order directed the Government to respond in writing regarding steps that have been, or will be, taken with regard to applications filed by the FBI. The internal accuracy procedures described herein, *i.e.*, the Woods Procedures, apply to applications for electronic surveillance pursuant to

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Government respectfully submits that (i) FBI's existing accuracy procedures, (ii) OI's oversight and reporting practices when errors or omissions are identified during the application drafting process, and (iii) the corrective actions and interim measures identified in the FBI Declaration and the additional steps identified in this filing combine to substantiate the reliability of information contained in applications submitted by the FBI. These policies and measures will continue to be supplemented through prompt notification by OI to the Court of any material misstatements or omissions at the time they are identified. Collectively, the Government submits that these policies and procedures, and the manner in which they are implemented, provide grounds to rely on the accuracy and completeness of the FBI's submissions to the Court.

(U) The Government further notes that the OIG is conducting an audit of FBI's process for the verification of facts included in FISA applications that FBI submits to the Court, including an evaluation of whether the FBI is in compliance with its Woods Procedures requirements. The Department will work with the OIG to address any issues identified in this audit.

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Title I of the Act, 50 U.S.C. § 1801 *et seq.*, and applications for physical search pursuant to Title III, 50 U.S.C. § 1821, *et seq.* The Woods Procedures are also applied by the FBI in applications for the acquisition of foreign intelligence information targeting United States persons outside the United States pursuant to 50 U.S.C. § 1881c. The Government uses the term application in this response to refer to applications for Court-authorized electronic surveillance or physical search, or for authorization to target a U.S. person overseas pursuant to 50 U.S.C. § 1881c.

(U) Currently, the accuracy of facts contained in applications for pen register and trap and trace surveillance pursuant to 50 U.S.C. § 1841, *et seq.*, or applications for business records pursuant to 50 U.S.C. § 1861, *et seq.*, must, prior to submission to the Court, be reviewed for accuracy by the case agent and must be verified as true and correct under penalty of perjury pursuant to 28 U.S.C. § 1746 by the Supervisory Special Agent or other designated federal official submitting the application. Historically, the Woods Procedures described herein have not been formally applied by the FBI to applications for pen register and trap and trace surveillance or business records. As discussed in the FBI Declaration, FBI will begin to formally apply accuracy procedures to such applications and proposes to update the Court on this action by March 27, 2020.

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**II. (U) PROCEDURES TO ENSURE ACCURACY AND COMPLETENESS**

**A. (U) Background Regarding FBI's Accuracy Procedures**

(U) The Foreign Intelligence Surveillance Act mandates that, "[e]ach application for an order [seeking Court-authorized electronic surveillance or physical search] under this title shall be made by a Federal officer in writing upon oath or affirmation ...." 50 U.S.C. §§ 1804(a), 1823(a). In matters submitted by the FBI in counterterrorism, counterintelligence, and other national security investigations, applications for Court-authorized electronic surveillance or physical search are submitted by FBI Supervisory Special Agents who verify the truth and correctness of the application's factual statements under penalty of perjury pursuant to 28 U.S.C. § 1746.<sup>3</sup>

(U) Historically, the FBI has adopted and implemented a variety of procedures to ensure that factual information contained in initial and renewal applications is accurate and complete. In April 2001, the FBI implemented procedures, known as the Woods Procedures, that must be followed by FBI personnel to ensure the accuracy of specific facts supporting probable cause, the existence and nature of any related criminal investigations involving the target of the FISA, and the nature of any prior or ongoing reporting relationship between the target and the FBI. *Foreign Intelligence Surveillance Act Procedures to Ensure Accuracy, Electronic Communication from*

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<sup>3</sup> (U) Agents from other federal law enforcement agencies or state or local law enforcement officers serving on a Joint Terrorism Task Force with the FBI may, in some cases, act as the declarants for applications submitted by the FBI after receiving the necessary training. In the case of state or local law enforcement officers, such officers are deputized as Special Deputy United States Marshals for this purpose. The accuracy procedures which must be followed prior to the verification of an application's accuracy and described herein are unchanged in cases where agents from other federal law enforcement agencies or Special Deputy United States Marshals serve as a declarant. This submission therefore uses the term declarant to refer to the Supervisory Special Agent or other federal law enforcement officer, including Special Deputy U.S. Marshals, responsible for signing a verified application submitted to the Court on behalf of the FBI.

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*Office of the General Counsel to all Field Offices* (Apr. 5, 2001). In pertinent part, the procedures require that the application be reviewed for accuracy by the case agent, the FBI headquarters supervisor for the case, and any other personnel who may need to review the application for factual accuracy.

(U) On February 2, 2006, the FBI issued additional guidance to its personnel, reminding agents and analysts involved in submitting FISA applications that “accuracy can only be insured by carefully cross-checking assertions which appear in the FISA declaration with source documentation.” *Foreign Intelligence Surveillance Act Change in Procedures to Ensure Accuracy in Documents Submitted to the Foreign Intelligence Surveillance Court, Electronic Communication from Executive Assistant Director, National Security Branch, to all Field Offices*, at 2 (Feb. 2, 2006). This guidance required that case agents create, maintain, and update a sub-file that contains all materials that document the support for each factual assertion contained in FISA applications. *Id.* at 2-3.

(U) On March 24, 2006, the Office of Intelligence Policy and Review (“OIPR”), predecessor to OI, filed a letter advising the Court of the efforts undertaken by the FBI and other members of the Intelligence Community “to ensure that we include in our applications all of the information that is material to the case, and that all of the information reported in our applications is accurate.” *Letter from James A. Baker, Counsel for Intelligence Policy, to the Presiding Judge of the Foreign Intelligence Surveillance Court*, dated March 24, 2006 (March 2006 letter). The March 2006 letter explained the requirement that FBI maintain a separate sub-file to the main case file that must contain “appropriate source documentation for each factual assertion in a FISA declaration ... [and that] such a system will focus the attention of the case agent on ensuring that there is adequate documentation for every factual assertion contained

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within a FISA declaration.” *Id.* In addition, the March 2006 letter explained that, effective April 15, 2006, “prior to the filing of any application that relies in whole or in part on human source information, the OIPR attorney responsible for the case will specifically verify that the FBI Special Agent or Supervisory Special Agent responsible for the case has confirmed with the federal official currently handling the source (or the federal official who is responsible for liaison to another entity who is handling the source) that the source remains reliable, and that all material information regarding the reliability of the source is reported accurately in the FISA application. The description of the reliability of the source that will be included in the FISA application must be transmitted (orally or in writing) to the above-referenced federal official to ensure that it is accurate[.]” *Id.* at 3.

(U) In February 2009, NSD and FBI issued guidance (“the 2009 Memorandum”) to FBI and OI personnel that mandated specific practices and documentary requirements to ensure accuracy of facts in FISA applications, certain procedures that should be followed during the drafting of FISA applications to ensure accuracy, and the parameters of subsequent reviews for accuracy by OI personnel. *Guidance to Ensure the Accuracy of Federal Bureau of Investigation Applications under the Foreign Intelligence Surveillance Act, Memorandum from Matthew G. Olsen & Valerie Caproni to all Office of Intelligence Attorneys, All National Security Law Branch Attorneys, and All Chief Division Counsels* (Feb. 11, 2009). Among other provisions, the 2009 Memorandum requires that if there is a lack of documentation, any undocumented material facts should be removed from the application, and if mistakenly included in the prior application, notice of the lack of documentation should be brought to the Court’s attention in any renewal application. The 2009 Memorandum also memorialized processes for conducting accuracy reviews of a subset of FISAs on an annual basis by OI and by the FBI Chief Division

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Counsels (CDCs) on a quarterly basis.<sup>4</sup> Currently, the Woods Procedures and 2009 Memorandum are implemented internally by the FBI through more specific policy guidance, which was updated and re-issued most recently in August 2016.

**B. (U) OI Oversight and Reporting Practices When Errors or Omissions are Identified During the Application Drafting Process**

**i. (U) Accuracy Reviews**

(U) OI's Oversight Section conducts oversight reviews at approximately 25-30 FBI field offices annually. During those reviews, OI assesses compliance with Court-approved minimization and querying procedures, as well as the Court orders. Pursuant to the 2009 Memorandum, OI also conducts accuracy reviews of a subset of cases as part of these oversight reviews to ensure compliance with the Woods Procedures and to ensure the accuracy of the facts in the applicable FISA application.<sup>5</sup> OI may conduct more than one accuracy review at a particular field office, depending on the number of FISA applications submitted by the office and factors such as whether there are identified cases where errors have previously been reported or where there is potential for use of FISA information in a criminal prosecution. OI has also, as a matter of general practice, conducted accuracy reviews of FISA applications for which the FBI has requested affirmative use of FISA-obtained or -derived information in a proceeding against an aggrieved person. *See* 50 U.S.C. §§ 1806(c), 1825(d).

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<sup>4</sup> (U) FBI advises that since the 2009 Memorandum was signed, the FBI changed the requirements for the number of accuracy reviews to be completed; currently, with limited exceptions, they are conducted on a semi-annual basis.

<sup>5</sup> (U) OI's accuracy reviews cover four areas: (1) facts establishing probable cause to believe that the target is a foreign power or an agent of a foreign power; (2) the fact and manner of FBI's verification that the target uses or is about to use each targeted facility and that property subject to search is or is about to be owned, used, possessed by, or in transit to or from the target; (3) the basis for the asserted U.S. person status of the target(s) and the means of verification; and (4) the factual accuracy of the related criminal matters section, such as types of criminal investigative techniques used (e.g., subpoenas) and dates of pertinent actions in the criminal case. *See* 2009 Memorandum at 3.

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(U) During these reviews, OI attorneys verify that every factual statement in the categories of review described in footnote 5 is supported by a copy of the most authoritative document that exists or, in enumerated exceptions, by an appropriate alternate document. With regard specifically to human source reporting included in an application, the 2009 Memorandum requires that the accuracy sub-file include the reporting that is referenced in the application and further requires that the FBI must provide the reviewing attorney with redacted documentation from the confidential human source sub-file substantiating all factual assertions regarding the source's reliability and background.<sup>6</sup>

(U) Consistent with Rule 13(a) of this Court's Rules of Procedure, the 2009 Memorandum requires that any material misstatement or omission of fact that is discovered during an OI accuracy review be reported to the Court immediately. Further, the 2009 Memorandum requires that the Government clarify or correct any non-material misstatement or omission that is identified through an OI accuracy review in any subsequent application to the Court for renewed authority for that target.<sup>7</sup> Similarly, if an OI accuracy review reveals that a case agent lacks documentation to support a particular factual assertion, and cannot obtain that documentation, the Government is required to notify the Court.

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<sup>6</sup> (U) If production of redacted documents from the confidential human source sub-file would be unduly burdensome, compromise the identity of the source, or otherwise violate the Attorney General Guidelines for Confidential Human Sources or the FBI's Confidential Human Source Manual, FBI personnel may request that the attorney use a human source sub-file request form. Upon receipt of that form, the relevant FBI confidential human source coordinator will verify the accuracy of the source's reliability and background that was used in the application, and transmit the results of that review to the reviewing OI attorney.

<sup>7</sup> (U) If the Government does not seek to renew authority for that target, the 2009 Memorandum requires that the Government should still notify the Court of any identified non-material misstatements or omissions, unless NSD management determines that they do not need to be reported.



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(U) Admittedly, these accuracy reviews do not check for the completeness of the facts included in the application. That is, if additional, relevant information is not contained in the accuracy sub-file and has not been conveyed to the OI attorney, these accuracy reviews would not uncover the problem. Many of the most serious issues identified by the OIG Report were of this nature. Accordingly, OI is considering how to expand at least a subset of its existing accuracy reviews at FBI field offices to check for the completeness of the factual information contained in the application being reviewed. NSD will provide a further update to the Court on any such expansion of the existing accuracy reviews.

**ii. (U) Accuracy and Completeness During the Drafting Process**

(U) During the drafting process, attorneys and supervisory attorneys in OI work closely with the case agent or agents submitting a FISA request to elicit, articulate, and provide full factual context for those facts which are relevant to a material element in the application.<sup>8</sup> These include facts or negative inferences that may lead the Court to conclude that an element of probable cause does not exist. This iterative process relies on the candidness of the agent, as well as the proactiveness of the OI attorney. The OIG investigation uncovered several significant instances in which the agents involved with the Page FISAs did not share material information with OI. Several of the corrective measures discussed in the FBI Director's declaration are designed to address this problem.

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<sup>8</sup> (U) Close coordination between FBI personnel and the NSD attorney who drafted a particular FISA application is not limited solely to the drafting process. For example, section V.C of the FBI PG requires that, following the Court's authorization of electronic surveillance or physical search, the OI attorney shall conduct a briefing with appropriate FBI personnel who are responsible for that surveillance or search. These briefings instruct FBI personnel on the generally applicable rules for the authorities in that case, as well as any particularized rules for that case. These briefings remind case personnel to notify and work closely with OI throughout the pendency of the FISA authorities regarding, among other things, significant changes in circumstances about the target or the targeted facilities.



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(U) At all stages of drafting initial or renewal applications, NSD attorneys are expected to look for errors and omissions in prior submissions to the Court, and, if any are found, to correct the non-material errors or omissions in the subsequent renewal application and to bring any material misstatements or omissions immediately to the attention of the Court, as required by Rule 13 of the FISC Rules of Procedure. The OIG Report reiterated the practice of OI as set forth by supervisors interviewed in connection with that OIG investigation, which is to consider a fact or omission material if the information is capable of influencing the Court's probable cause determination and to err in favor of disclosing information that OI believes the Court would want to know. OIG Report at 230.

**III. (U) ADDITIONAL ACTIONS TO ENSURE FACTUAL ACCURACY AND COMPLETENESS OF INFORMATION IN APPLICATIONS SUBMITTED BY THE FBI**

**A. (U) Corrective Actions by the FBI**

(U) In response to the OIG Report, the FBI identified multiple corrective actions to supplement its processes both for initial applications and renewals filed with the Court in order to enhance accuracy and completeness. These actions were initially identified in Director Wray's December 6, 2019, response to the OIG Report, OIG Report Appendix 2, and are described in greater detail in the FBI Declaration. Pending the implementation of corrective actions 1, 3-7, and 9 that are discussed in the FBI Declaration, the FBI has identified specific interim measures that will be implemented as of January 13, 2020, to help to mitigate the weaknesses identified by the OIG Report. The FBI will communicate directly to the entire FBI workforce through a message from the FBI Director on January 13, 2020, describing these actions and emphasizing both the importance of adhering to the accuracy procedures and the commitment of the FBI to ensure factual accuracy and completeness in all submissions to the Court.

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(U) As discussed in the FBI Declaration, these corrective measures include revisions to the form used by FBI personnel to request initial or renewed Court authorization to conduct electronic surveillance or physical search ("the request form"), as well as revisions to the form used by case agents and supervisors to certify their compliance with the Woods Procedures during the verification of an application's accuracy ("the verification form"). The revisions to the request form are designed, for example, to elicit information that may undermine probable cause. The revisions to the verification form are intended to safeguard factual accuracy and completeness through additional certifications that must occur during the case agent's review of the application and accuracy sub-file prior to submitting a proposed application to the declarant and filing with the Court. The FBI Declaration also sets forth the FBI's timeline for training personnel regarding these modified or additional forms and the timeline for requiring that FBI personnel use the modified request and verification forms.

(U) In addition to the modification of these existing forms, FBI and OI are developing a checklist to be completed by FBI personnel during the drafting process to ensure that all relevant information regarding a source's reliability, including the bias or motivation of the source, as well as the accuracy or basis of a source's reporting, is provided to OI. The FBI Declaration also describes the accuracy training and case study that will be developed by FBI for its personnel and the timeframe for delivery of this training.

(U) Finally, as noted above, the FBI Declaration identifies interim requirements that will be implemented effective January 13, 2020, until completion of corrective actions 1, 3-7, and 9. These measures include a review for each initiation and renewal of the case file by case agents and field supervisors to ensure that all relevant information has been included in the applications submitted to the Court. This review will be supplemented by an attorney-assisted accuracy

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review by FBI of each FISA application that targets a U.S. person. These interim measures would also supplement existing requirements by obliging confidential human source handlers to confirm the accuracy of any representations regarding an FBI source's reporting that is included in an application.<sup>9</sup>

**B. (U) Training Delivered by the Office of Intelligence**

(U) As the Court is aware, NSD also conducts FISA-related training during reviews at FBI field offices in the form of one-on-one training with case agents and other personnel involved in accuracy reviews, as well as in office-wide training sessions during the reviews. In response to the OIG Report, NSD has updated its existing training on accuracy and completeness delivered by OI attorneys during these oversight reviews at FBI field offices to reemphasize and ensure that all relevant information is brought to the attention of OI during the FISA application drafting process. This updated training has been informed both by the OIG Report and OI's experience and includes, for example, training on the need to bring inconsistent details, the full context of relevant conversations or correspondence, and relevant information from other law enforcement or government agencies to the attention of OI in order to evaluate such information and bring all relevant information to the attention of the Court.<sup>10</sup>

(U) OI is also developing training to be delivered during January 2020 to all OI attorneys responsible for preparing FISA applications to be submitted to the Court. This training will address the findings of the OIG Report by emphasizing specific steps that can be taken to present

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<sup>9</sup> (U) Currently, the accuracy sub-file must include documentary confirmation from a confidential human source handler or coordinator for the appropriate field office stating that the facts presented in the FISA application regarding the source's reliability and background are accurate. 2009 Memorandum at 4-5.

<sup>10</sup> (U) NSD delivered this revised training for the first time at FBI field offices on January 9, 2020, at the conclusion of an OI field office review of FBI's Phoenix Division.



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all relevant material facts for the Court's consideration, and will reemphasize the need to elicit all information that may be inconsistent with the FBI's theory of a case to allow OI to evaluate that information. This training will also inform OI attorneys of the additional information that will be collected by the FBI through the newly-updated FISA request and verification forms and the human source checklist, and which must be evaluated by OI before an application will be submitted to the Court.

**C. (U) Revisions to the 2009 Memorandum**

(U) In light of the OIG findings, NSD and FBI have determined that the 2009 Memorandum needs to be revised to more clearly explain the processes required to ensure accurate and complete FISA applications. To this end, NSD and the FBI are in the process of revising this memorandum. The updated memorandum will be issued to all personnel both at NSD and FBI who are involved in the FISA process. NSD will update the Court when the revised memorandum has been issued.

**D. (U) OI's Accuracy Reviews at FBI field offices**

(U) As noted above, OI will continue to conduct accuracy reviews at FBI field offices. In addition, NSD is considering whether to supplement its existing accuracy reviews with additional oversight measures designed to determine the completeness of applications subject to review and will provide a further update to the Court if such measures are implemented.

**IV. (U) CONCLUSION**

(U) The protocols and procedures used by the FBI to ensure that all applications submitted to the Court fully and accurately present all information relevant to the Court's decision have evolved in response to accuracy and completeness issues identified by FBI, NSD, and the Court. These policies are implemented with the assistance of, and

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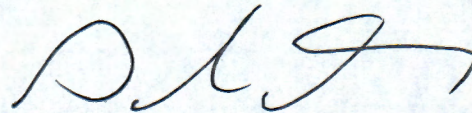
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oversight by, OI and are supplemented by OI's ongoing efforts to bring all material misstatements or omissions to the Court's prompt attention. The OIG Report has nonetheless identified lapses in the implementation and, in some cases, sufficiency of existing procedures, which the Government is taking steps to rectify. To address these findings, the FBI has taken, and will be taking, specific steps identified in the FBI Declaration that will reinforce compliance with existing requirements and implement new procedures that must be satisfied before FBI applications may be presented to the Court. NSD believes that these additional measures will help to mitigate the errors identified by the OIG Report. In addition, as discussed above, the Department is actively considering whether additional measures need to be taken to facilitate the accuracy and completeness of FISA applications submitted to the Court.

(U) The above includes the Government's response to the Court's December 17, 2019 Order. Attached to this submission is a Declaration from the Director of the FBI. The FBI has also reviewed this response and confirmed its accuracy.

Respectfully submitted,

Dated: 1/10/20



Gabriel Sanz-Rexach  
Acting Deputy Assistant Attorney General  
National Security Division  
U.S. Department of Justice

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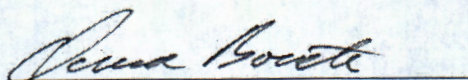


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**(U) VERIFICATION**

(U) I declare under penalty of perjury that the foregoing response to the Court's Order dated December 17, 2019, is true and correct with regard to the Federal Bureau of Investigation's policies and practices based upon my best information, knowledge, and belief.

(U) Executed pursuant to 28 U.S.C. § 1746 on January 10<sup>th</sup>, 2020.

A handwritten signature in dark ink, appearing to read "Dane J. Boente", is written over a horizontal line.

Dane J. Boente  
General Counsel  
Federal Bureau of Investigation

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UNITED STATES  
FOREIGN INTELLIGENCE SURVEILLANCE COURT  
WASHINGTON, D.C.

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(U) IN RE ACCURACY CONCERNS REGARDING  
FBI MATTERS SUBMITTED TO THE FISC

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Docket No. Misc. 19-02

(U) DECLARATION OF CHRISTOPHER W. WRAY,  
DIRECTOR, FEDERAL BUREAU OF INVESTIGATION,  
IN SUPPORT OF RESPONSE TO THE COURT'S  
ORDER DATED DECEMBER 17, 2019

(U) I, Christopher A. Wray, hereby declare the following:

1. (U) Since August 2, 2017, I have been the Director of the Federal Bureau of Investigation (FBI), United States Department of Justice (DOJ), a component of an Executive Department of the United States Government (USG). I am responsible for, among other things, the national security operations of the FBI, including those conducted by the FBI's Counterterrorism Division (CTD), Counterintelligence Division (CD), and Cyber Division (CyD), all of which submit applications to the Foreign Intelligence Surveillance Court (the Court).

2. (U) The matters stated herein are based on my personal knowledge, my review and consideration of documents and information available to me in my official capacity, and information obtained from FBI personnel in the course of their official duties. My conclusions have been reached in accordance therewith.

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3. (U) I am submitting this declaration in support of the Government's Response to the Court's Order dated December 17, 2019, which directed the government to "inform the Court in a sworn written submission of what it has done, and plans to do, to ensure that the statement of facts in each FBI application accurately and completely reflects information possessed by the FBI that is material to any issue presented by the application." As required by the Court's Order, to the extent that this submission precedes implementation of some of the corrective actions I have directed, I am including a proposed timetable and an outline of the immediate actions we are taking in the interim to ensure the information in FBI applications is reliable.

**I. (U) CORRECTIVE ACTIONS  
TO IMPROVE FISA ACCURACY**

4. (U) In connection with the Office of Inspector General's Report, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation* ("OIG Report" or "Report"), I directed FBI personnel to undertake more than forty Corrective Actions, twelve of which relate to the FISA process. Through these Corrective Actions, the FBI will implement all of the OIG's recommendations pertaining to accuracy and completeness in FISA applications and indeed make additional changes beyond those recommended by the OIG. While these Corrective Actions I have directed – including those that address the FBI's policies surrounding the use of Confidential Human Sources (CHS) – represent significant and meaningful improvements to how the FBI conducts and manages national security investigations, I am outlining below the implementation plan for the twelve FISA-specific Corrective Actions. The FISA-specific Corrective Actions that I directed the Bureau to undertake are as follows:

- (U) (#1) Supplementing the FISA Request Form with new questions, including a checklist of relevant information, which will direct agents to

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provide additional information and to collect all details relevant to the consideration of a probable cause finding, emphasizing the need to err on the side of disclosure;

- (U) (#2) Requiring that all information known at the time of the request and bearing on the reliability of a CHS whose information is used to support the FISA application is captured in the FISA Request Form and verified by the CHS handler;
- (U) (#3) Adding reverification directives to the FISA Verification Form, known as the Woods Form, which will require agents and their supervisors to attest to their diligence in re-verifying facts from prior factual applications and to confirm that any changes or clarifying facts, to the extent needed, are in the FISA renewal application;
- (U) (#4) Improving the FISA Verification Form by adding a section devoted to CHSs, including a new certification related to the CHS-originated content in the FISA application by the CHS handler, and CHS-related information that requires confirmation by the CHS handler, which will be maintained in the CHS's file;
- (U) (#5) Adding an affirmation to the FISA Verification Form that, to the best of the agent's and supervisor's knowledge, OI has been apprised of all information that might reasonably call into question the accuracy of the information in the application or otherwise raise doubts about the requested probable cause findings or the theory of the case;
- (U) (#6) Adding a checklist to the FISA Verification Form that walks through the new and existing steps for the supervisor who is affirming the case agent's accuracy review prior to his or her signature, affirming the completeness of the accuracy review;
- (U) (#7) Formalizing the role of FBI attorneys in the legal review process for FISA applications, to include identification of the point at which SES-level FBI OGC personnel will be involved, which positions may serve as the supervisory legal reviewer, and establishing the documentation required for the legal review;
- (U) (#8) Creating and teaching a case study based on the OIG Report findings, analyzing all steps of that particular FISA application and its renewals to show FBI personnel the errors, omissions, failures to follow policy, and communication breakdowns, and to instruct where new or revised policies and procedures will apply, so that mistakes of the past are not repeated;
- (U) (#9) Requiring serialization of completed FISA Verification Forms in the FBI's case management system to increase accountability and transparency;
- (U) (#10) Developing and requiring new training focused on FISA process rigor and the steps FBI personnel must take, at all levels, to make sure that OI and the FISC are apprised of all information in the FBI's holdings at the time of an application that would be relevant to a determination of probable cause;

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- (U) (#11) Identifying and pursuing short- and long-term technological improvements, in partnership with DOJ, that will aid in consistency and accountability; and,
- (U) (#12) Directing the FBI's recently expanded Office of Integrity and Compliance to work with the FBI's Resource Planning Office to identify and propose audit, review, and compliance mechanisms to ensure the above changes to the FISA process are effective.

5. (U) The FBI is committed to implementing the Corrective Actions as expeditiously as possible, while also ensuring that they are accomplished thoughtfully and effectively. The FBI will implement the Corrective Actions, and further actions deemed appropriate, with enhanced communication and training to the workforce, so that we may all internalize the lessons learned and ensure that FBI personnel adhere to the highest standards. Critically, the FBI must also balance the implementation of these actions with its ongoing responsibility to protect the American people and uphold the Constitution of the United States, during a time of ever-present threats to our national security. The leadership of the FBI has devoted – and will continue to devote – a substantial amount of time, thought, and effort to striking this balance, while paying scrupulous attention to its duty of candor to the Court and maintaining the trust of the American people.

6. (U) The FBI has already made substantial progress toward the development and implementation of some of the FISA-related Corrective Actions identified above. For example, in mid-November 2019, weeks before the release of the OIG Report, a working group that includes field and FBI Headquarters attorneys, Special Agents, and attorneys from the Office of Intelligence (OI), National Security Division (hereinafter “working group”) began meeting weekly to revise the FISA Request Form, as outlined in Corrective Action #1. Pursuant to Corrective Action #1, this form has been significantly revised in an effort to elicit a fulsome

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picture of the FBI's case in any instance in which the Bureau seeks FISA authority, including any information that might undermine the requested probable cause findings. The revised FISA Request Form has been finalized as of the date of this filing. I will require agents to begin using the new FISA request form on February 14, 2020, following a brief period of training.

7. (U) The second FISA-related Corrective Action I have directed will require that all information known at the time of a FISA request and bearing on the reliability of a CHS whose information is used to support the FISA application is captured as part of the FISA Request Form and verified by the CHS handler. In coordination with the FBI's Directorate of Intelligence, the working group is developing a new CHS Questionnaire, which will be used as an addendum to the FISA Request Form, identifying the categories of source information (e.g., payment information, criminal history) that OI should be informed of when preparing FISA applications that rely on CHS reporting. Completion of this Corrective Action will require consultation with external partners, finalization of the CHS Questionnaire, and the training of FBI personnel. The FBI proposes to update the Court on the status of the implementation of this Corrective Action by February 28, 2020.

8. (U) Corrective Actions #3, #4, #5, and #6 require amplification of the FISA Verification Form to require agents and supervisors to attest to their diligence in re-verifying facts from prior factual applications and to confirm that any required changes or clarifying facts are in the FISA renewal application (Corrective Action #3); provide a new certification that the case agent has conferred with all relevant CHS handlers to confirm that all source descriptions and source-originated content is accurate and complete, and that all source reporting in the application is supported by documentation included in the FISA Accuracy sub-file (Corrective

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Action #4); include affirmations by the case agent and supervisor that to the best of their knowledge, OI has been apprised of all information that might reasonably call into question the accuracy of the information in the application or otherwise raise doubts about the requested probable cause findings or the theory of the case (Corrective Action #5); and add a checklist to the FISA Verification Form that walks through the new and existing steps for the supervisor who is affirming the case agent's accuracy review prior to his or her signature, affirming the completeness and accuracy review (Corrective Action #6). Additionally, Corrective Action #9 requires the serialization of completed FISA Verification Forms in the FBI's case management system to increase accountability and transparency. More specifically, serialization will create a permanent record of the additional affirmations agents and supervisors will be required to make through implementation of Corrective Actions #3, #4, #5, and #6. I have instructed FBI personnel to complete the aforementioned revisions to the Verification Form by January 17, 2020, and to begin using the form beginning February 14, 2020, following a brief period of training.

9. (U) The training referenced in paragraphs 6, 7, and 8 will be provided jointly by FBI and OI attorneys. It will be delivered through in-person instruction at the field offices that process the majority of FISA applications, and offered virtually for all other FBI personnel. In addition to providing instruction on the new forms, this training will include an overview of lessons learned from the FISA applications and associated FBI actions examined in the OIG Report, with an emphasis on the critical importance of ensuring accuracy, transparency, and completeness in all FISA applications. This training will be an interim measure, pending the completion of more comprehensive training discussed in paragraph 11 below, and it will be

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completed before February 14, 2020, to enable use of the new FISA Request Form and FISA Verification Form beginning February 14, 2020.

10. (U) Corrective Action #7 requires the formalization of the role of FBI attorneys in the legal review process for FISA applications, to include identification of the point at which SES-level FBI OGC personnel will be involved, which positions may serve as the supervisory legal reviewer, and establishing the documentation required for the legal reviewer. Through this Corrective Action, the FBI seeks to encourage legal engagement throughout the FISA process, while still ensuring that case agents and field supervisors maintain ownership of their contributions. I directed the Bureau to implement this Corrective Action in response to the more narrow OIG recommendations that the FBI revise its FISA Verification (or Woods) Form “to specify what steps must be taken and documented during the legal review performed by an FBI Office of General Counsel (OGC) line attorney and SES-level supervisor before submitting the FISA application package to the FBI Director for certification[.]” and “to clarify which positions may serve as the supervisory legal reviewer for OGC[.]” I have instructed FBI personnel to revise the FISA Verification Form to address the OIG documentation recommendations by January 17, 2020, and to begin using that form beginning February 14, 2020, following a brief period of training. FBI OGC is currently reviewing its internal processes to address the remaining elements of Corrective Action #7 and to determine what changes it can make to introduce additional rigor into the FISA legal review process. The FBI proposes to update the Court on its implementation of the remaining elements of Corrective Action #7 in a filing made with the Court by March 27, 2020.

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11. (U) Corrective Action #8 requires the creation and teaching of a case study based on the OIG Report findings, wherein FBI personnel will be instructed on the errors and omissions that were made in the Carter Page FISA applications and associated processes, and taught the updated procedures, policies, and protocols designed to avoid similar mistakes in the future. Relatedly, Corrective Action #10 requires the development of new training focused on FISA process rigor, and the steps all FBI personnel who work on FISAs must take to ensure that OI and the FISC are apprised of all information in FBI holdings that might be relevant to the requested probable cause findings in a given application. I have instructed FBI personnel to develop two specific trainings: (1) a virtual case study (hereinafter "case study training") delivered as mandatory training to all FBI operational personnel, regardless of the program they are assigned to, and (2) a focused virtual or in-person mandatory FISA process training (hereinafter, "FISA process training") tailored to FBI personnel who work on FISA applications, to explain the need to be rigorous during each part of the FISA process. I am determined that operational personnel understand, holistically, what occurred during the activities reflected in the OIG's Report, and that, in addition, personnel working on FISA applications understand the importance of rigor during each and every phase of the application process. Both trainings will include testing to confirm that personnel understand the expectations and the materials, and a certification that personnel have completed the training. I have instructed the relevant FBI divisions to complete the case study training not later than April 30, 2020, and I will require all operational personnel to complete that training by June 30, 2020. Similarly, I have instructed the relevant FBI divisions to complete the FISA process training instructional materials not later than April 30, 2020, and I will require all personnel working on FISA applications to complete

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the FISA process training not later than June 30, 2020. While converting the lessons of the Report into effective training will take time, the FBI's goal is to ensure that these trainings are impactful, and that they ingrain in our workforce the absolute necessity for accuracy, transparency, and completeness in all FISA applications and, more broadly, the need to learn from our past. As explained above, while these trainings are being developed, FBI and OI attorneys will be engaged simultaneously in other training efforts to reemphasize to FBI personnel the importance of accuracy and completeness in FISA applications.

12. (U) Corrective Action #11 requires the identification and pursuit of short- and long-term technological improvements, in partnership with DOJ, that aid in consistency and accountability. I have already directed executives in the FBI's Information Technology Branch leadership to work with our National Security Branch leadership and other relevant stakeholders to identify technological improvements that will advance these goals. To provide one example of a contemplated improvement, the FBI is considering the conversion of the revised FISA Request Form into a workflow document that would require completion of every question before it could be sent to OI. The FBI proposes to update the Court on its progress with respect to this Corrective Action in a filing made by March 27, 2020.

13. (U) The final FISA-related Corrective Action I directed (#12) requires the FBI's Office of Integrity and Compliance ("OIC") to work with our Resource Planning Office to identify and propose audit, review, and compliance mechanisms to ensure that all changes to the FISA process are effective in achieving the identified goals, and to evaluate whether other compliance mechanisms would be beneficial. I have already directed OIC to begin this work. This responsibility will be ongoing and last the duration of the enhancement of our FISA

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processes. The FBI proposes to update the Court on its progress with respect to this Corrective Action in a filing made by May 22, 2020.

**II. (U) INTERIM MEASURES TO ENSURE  
RELIABILITY OF FISA INFORMATION**

14. (U) I understand that the institutionalization of these Corrective Actions will take time, and that in the interim, the Court deserves additional assurances that the information presented in all FISA applications from the FBI is complete and accurate. As noted above, the FBI's goal is to implement the Corrective Actions as expeditiously as possible, without compromising effectiveness or sacrificing the operational agility and vigilance needed to continue protecting our country from national security threats. In contemplating interim measures to provide assurance to the Court between now and the completion of the FISA-related Corrective Actions, FBI leadership endeavors to strike the balance between its absolute commitment to improving its processes and maintaining the Court's trust, and meeting its continued obligation to conduct national security investigations and operations effectively. Both responsibilities require personnel with specialized knowledge, skills, and training. With this delicate balance in mind, I propose the interim measures outlined below.

15. (U) By way of background, and as was described in the Response to the Court's Order Dated December 5, 2019, filed with this Court on December 20, 2019 (hereinafter "December 20 Response"),

"the FBI, and other members of the Intelligence Community engage in various efforts to ensure that we include in our applications all of the information that is material to the case, and that all of the information reported in our applications is accurate." See March 24, 2006 Letter in Response to FISC letter dated December 12, 2005. On April 5, 2001, the FBI issued an Electronic Communication (EC) to FBI personnel known as the "Woods procedures." These procedures set forth

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various processes that must be followed by the FBI to ensure accuracy in FISA applications. The procedures require that the application be reviewed for accuracy by the case agent, the Headquarters supervisor for the case, and any other personnel those individuals determine need to review the application for factual accuracy. *See* April 5, 2001 Woods Procedures. On January 24, 2006, the FBI issued additional guidance to FBI personnel, reminding them that "strict compliance with the Woods procedures is mandatory for all FBI personnel involved in the FISA process" and that "[t]he facts and statements presented in the FBI's requests for electronic surveillance and searches must be accurate and complete...." *See* FBI EC dated January 24, 2006. On February 2, 2006, the FBI issued additional guidance to its personnel, requiring that case agents create, maintain, and update a sub-file that contains all materials that document the support for each factual assertion contained in a FISA application. *See* FBI EC dated February 2, 2006. On February 11, 2009, NSD and FBI issued guidance to FBI and OI personnel that memorialized practices developed to ensure accuracy of facts in FISA applications, as well as certain procedures that should be followed during the drafting of FISA applications to ensure accuracy. This 2009 guidance also memorialized processes for conducting accuracy reviews of a limited number of FISAs on an annual basis by OI, and by the FBI Chief Division Counsels on a quarterly basis.

December 20 Response at 5-6.

16. (U) The requirements referenced in the paragraph above still apply to all FBI personnel who prepare FISA applications, and I have already reemphasized the importance of strict compliance with them in a video I distributed to the entire FBI workforce via email on December 9, 2019. On January 13, 2020, I will send an FBI-wide email that will inform the workforce of our impending implementation of the interim measures and Corrective Actions described above. Beginning January 13, 2020, I will also require case agents and field supervisors to begin conducting two additional steps during their accuracy reviews, pending implementation of Corrective Actions #1, #3-7, and #9 by February 14, 2020. These two additional interim steps are as follows:

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- a. (U) First, case agents and their supervisors will be required to complete a review of the relevant case file for all applications submitted to the Court (including initiations and renewals) to ensure that there is no information omitted from their FISA applications that may bear on the requested probable cause findings. If agents are unsure of the materiality of particular information, that information should be discussed with the assigned OI attorney. After February 14, 2020, because personnel will be using the revised FISA Verification Form, this requirement will effectively become permanent in that agents and supervisors will be affirming that, to the best of their knowledge, OI has been apprised of all information that might reasonably call into question the accuracy of the information in the application or otherwise raise doubts about the requested probable cause findings (i.e., through implementation of Corrective Action #5).
- b. (U) Second, once a final draft of a FISA application has been prepared, the case agent will send any language relating to a CHS — including not only the reliability statement but also any representation of the CHS's reporting — to the CHS's handler, the CHS Coordinator, or either individual's direct supervisor, for review and verification of accuracy. The CHS's handler will then confirm the information's accuracy in a written response back to the case agent. This requirement will likewise become permanent when personnel begin using the revised FISA Verification Form beginning February 14, 2020 (i.e., through implementation of Corrective Action #4).

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(U) Until Corrective Actions #1, #3-7, and #9 are fully implemented, I will require case agents to attest that they have completed these steps by sending an email to the Headquarters-based Program Manager who is serving as the declarant for the application. This email will then be included in the package of materials circulated at Headquarters for review, approval, and certification.

17. (U) The FBI will also bolster its existing validation procedures by requiring an attorney-assisted accuracy review for every FISA application targeting a U.S. person submitted to the Court during the interim period (i.e., between January 13, 2020, and February 14, 2020). Currently, both the case agent and the field supervisor are required to validate that each factual statement included in the application is supported by documentation. During this interim phase, I will mandate an enhanced review of each application targeting a U.S. person, which will mirror the existing accuracy review process used by OI on its oversight visits.

18. (U) FBI leadership believes that the interim measures outlined above – an attorney-assisted accuracy review in all U.S. person target cases, file reviews in every case to identify material omissions in applications, and affirmations by CHS handlers of all source reliability descriptions and source-originated content in applications – will introduce immediate safeguards to promote accuracy and completeness in all FISAs applications. Additionally, FBI leadership believes that the repeated messaging to its workforce of the absolute need for accuracy and completeness in all FISA applications (i.e., through the video message I distributed to all FBI personnel on December 9, 2019, the all-employee email I will send on January 13, 2020, and the training on new forms that will be provided virtually and at field offices), and the implementation of Corrective Actions #1, #3-7, and #9 by February 14, 2020, will result in a

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substantially renewed institutional focus on ensuring accuracy, transparency, and completeness in all FISA applications. As noted above, implementation of Corrective Actions #1, #3-7, and #9 will include use of the new FISA Request Form, which has been significantly revised to elicit a fulsome picture of the FBI's cases, including information that might undermine the requested probable cause findings in FISA applications, and use of the revised FISA Accuracy Form, which will require agents and supervisors to confirm their diligence in re-verifying facts from past applications, affirm that CHS handlers have confirmed CHS-related information in applications, and affirm that OI has, to the best of the agent's and supervisor's knowledge, been apprised of all information that is material to a given application. Finally, FBI leadership believes that the implementation of the remaining five FISA-related Corrective Actions, including the above-referenced training and the continued monitoring of the efficacy of these Corrective Actions, will bring about the institutional reform in its FISA process that the FBI seeks to effect.

19. (U) In addition to the measures I have outlined above, I have decided the FBI will enhance its protocols to ensure the accuracy of applications brought under Titles IV (relating to pen register and trap and trace surveillance) and V (relating to the acquisition of business records) of FISA. As the Court is aware, the authorities obtained pursuant to Titles IV and V of FISA are far less intrusive than electronic surveillance and physical search authorities, which have been subject to accuracy procedures since 2001. Pen register and business records applications, moreover, were not at issue in the OIG investigation. Nevertheless, I have decided, out of an abundance of caution, that the FBI will enhance accuracy protocols for these additional less intrusive authorities. This effort will require changes in workflow processes, and the

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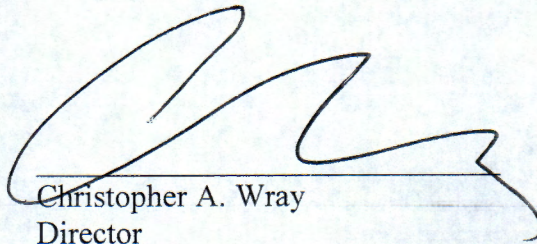
development of accuracy procedures and FISA accuracy forms that are specific to pen register and trap and trace and business records applications. The FBI proposes to update the Court on its progress with respect to this effort in a filing made by March 27, 2020.

**III. (U) CONCLUSION**

20. (U) The FBI has the utmost respect for this Court, and deeply regrets the errors and omissions identified by the OIG. The OIG Report and the affiliated Rule 13(a) letters describe conduct that is unacceptable and unrepresentative of the FBI as an institution. FISA is an indispensable tool in national security investigations, and in recognition of our duty of candor to the Court and our responsibilities to the American people, the FBI is committed to working with the Court and DOJ to ensure the accuracy and completeness of the FISA process.

(U) Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

January 10<sup>th</sup>, 2020



Christopher A. Wray  
Director  
Federal Bureau of Investigation

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DEC 20 2019

UNITED STATES  
FOREIGN INTELLIGENCE SURVEILLANCE COURT  
WASHINGTON, D.C.

LeeAnn Flynn Hall, Clerk of Court

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IN RE ACCURACY CONCERNS REGARDING  
FBI MATTERS SUBMITTED TO THE FISC

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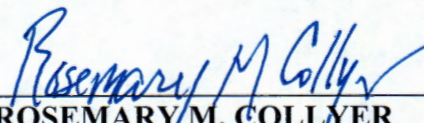
Docket No. Misc. 19-02

**ORDER OF PUBLICATION**

Pursuant to Rule 62(a) of the Rules of Procedure for the Foreign Intelligence Surveillance Court, it is HEREBY ORDERED that the Clerk of the Court shall cause a copy of the attached Order issued on December 5, 2019, as subsequently declassified by the Executive Branch, to be filed in the above-captioned docket and published by having it posted on the Court's website, together with this Order of Publication.

SO ORDERED.

Entered this 20<sup>th</sup> day of December, 2019.

  
ROSEMARY M. COLLYER  
Presiding Judge, United States Foreign  
Intelligence Surveillance Court



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**Unclassified**

Filed  
United States Foreign  
Intelligence Surveillance Court

DEC 05 2019

LeeAnn Flynn Hall, Clerk of Court

UNITED STATES  
FOREIGN INTELLIGENCE SURVEILLANCE COURT  
WASHINGTON, D.C.

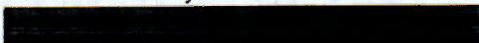
IN RE ALL MATTERS SUBMITTED TO THE  
FOREIGN INTELLIGENCE SURVEILLANCE COURT

Docket No.



**ORDER**

On October 25, 2019, and November 27, 2019, the United States filed letters concerning information relevant to applications targeting Carter w. Page approved by the Court. See *Preliminary Supplemental Rule 13(a) letter regarding applications submitted to the Court targeting Carter W. Page in Docket Numbers 2016-1182, 2017-0052, 2017-0375, and 2017-0679* (October 25, 2019) ("Preliminary Letter"); *Supplemental Rule 13(a) letter regarding applications submitted to the Court targeting Carter W. Page in Docket Numbers 2016-1182, 2017-0052, 2017-0375, and 2017-0679* (November 27, 2019) ("Supplemental Letter"). The United States filed those letters pursuant to Rule 13(a) of the Rules of Procedure for the Foreign Intelligence Surveillance Court. Rule 13(a) requires that the government immediately inform the Court if it discovers that a submission to the Court contained a misstatement or omission of material fact, including, among other things, the facts and circumstances relevant to the misstatement or omission. FISC R. Proc. 13(a).

The Preliminary Letter informed the Court that in the course of conducting an "Examination of the Department's and the FBI's Compliance with the Legal Requirements and Policies in Applications Filed with the U.S. Foreign Intelligence Surveillance Court Relating to a Certain U.S. Person," the Office of the Inspector General (OIG) discovered that Carter Page had a prior reporting relationship with a separate United States Government Agency (USGA), a limited number of personnel at the Federal Bureau of Investigation (FBI) were aware of the existence of the relationship but did not disclose it to the Court, and an attorney in the FBI's Office of the General Counsel (OGC) had altered an email from the other USGA regarding that relationship to state that Page was not a source. The Preliminary Letter also indicated that the attorney who altered the email had resigned from the FBI, the OIG had made a criminal referral of the matter to the Department of Justice, 

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The Supplemental Letter identified the [REDACTED] as the USGA and provided additional information on the matter, some of which responded to specific requests made by the Court concerning the conduct of the FBI OGC attorney and the nature of Page's prior reporting relationship. The United States noted, however, that not all of the detailed findings of the OIG regarding those issues were contained in the letter and the full OIG's report, which was still being finalized, would be provided to the Court. To date, the Court has not received any part of that report in any form. The United States also noted that a separate Rule 13 letter describing other information of which it had become aware as a result of the OIG investigation was being prepared.

In light of the United States' obligation to inform the Court of the facts and circumstances relevant to any misstatement or omission of material fact contained in a submission to the Court immediately upon discovery, it is hereby ORDERED that any subsequent notice to the Court concerning additional facts and circumstances reportable under Rule 13(a) that were discovered as a result of the OIG investigation (whether in the form of the full OIG report or a separate Rule 13(a) letter to the Court) be accompanied by an explanation of any delay between the conclusion of the OIG's investigation and the Court's receipt of the required reporting.

It is further ORDERED that by written submission on or before December 20, 2019, the United States shall:

- (1) Identify all other matters currently or previously before this Court that involved the participation of the FBI OGC attorney whose conduct was described in the Preliminary Letter and Supplement Letter;
- (2) Describe any steps taken or to be taken by the Department of Justice or FBI to verify that the United States' submissions in those matters completely and fully described the material facts and circumstances; and
- (3) Advise whether the conduct of the FBI OGC attorney has been referred to the appropriate bar association(s) for investigation or possible disciplinary action.

Entered this 5<sup>th</sup> day of December, 2019.

*Rosemary M. Collyer*  
ROSEMARY M. COLLYER  
Judge, United States Foreign  
Intelligence Surveillance Court

I, [REDACTED] Deputy Clerk,  
FISC, certify that this document  
is a true and correct copy of the  
original. [REDACTED]

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DEC 17 2019

UNITED STATES  
FOREIGN INTELLIGENCE SURVEILLANCE COURT LeeAnn Flynn Hall, Clerk of Court  
WASHINGTON, D.C.

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IN RE ACCURACY CONCERNS REGARDING  
FBI MATTERS SUBMITTED TO THE FISC

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Docket No. Misc. 19-02

**ORDER**

This order responds to reports that personnel of the Federal Bureau of Investigation (FBI) provided false information to the National Security Division (NSD) of the Department of Justice, and withheld material information from NSD which was detrimental to the FBI's case, in connection with four applications to the Foreign Intelligence Surveillance Court (FISC) for authority to conduct electronic surveillance of a U.S. citizen named Carter W. Page.<sup>1</sup> When FBI personnel mislead NSD in the ways described above, they equally mislead the FISC.

In order to appreciate the seriousness of that misconduct and its implications, it is useful to understand certain procedural and substantive requirements that apply to the government's conduct of electronic surveillance for foreign intelligence purposes. Title I of the Foreign Intelligence Surveillance Act (FISA), codified as amended at 50 U.S.C. §§ 1801-1813, governs such electronic surveillance. It requires the government to apply for and receive an order from the FISC approving a proposed electronic surveillance. When deciding whether to grant such an application, a FISC judge must determine, among other things, whether it provides probable cause to believe that the proposed surveillance target is a "foreign power" or an "agent of a foreign power." See § 1805(a)(2)(A). Those terms are defined by FISA. See § 1801(a)-(b). A finding of probable cause to believe that a U.S. citizen (or other "United States person" as defined at Section 1803(i)) is an agent of a foreign power cannot be solely based on activities protected by the First Amendment. See § 1805(a)(2)(A).

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<sup>1</sup> The government reported to the FISC certain misstatements and omissions in July 2018, see Department of Justice Office of Inspector General, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation* (Dec. 9, 2019), at 167-68, 230-31 (OIG Report); however, the FISC first learned of the misstatements and omissions discussed herein on December 9, 2019, or, in the case of the conduct of the FBI attorney discussed below, from submissions made by the government on October 25, 2019, and November 27, 2019.



An electronic surveillance application must “be made by a Federal officer in writing upon oath or affirmation.” § 1804(a).<sup>2</sup> When it is the FBI that seeks to conduct the surveillance, the Federal officer who makes the application is an FBI agent, who swears to the facts in the application. The FISC judge makes the required probable cause determination “*on the basis of the facts submitted by the applicant.*” § 1805(a)(2) (emphasis added); *see also* § 1804(c) (a FISC judge “may require *the applicant* to furnish such other information as may be necessary to make the determinations required by” Section 1805) (emphasis added). Those statutory provisions reflect the reality that, in the first instance, it is the applicant agency that possesses information relevant to the probable cause determination, as well as the means to potentially acquire additional information.

Notwithstanding that the FISC assesses probable cause based on information provided by the applicant, “Congress intended the pre-surveillance judicial warrant procedure” under FISA, “and particularly the judge’s probable cause findings, to provide an external check on executive branch decisions to conduct surveillance” in order “to protect the fourth amendment rights of U.S. persons.”<sup>3</sup> The FISC’s assessment of probable cause can serve those purposes effectively only if the applicant agency fully and accurately provides information in its possession that is material to whether probable cause exists. Accordingly, “the government . . . has a heightened duty of candor to the [FISC] in *ex parte* proceedings,”<sup>4</sup> that is, ones in which the government does not face an adverse party, such as proceedings on electronic surveillance applications. The FISC “expects the government to comply with its heightened duty of candor in *ex parte* proceedings at all times. Candor is fundamental to this Court’s effective operation . . . .”<sup>5</sup>

With that background, the Court turns to how the government handled the four applications it submitted to conduct electronic surveillance of Mr. Page. The FISC entertained those applications in October 2016 and January, April, and June 2017. *See* OIG Report at vi.

On December 9, 2019, the government filed with the FISC public and classified versions of the OIG Report.<sup>6</sup> The OIG Report describes in detail the preparation of the four applications for electronic surveillance of Mr. Page. It documents troubling instances in which FBI personnel provided information to NSD which was unsupported or contradicted by information in their

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<sup>2</sup> The application must also be approved by the Attorney General, Deputy Attorney General or, upon designation, the Assistant Attorney General for National Security (who is the head of NSD) “based upon his finding that it satisfies the criteria and requirements” of Title I of FISA. §§ 1801(g), 1804(a).

<sup>3</sup> Docket No. [Redacted], Order and Mem. Op. issued on Apr. 3, 2007, at 14 (footnotes and internal quotation marks omitted), *available at* [https://repository.library.georgetown.edu/bitstream/handle/10822/1052774/gid\\_c\\_00012.pdf?sequence=1&isAllowed=y](https://repository.library.georgetown.edu/bitstream/handle/10822/1052774/gid_c_00012.pdf?sequence=1&isAllowed=y).

<sup>4</sup> Docket No. BR 14-01, Op. and Order issued on Mar. 21, 2014, at 8, *available at* [https://repository.library.georgetown.edu/bitstream/handle/10822/1052715/gid\\_c\\_00098.pdf?sequence=1&isAllowed=y](https://repository.library.georgetown.edu/bitstream/handle/10822/1052715/gid_c_00098.pdf?sequence=1&isAllowed=y).

<sup>5</sup> Docket No. [Redacted], Mem. Op. and Order issued on Nov. 6, 2015, at 59, *available at* [https://repository.library.georgetown.edu/bitstream/handle/10822/1052707/gid\\_c\\_00121.pdf?sequence=1&isAllowed=y](https://repository.library.georgetown.edu/bitstream/handle/10822/1052707/gid_c_00121.pdf?sequence=1&isAllowed=y).

<sup>6</sup> This Order cites the public version of the OIG Report.



possession.<sup>7</sup> It also describes several instances in which FBI personnel withheld from NSD information in their possession which was detrimental to their case for believing that Mr. Page was acting as an agent of a foreign power.<sup>8</sup>

In addition, while the fourth electronic surveillance application for Mr. Page was being prepared, an attorney in the FBI's Office of General Counsel (OGC) engaged in conduct that apparently was intended to mislead the FBI agent who ultimately swore to the facts in that application about whether Mr. Page had been a source of another government agency. *See id.* at 252-56. The information about the OGC attorney's conduct in the OIG report is consistent with classified submissions made to the FISC by the government on October 25, 2019, and November 27, 2019. Because the conduct of the OGC attorney gave rise to serious concerns about the accuracy and completeness of the information provided to the FISC in any matter in which the OGC attorney was involved, the Court ordered the government on December 5, 2019, to, among other things, provide certain information addressing those concerns.

The FBI's handling of the Carter Page applications, as portrayed in the OIG report, was antithetical to the heightened duty of candor described above. The frequency with which representations made by FBI personnel turned out to be unsupported or contradicted by information in their possession, and with which they withheld information detrimental to their case, calls into question whether information contained in other FBI applications is reliable. The FISC expects the government to provide complete and accurate information in *every* filing with the Court. Without it, the FISC cannot properly ensure that the government conducts electronic surveillance for foreign intelligence purposes only when there is a sufficient factual basis.

THEREFORE, the Court ORDERS that the government shall, no later than January 10, 2020, inform the Court in a sworn written submission of what it has done, and plans to do, to ensure that the statement of facts in each FBI application accurately and completely reflects

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<sup>7</sup> *See* OIG Report at 157-59, 365-66 (in September 2016, an FBI agent provided an NSD attorney with information about the timing of Mr. Page's source relationship with another government agency and its relevance to the FISA proffer that was contradicted by a memorandum received from the other agency in August 2016); *id.* at 160-62, 364, 367 (FBI personnel exaggerated the extent to which Christopher Steele's reporting had been corroborated and falsely represented that it had been used in criminal proceedings).

<sup>8</sup> *See, e.g., id.* at 186-90, 368-70 (statements made by Mr. Steele's primary sub-source that undermined Mr. Steele's reporting); *id.* at 168-69, 364, 366-67 (statements made by Mr. Page to an FBI source in August 2016 that he had never met or spoken with Paul Manafort and that Mr. Manafort did not return his emails were first provided to NSD in June 2017; all four applications included reporting that Mr. Manafort used Mr. Page as an intermediary with Russia but did not include those statements by Mr. Page); *id.* at vii, 170-71, 364-65, 367 (statements made by Mr. Page to an FBI source in October 2016 that he had never met with Igor Sechin or Igor Divyeykin were first provided to NSD in January 2017; all four applications included reporting that he met with both men in Russia in July 2016 and discussed lifting sanctions against Russia with the former and receiving derogatory information about Hillary Clinton with the latter, but did not include the denials by Mr. Page). Moreover, all four applications omitted statements made by Mr. Steele in October 2016 that detracted from the reliability of another of his sub-sources whose reporting was included in the applications, even though the FBI provided a document to an NSD attorney that included those statements prior to the submission of the first application. *See id.* at 163-64, 364-65, 367.

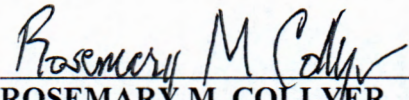


information possessed by the FBI that is material to any issue presented by the application. In the event that the FBI at the time of that submission is not yet able to perform any of the planned steps described in the submission, it shall also include (a) a proposed timetable for implementing such measures and (b) an explanation of why, in the government's view, the information in FBI applications submitted in the interim should be regarded as reliable.

IT IS FURTHER ORDERED, pursuant to FISC Rule of Procedure 62(a), that the government shall, no later than December 20, 2019, complete a declassification review of the above-referenced order of December 5, 2019, in anticipation of the FISC's publishing that order. In view of the information released to the public in the OIG Report, the Court expects that such review will entail minimal if any redactions.

SO ORDERED.

Entered this 17<sup>th</sup> day of December, 2019.

  
ROSEMARY M. COLLYER  
Presiding Judge, United States Foreign  
Intelligence Surveillance Court