

Like It or Not, Trump Has a Point:  
FISA Reform and the Appearance of Partisanship in Intelligence Investigations  
by  
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*The Chairman of the U.S. Privacy and Civil Liberties Oversight Board has, perhaps unwisely, invited me to provide written input on ways to reform the country's intelligence collection authorities. I have commented publicly on the topic many times since my tenure as general counsel of the National Security Agency in the early 1990s.<sup>2</sup> Because recent commentators have failed to address the most pressing need for intelligence reform, I am grateful for the opportunity to do so again. Recognizing that this testimony has exceeded the suggested page limits and most readers' patience, I have also submitted a shorter version, which is available online at [Lawfare](#).*

To protect the country from existential threats, American intelligence capabilities need to be extraordinary -- and extraordinarily intrusive. The more intrusive they are, the greater the risk they will be abused. So, since the attacks of 9/11, debate over civil liberties has focused almost exclusively on the threat that intelligence abuses pose to the individuals and disfavored minorities.

That made sense when our intelligence agencies were focused on terrorism carried out by small groups of individuals. But a look around the world shows that intelligence agencies can be abused in ways that are even more dangerous, not just to individuals but to democracy. Using security agencies to surveil and suppress political opponents is always a temptation for those in power. It is a temptation from which the United States has not escaped. The FBI's director for life, J. Edgar Hoover, famously maintained his power by building files on numerous Washington politicians and putting his wiretapping and investigative capabilities at the service of Presidents pursuing political vendettas.

That risk is making a comeback. The United States used the full force of its intelligence agencies to hold terrorism at bay for twenty years, but we paid too little attention to geopolitical adversaries who are now using chipping away at our strengths in ways we did not expect. As American intelligence reshapes itself to deal with new challenges from Russia and China, it is no longer hunting small groups of terrorists in distant deserts. It is hunting clandestine political operators inside the country and our networks. This calls for aggressive domestic surveillance of foreign agents. At the same time, the temptation to cast our partisan opponents as threats to national security is growing.

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<sup>2</sup> As always, these and other public comments are based exclusively on public reports and not on my exposure to classified material in the (often distant) past.

In this new world, we can't be content to protect individual rights from the excesses of counterterrorism measures. We also have to protect our democracy from a politicized use of intelligence authorities.

My testimony here will focus on the second task. I acknowledge that it may stray beyond your jurisdiction, which is shaped by the expectation that our biggest civil liberties challenge will be a threat to individuals arising from the war on terror.<sup>3</sup> I hope to persuade you to take a broader view of civil liberties, and to propose measures that will preserve our counterintelligence capabilities from even the appearance of political abuse.

At the risk of losing half my audience, I will argue that our national security apparatus was used against of the Trump campaign in a fashion that created at least an appearance of partisanship. I will not argue that Donald Trump was the victim of a deep state conspiracy, but I will argue that his treatment raises legitimate questions about the risk of partisan abuse of our intelligence agencies. I hope to persuade even Donald Trump's confirmed opponents that we should take those questions seriously – first because disclosures over the last year have brought to light disturbing behavior on the government side and second because even if the behavior wasn't intentionally partisan, it lent itself all too well to that interpretation, and that is enough reason to adopt measures to avoid the appearance of partisan abuse in the future.

Finally, for those whose objections to Donald Trump make it impossible to credit any claim that he might be the victim of improper intelligence scrutiny, I suggest that you instead imagine him as the abuser: Try asking a mirror image question: Would you see a risk to democracy and civil liberties if the Trump administration were doing today to the Biden campaign the things that were incontestably done to the Trump campaign four years ago?

To understand what I'm talking about, we need to start at the beginning of the 2016 presidential campaign.

### **The 2016 campaign for President**

As the contest shaped up, most observers agreed: It was Hillary Clinton's biggest liability was her use of a private email server while she was Secretary of State. The Republican line was that she had risked the nation's security; she was so determined to keep her messages away from Republican subpoenas, the GOP argued, that she recklessly exposed them to Russian and Chinese hackers.

How could the Clinton campaign negate this disadvantage? Well, one way would be to make sure she wasn't the only presidential candidate under FBI investigation. To speculate just a bit, why wouldn't a hard-bitten Democratic operative see the answer as getting the FBI to investigate Trump too? The Clinton campaign, like any other, had assembled oppo research files on Trump. Focusing some of that research on his disturbing affinity for Vladimir Putin was not exactly an original idea. GOP activist Paul Singer and the Washington Free Beacon had already paid a

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<sup>3</sup> 42 U.S. Code § 2000ee.

journalist/investigator, Glenn Simpson, to gather information on Trump's Russian connection.<sup>4</sup> But having the information was one thing. To really make a difference, it needed to be presented in a way that induced the FBI to open a counterintelligence case on Trump.

## **The Steele dossier**

We can't say for sure that getting the FBI to launch an investigation was the original intent of the operation. In part that's because the operation clearly was designed from the start to be deniably cordoned off from the Democratic National Committee (DNC) and the Clinton campaign. The DNC's general counsel, Mark Elias, used DNC funds to pay Simpson's investigative firm, Fusion GPS, \$60 thousand a month for continued oppo research. Some of the money then went in a separate contract to Christopher Steele, a free-lance former British intelligence officer with credibility at the FBI on Russian issues.<sup>5</sup> Elias told Simpson to report only to him so the work would be covered by attorney-client privilege.<sup>6</sup> Later, when news of Steele's reporting broke, the DNC and Clinton campaign would take full advantage of the distance this arrangement offered them, falsely denying any connection to Fusion GPS.<sup>7</sup>

In fact, the general counsel briefed the campaign's leadership about the effort, but only orally, and he sometimes put off their questions, saying, "You don't need to know."<sup>8</sup> Elias, in contrast, was kept up to date fairly frequently. From the first briefing, he encouraged Simpson and Steele to dig into Trump's Russian connections: "This angle was all new to Elias, and he loved it," said Simpson.<sup>9</sup>

Unfortunately, Steele didn't actually have a lot of contacts in Russia, so he recruited as his primary "subsource" a Russian who was based in Washington, D.C., and whose social circle Steele would eventually portray as a network of subsources. (The subsource would later reject that characterization, saying that he "did not view his/her contacts as a network of sources, but rather as friends with whom he/she has conversations about current events and government relations."<sup>10</sup>)

From these and other sources, Steele would assemble a collection of memos now known as the Steele dossier. Despite the elaborate detailing of the "network," the actual sources of the information in the dossier are often unknown, since even the subsource's subsources were reporting gossip and second- or third-hand information. The Senate Intelligence Committee even

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<sup>4</sup> Select Committee on Intelligence, United States Senate, Russian Active Measures Campaigns and Interference in the 2016 U.S. Election, v. 5: Counterintelligence Threats and Vulnerabilities,, at 856 (2020). Office of the Inspector Gen., U.S. Dep't of Justice, Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation, at 93 (June 2018) available at <https://www.justice.gov/storage/120919-examination.pdf> (cited hereinafter as "OIG Report").

<sup>5</sup> Id. at 861.

<sup>6</sup> Id. at 858.

<sup>7</sup> "DNC, Clinton campaign paid for research that resulted in Trump dossier: Report," CBS News (October 25, 2017) <https://www.cbsnews.com/news/dnc-clinton-campaign-paid-for-research-in-trump-dossier-report/>

<sup>8</sup> Id. at 859.

<sup>9</sup> Id. at 862.

<sup>10</sup> Select Committee on Intelligence, United States Senate, Russian Active Measures Campaigns and Interference in the 2016 U.S. Election, v. 5: Counterintelligence Threats and Vulnerabilities, at 870.

traced some of it to a Russian disinformation campaign.<sup>11</sup> But it was mostly plausible enough, and often hard to prove or disprove. To this day, FBI director Comey's characterization of it as "salacious and unverified" remains true.<sup>12</sup>

### **Lobbying the national security infrastructure**

Once he'd begun work for the DNC, Steele acted promptly to bring the FBI into the picture. Hired in May or June of 2016, Steele placed his first urgent call to the FBI on July 2 or 3, 2016.<sup>13</sup> He handed his contact at the FBI his notorious memo alleging that Trump had hired prostitutes to urinate on a hotel bed in Moscow and asked who in the FBI should receive copies.<sup>14</sup> In fact, getting the dossier to the FBI team investigating the Trump campaign took more than two months, until mid-September. Frustrated, Steele turned to other channels, including Bruce Ohr, whose wife Simpson had hired to perform research. Ohr worked for the Deputy Attorney General. In August Simpson arranged for Steele to meet with Ohr, who later described Steele as passionate, even "desperate," to prevent Trump's election.<sup>15</sup>

In late September, as election day drew nearer, Steele flew to Washington to meet with Elias, the general counsel of the DNC. On the same trip, he leaked his dossier to The New York Times, The Washington Post, CNN, the New Yorker, and Yahoo! News.<sup>16</sup> That effort produced only a fairly low-impact Yahoo! News story about Carter Page,<sup>17</sup> whose role in the Trump campaign was by then in doubt.<sup>18</sup> So Steele returned to Washington in mid-October, again briefing the Times, the Post, and Yahoo! News.<sup>19</sup>

Although they were now talking to the Trump campaign investigators, Steele and Simpson still had not injected their oppo research into the public arena. And as the campaign entered its final days, Comey had instead delivered a body blow to Clinton's candidacy by reopening the email investigation. Steele was angry that there was still no balancing story about the investigation of Trump; worse, law enforcement officials were telling The New York Times that they had found no direct link between Trump and the Russian government.<sup>20</sup>

Trying a "Hail Mary" pass, Steele and Simpson disclosed the investigation and Steele's role in it to a *Mother Jones* reporter<sup>21</sup> whose story appeared on October 31,<sup>22</sup> just over a week before the

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<sup>11</sup> Id. at 881.

<sup>12</sup> Politico, Full text: James Comey testimony transcript on Trump and Russia (June 8, 2017) at <https://www.politico.com/story/2017/06/08/full-text-james-comey-trump-russia-testimony-239295>

<sup>13</sup> Id. at 894.

<sup>14</sup> Id.

<sup>15</sup> OIG Report at 234.

<sup>16</sup> Id. at 104.

<sup>17</sup> Michael Isikoff, U.S. Intel Officials Prove Ties Between Trump Adviser and Kremlin, Yahoo News, September 23, 2016, <https://news.yahoo.com/u-s-intel-officials-probe-ties-between-trump-adviser-and-kremlin-175046002.html>.

<sup>18</sup> OIG Report at 106.

<sup>19</sup> OIG Report at 117

<sup>20</sup> Id. at 174

<sup>21</sup> Id. at 234.

<sup>22</sup> <https://www.motherjones.com/politics/2016/10/veteran-spy-gave-fbi-info-alleging-russian-operation-cultivate-donald-trump/>

election. At the same time, Senate Minority Leader Harry Reid pushed a similar line of attack, telling Director Comey, “it has become clear that you possess explosive information about close ties and coordination between Donald Trump, his top advisors, and the Russian government . . . . The public has a right to know this information.”<sup>23</sup>

It was another miss. Reid’s unsupported claim was treated with skepticism. The *Mother Jones* story got little traction. And the FBI formally terminated its relationship with Steele because of his leak. That mattered less than one might think, because of Steele’s channel to Bruce Ohr. Ohr took Steele’s reports to Andrew McCabe, the Deputy Director of the FBI, and thereafter acted as a conduit by which Steele could transmit further information to the FBI despite his formal termination as a source.

A week later, Clinton lost. The entire effort seemed to be a failure, destined to become another disreputable chapter in the long, disreputable history of political oppo research and October surprises.

In fact, the dossier was just beginning to have a remarkable impact. By luck or design, Steele, Simpson, and their client at the DNC had discovered a new way to influence the political course of the country. Steele had conducted what amounted to a lobbying campaign to get the FBI to open a national security investigation of the Trump campaign. Then, when the investigation was under way, he used its existence to bolster the credibility of the material he leaked.

It is deeply troubling that the FBI would be on the receiving end of such a campaign without any certain way to know whether Steele was being paid to get the bureau to investigate (and to leak that fact) before the election. Without knowing the financial sponsors and motives behind its volunteer “sources” the FBI cannot evaluate the material it receives. In response to the Steele flap, FBI director Wray has said that the bureau should more directly “admonish” its sources against leaking the fact that they are working with the FBI.<sup>24</sup> Still, one suspects that Christopher Steele could have been admonished until the cows came home and he still would have leaked about the investigation. The director’s corrective actions probably should also include “admonishing” FBI sources to disclose whether someone is paying them to influence the bureau (although realistically, a source who is being paid to lobby the FBI isn’t going to be overly influenced by FBI “admonishments”).

At the end of the day, it’s likely that only Congress can address this problem. We don’t want to discourage sources from providing information to the FBI on national security issues, even ones with partisan implications. After all, very few sources come to the FBI without some unsavory motives; we should want the FBI to hear the tales, but we also want the FBI to know as much about that motive as possible, especially in cases with partisan implications. Perhaps the most useful model is the Lobbying Disclosure Act. A disclosure requirement, if adopted, could also

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<sup>23</sup> <https://www.washingtonpost.com/news/the-fix/wp/2016/10/31/harry-reid-just-made-a-huge-incendiary-evidence-free-claim-about-trump-and-russia/>

<sup>24</sup> The Federal Bureau of Investigation's Response to the Report, OIG Report, Appendix 2 at 430 (The FBI should “revise its standard CHS admonishment form to include a prohibition on the disclosure of the CHS's relationship with the FBI to third parties absent the FBI's permission, and assess the need to include other admonishments in the standard CHS admonishments”).

bring to light other ties to the Department or the bureau, such as the financial connection between Simpson and Bruce Ohr's wife.

In the absence of such a law, we'll see this tactic repeated. Because it worked. Steele's lobbying and oppo research may not have produced an October surprise, but it did add great impetus to the national security investigation the FBI had already begun against members of the Trump campaign.

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## **Crossfire Hurricane**

The original FBI investigation had drawn mainly on things everyone knew, rather than Steele's input. Russia's intent to hurt Clinton, and to help Trump, could be inferred from the Russian government campaign to compromise prominent Democrats' email messages and release them to Wikileaks. And there were an uncomfortable number of connections between the Trump campaign and the Russian government. The campaign manager, Paul Manafort, had deep financial ties to pro-Russian forces in Ukraine. Trump himself was oddly solicitous of Putin's good opinion. His national security advisor, Michael Flynn, had appeared at Putin's side at a gala Moscow state dinner. Carter Page, who also had ties to the campaign, had a long and murky history of involvement with intelligence figures in the Putin government.

None of this could be ignored. It would have been national security malpractice for the FBI not to investigate it, although what finally tipped the scales was pretty thin by itself -- a friendly foreign government's report that a Trump adviser had "suggested" that the Russians had "made some kind of suggestion" about anonymously releasing information to help to the campaign.<sup>25</sup> Spurred by that additional scrap of evidence, the FBI launched its probe of the Trump-Russia connection, now known as Crossfire Hurricane.

## **The Carter Page FISA application**

Now Steele's partisan research project really came into its own. When the FBI first thought about a FISA wiretap on Carter Page, it wasn't convinced it had probable cause -- until it read the Steele dossier in September.<sup>26</sup> The first FISA application to wiretap Page<sup>27</sup> shows just how much influence Steele's dossier had. The heart of the application's case against Page is roughly seventeen pages long.<sup>28</sup> Fully a third of this section is based on Steele's reports, and the dossier provides the only support for the central allegation of the application -- that Russia hacked and leaked Clinton campaign emails *as part of an agreement with members of the Trump campaign*.<sup>29</sup>

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<sup>25</sup> OIG Report at ii

<sup>26</sup> OIG Report at iv-v.

<sup>27</sup> The application is now almost entirely declassified.

<https://www.judiciary.senate.gov/imo/media/doc/FISA%20Warrant%20Application%20for%20Carter%20Page.pdf>

<sup>28</sup> Id. 10-26.

<sup>29</sup> "In support of the fourth element in the FISA application-Carter Page's alleged coordination with the Russian government on 2016 U.S. presidential election activities-the application relied entirely on the ... information from Steele Reports 80, 94, 95, and 102." OIG Report at vii.

That was the linchpin of the application's case. The remaining two-thirds of the application are far softer. Indeed, another third repeats newspaper stories. The remaining third is information supplied by Page in FBI interviews or in a meeting with an FBI human source. At best, these sections provide mood music to accompany allegations in the dossier.

The critical question for the FBI was whether Page coordinated with Russia on the 2016 election. And the only concrete allegation that he did come from the Steele dossier.<sup>30</sup> This crucial claim in the Steele dossier – that there was a “well-developed conspiracy” between Russia and the Trump campaign – has now more or less collapsed. It was never corroborated by the FBI,<sup>31</sup> nor, ultimately, by the Mueller investigation that followed.<sup>32</sup> It seems to have come from a single dubious subsource whom even Steele saw as a “boaster” given to “some embellishment” and who offered the FBI an account of his communications with Steele that, the inspector general found, “contradicted the allegations of a ‘well-developed conspiracy.’”<sup>33</sup>

For anyone who lived through the last few years, that is a striking finding. It casts doubt on that the surveillance of Carter Page, and a large part of the case for Crossfire Hurricane, not to mention the years in which Trump's legitimacy as President was under constant challenge. All these were grounded on false statements in a dossier paid for by the party in power and designed to discredit the party trying to unseat it. If there were a prize for oppo research overachievement, the DNC and the Steele report would surely have retired it.

I do not suggest that an investigation should not have been opened. From its earliest days, legitimate counterintelligence concerns and the highest possible partisan stakes were intertwined in Crossfire Hurricane. Everyone who approved the investigation and the FISA surveillance knew that. They surely also knew that half the country, give or take a few percentage points, would suspect that the investigation was a sham – the Obama administration turning the FBI loose on the political opposition.

The problem was not that an investigation was conducted, but that it was conducted with so little regard for that likely outcome. In the Page FISA application, where we have the clearest record of the investigator's actions, almost no one went behind the paperwork to challenge the investigators' evidentiary case.<sup>34</sup> If they had been pressed to back with evidence the facts they alleged and to explain the facts they left out, the wiretap would have come apart quickly. As the OIG report makes clear, the application was far from meeting FBI policy that all factual statements in a FISA application must be “scrupulously accurate.”<sup>35</sup> Instead, it left out much information that was “inconsistent with, or undercut, the assertions contained in the FISA

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<sup>30</sup> Id. at vii.

<sup>31</sup> Id at 11.

<sup>32</sup> Special Counsel Robert S. Mueller, Report On The Investigation Into Russian Interference In The 2016 Presidential Election, U.S. Department of Justice, <https://www.justice.gov/storage/report.pdf> (hereinafter cited as “Mueller Report”).

<sup>33</sup> Id. at xii.

<sup>34</sup> To be fair, the inspector general notes that FBI general counsel James Baker took the unusual step of examining the evidence before the application was finished, and he asked questions about Steele's credibility and the reason he had a network. Id. at 133-34. Those questions apparently did not reveal the flimsiness of Steele's so-called “network.”

<sup>35</sup> Id. at vii.

applications.”<sup>36</sup> In some instances, it presented inaccurate information to the court.<sup>37</sup> (In the end, the Justice Department had to admit that at least two and perhaps all of the Page wiretaps lacked probable cause.<sup>38</sup>)

One person, Stu Evans, the Deputy Assistant Attorney General in charge of the FISA process, did question the wisdom of seeking a FISA order against Page, doubting that the take would outweigh the risk of a political storm. But FBI leadership pushed Evans and his concerns aside, saying that they “felt strongly” that “they had to get to the bottom of what they considered to be a potentially serious threat to national security, even if the FBI would later be criticized for taking such action.”<sup>39</sup>

In fact, FBI leadership didn’t get to the bottom even of the allegations in the Page wiretap. No one dug deep into the facts it alleged. Evans did work to get ground truth on the partisan source of Steele’s funding, but the FBI response was classic bureaucratic resistance – he got slow, grudging, and partial answers combined with pressure at all levels of the FBI to just move the damn document through the system already.<sup>40</sup>

Even the footnote that Evans at last extracted from the FBI does not forthrightly identify the dossier’s connection to the Clinton campaign. It states that Steele was hired “to conduct research regarding [Trump’s] ties to Russia” but that Steele was never told “the motivation behind the research”<sup>41</sup> and offers only “speculat[ion] that the identified U.S. person was likely looking for information that could be used to discredit [Trump’s] campaign.”<sup>42</sup> In fact, the OIG report makes clear, the FBI knew before filing the application that Steele was likely hired by someone associated with the Clinton campaign.<sup>43</sup>

After fighting through the resistance he encountered on the footnote, Evans was more or less done. He did not flyspeck the rest of the application, and he ultimately bowed to the FBI’s insistence that the application move forward.

### **Trying to avoid political impact**

It’s not as though Justice and the FBI didn’t see the problem. They took steps to reduce the political risk created by the investigation. Unfortunately, their efforts largely backfired.

First, to prevent leaks, Crossfire Hurricane was run out of FBI headquarters rather than a field office. The unusual step did minimize leaks, and that is no small accomplishment in a case of

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<sup>36</sup> Id. at v.

<sup>37</sup> Id.

<sup>38</sup> <https://www.fisc.uscourts.gov/sites/default/files/FISC%20Declassified%20Order%2016-1182%2017-52%2017-375%2017-679%20%20200123.pdf>

<sup>39</sup> Id. at 360.

<sup>40</sup> Evans asked the FBI three times whether Steele was affiliated with a campaign or had made campaign contributions. Twice, the FBI answered only that Steele had made no contributions. Only when Evans asked a third time did he learn that the Clinton campaign had probably paid Steele for the report. Horowitz Report at 136.

<sup>41</sup> FISA application

<sup>42</sup> FISA application

<sup>43</sup> OIG Report

this kind, but a lack of resources for such an investigation at headquarters meant that much of the work was farmed out to a succession of TDY teams that did not coordinate well over time. This may have contributed to the errors in the FISA application, although the top management of the effort was in place throughout.<sup>44</sup> (Director Wray has taken corrective steps designed to make this mistake less likely in the future.)

Second, the FBI took care not to launch an investigation of Donald Trump. Instead, it focused its investigation on four members of the Trump organization (Papadopoulos, Page, Manafort, and Flynn). In theory, this reduced the partisan significance of Crossfire Hurricane. In practice, there was little difference in impact. For example, it allowed Director Comey to assure President Trump in private that he was not under investigation while refusing to say the same thing publicly.<sup>45</sup> And when the FBI used a defensive briefing to advance its investigation of Michael Flynn, it did so by sending an investigative agent to a briefing that included candidate Trump.<sup>46</sup> Instead of demonstrating caution in the face of partisan temptation, the ambiguous limits on the scope of the investigation added to an appearance that the investigation was designed for partisan advantage.

### **Didn't the inspector general find that there was no political bias in Crossfire Hurricane?**

Some have argued that the pervasive and one-sided errors in the Page FISA application weren't caused by partisan bias against the Trump campaign but by fundamental problems in the way the FBI documents its FISA applications.<sup>47</sup> This is a particularly comfortable conclusion for those who think the principal civil liberties threat posed by national security authorities is oppression of individuals and minority viewpoints. I think they are wrong, and their error could result in needless new barriers to agile use of national security authorities.

Support for their view rests on two inspector general findings. First, his report declares that he found no evidence of bias in the handling of the Carter Page case. Second, to determine whether the FBI's FISA process was more broadly tainted, he conducted an audit of 29 other FISA applications affecting Americans and found deficiencies in practically all of them.<sup>48</sup>

However, on a closer look, neither of the inspector general's findings fully rebuts the circumstantial evidence of bias.

First, the inspector general clears the investigators of political bias only by applying a special and rather artificial standard. He sets a very high bar for finding political bias in Crossfire Hurricane. His report states -- usually in just these words -- that the inspector general "did not find documentary or testimonial evidence that political bias or improper motivation" influenced the

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<sup>44</sup> Id. at 63-66.

<sup>45</sup> Tucker, The Comey firing, as retold by the Mueller report, Associated Press (April 23, 2019) <https://apnews.com/4ff1ecb621884a728b25e62661257ef0>

<sup>46</sup> OIG Report at xviii.

<sup>47</sup> <https://www.justsecurity.org/67691/the-crossfire-hurricane-reports-inconvenient-findings/>

<sup>48</sup> Office of the Inspector General, Management Advisory Memorandum for the Director of the Federal Bureau of Investigation Regarding the Execution of Woods Procedures for Applications Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons (March 2020) available at <https://oig.justice.gov/sites/default/files/reports/a20047.pdf>

investigators' decisions. This carefully constructed statement tells us that the inspector general was prepared to find political bias only if FBI or Justice personnel actually testified or disclosed in writing that they were motivated by political bias. That leaves out a lot of inferences that the inspector general refused to entertain, as he made clear in Senate testimony agreeing that what he found was an absence of bias evidence, not evidence of an absence of bias.<sup>49</sup>

Indeed, it's unclear how consistently the inspector general applied even that lenient standard. He actually did find "documentary evidence of political bias" in the texts between a high-ranking agent, Peter Strzok, and Lisa Page, the Deputy Director's legal adviser. In the face of that documentary evidence the report suddenly applies a different standard: whether Strzok or Page had sole responsibility for decisions that might look biased.<sup>50</sup> Because other FBI and Justice officials, some more high-ranking than Strzok, also participated in Crossfire Hurricane decisions, for example, the inspector general concludes that there was no evidence that Strzok's bias "directly affected" investigative decisions.<sup>51</sup> This is a very forgiving approach to identifying political bias, particularly because the report makes clear that Strzok set a tone for the Crossfire Hurricane investigation, provided continuity as TDY teams turned over, and pushed for aggressive action even when he was not formally in charge. He negotiated with Stu Evans over the footnote disclosing Steele's funding, and he was ready to call on the FBI's deputy director (presumably using his close relationship to Lisa Page) to overrule Evans.<sup>52</sup> It is implausible that his anti-Trump animus did not affect the investigators' choices, particularly the failure to stress-test the Page application and the Steele dossier.

To be blunt, the inspector general's "no documentary or testimonial evidence of bias" standard leaves open the possibility that FBI's leaders were motivated by political bias but had sufficient self-preservation instincts not to say so. It leaves open the possibility that FBI agents, lawyers, and leaders failed to identify weaknesses in the case against Trump because they didn't want to see evidence that contradicted their view that Trump was bad for the country. It leaves open the possibility that Strzok and Lisa Page, whose bias is documented, were able to maneuver their superiors into overlooking the investigation's weaknesses. Lastly, it ignores the possibility that

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<sup>49</sup> Inspector General Report Hearing Transcript: Michael Horowitz Testifies on FBI's Findings (Dec. 11, 2019) <https://www.rev.com/blog/transcripts/inspector-general-report-hearing-transcript-michael-horowitz-testifies-on-fbis-findings>. One reader pointed out that the inspector general's statement also means that no FBI official accuse any other of bias. True enough, but that would also have been imprudent both from a personal and an institutional perspective, so one wouldn't expect it. And, as far as I know, no FBI official accused Strzok or Page of bias, even though we now know they harbored plenty of it.

<sup>50</sup>Office of the Inspector General, A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election at iii (June 2018) available at <https://www.justice.gov/file/1071991/download>

<sup>51</sup> OIG Report at iii-iv.

<sup>52</sup>Strzok was almost removed from the investigation because in the past he and Page had apparently bypassed the chain of command to get what he wanted from the FBI's deputy director. Ironically, the effort to remove him was vetoed by... the deputy director. OIG report at 64. It appears he used the same tactics in the conflict with Stu Evans; consider, for example, this text exchange at the height of the fight:

8:00 p.m., Strzok to OGC Unit Chief: "Jim [Baker] or [Deputy Director] or someone may need to weigh in with [NSD Assistant Attorney General John] Carlin."

8:00 p.m., Strzok to OGC Unit Chief: "I'll bring it up at the prep SVTC tomorrow."

Id. at 138.

decisions made at every stage of the case were influenced by implicit bias against a populist candidate who had almost no support in Washington, including the higher ranks of the bureau and the Justice Department.<sup>53</sup>

If the inspector general's report isn't conclusive on how large a role political bias played in the numerous failings of the Carter Page application, what are we to make of his finding that there were widespread documentation problems in all 29 of the FISA applications he reviewed?<sup>54</sup> Once again, the limitations of the audit are important. The inspector general simply asked whether every factual statement in the 29 FISA applications was supported by the "Woods file" that is supposed to document the basis of any factual representation made to the FISA court. This was purely a paper exercise, akin to a law review cite check, that asked whether there was a supporting document in the file for each statement in the application; the inspector general admitted that "our review did not seek to determine whether support existed elsewhere for the factual assertion in the FISA application."<sup>55</sup>

Whether the inspector general's findings show a real problem in the FISA process depends on whether the gaps were substantive failures, as in the Page application, or simple footnoting lapses. We now have an answer, and it appears that the gaps were almost all paperwork rather than substantive. The FBI and Justice Department were ordered by the FISA court to review all 29 cases to determine whether there were material errors or omissions in any of the applications.<sup>56</sup> After completing the review, the FBI submitted a sworn statement telling the court that its review found only two material errors, neither of which cast doubt on the FISA order itself.<sup>57</sup>

This is good news for the credibility of the FISA process overall. But it casts the Carter Page application in sharper relief: Why did that one application fall so far from the FBI's usual standards? There may be other answers, but surely one of the most plausible is political bias against the candidacy of Donald Trump. Certainly it would be hard to fault his supporters if they came to that conclusion on this record.

It is also good news for those who fear that piling additional checks and paperwork demands on the FISA process will cause a loss of focus on counterintelligence priorities. FISA is

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<sup>53</sup> David Kris, as usual, wrote a detailed discussion of this topic shortly after the inspector general's report was issued. D. Kris, *Further Thoughts on the Crossfire Hurricane Report*, Lawfare (December 23, 2019) <https://www.lawfareblog.com/further-thoughts-crossfire-hurricane-report>. He reads the report as a broader "no evidence of bias" ruling than I do, but he also acknowledges that the inspector general was clear about the limitations of his inquiry, noting that in several cases he pointedly states that the FBI participants never supplied an adequate explanation for their actions. David Kris argues that the lack of an explanation doesn't mean the participant's motives were partisan True enough. But what his review and my examples above demonstrate best is that the inspector general's report on this topic leaves plenty of white space on the question of political bias – space that must be filled using the surrounding circumstantial evidence, which is hardly exculpatory..

<sup>54</sup> Management Advisory Memorandum for the Director of the Federal Bureau of Investigation Regarding the Execution of Woods Procedures for Applications Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons (March 2020) <https://oig.justice.gov/sites/default/files/reports/a20047.pdf>

<sup>55</sup> Id. at 2.

<sup>56</sup> <https://fisc.uscourts.gov/sites/default/files/Misc%2019%2002%20Order%20PJ%20JEB%20200403.pdf>

<sup>57</sup> Supplemental Response to the Court's Order Dated April 3, 2020, In re Accuracy Concerns Regarding the Matters Submitted to the FISC, (July 29, 2020) <https://www.justice.gov/nsd/page/file/1300701/download>

extraordinary because the threat of foreign espionage and terrorism is extraordinary. If we make the process of starting FISA surveillance too difficult, we may fail to gather intelligence we need. It is wise to remember that the last time the FISA court demanded new sworn assurances from FISA applicants, it ended by sanctioning a respected FBI agent and impressing upon the FBI that nothing was more important to their careers than enforcing the wall between intelligence and law enforcement. That, of course, is exactly what the FBI did a few months later, when it refused to let its best organized (and law enforcement) terrorism unit go looking for al-Qaeda terrorists who were reported to have entered the country. The country missed its best opportunity to prevent 9/11 as a result.<sup>58</sup>

We can't afford to do that again. And we don't have to if the problems in the Carter Page FISA were more likely the result of political bias than of weaknesses in the overall FISA process. I urge you to bear this in mind as you consider the lessons of the Page FISA for the future. In my view, most of the reforms needed after the Page debacle should focus on the relatively few sensitive investigations that could be influenced by political bias and not on every garden variety FISA application.

### **What needs to be done**

With that caution, what are the reforms needed in the wake of Crossfire Hurricane and the Page FISA? The FBI already had special procedures for "sensitive investigative matters," which included investigations of political figures. Those procedures were invoked. The protections for such matters are largely procedural and hierarchical. The FBI general counsel is notified. Higher levels in the FBI must approve the investigation. All this was done. The application was read and edited with care at Justice, but efforts to dig into the bureau's factual evidence were met with recalcitrance, end runs to higher levels at Justice, and even lies.<sup>59</sup>

The Attorney General responded to the Page failures with a memorandum setting additional requirements for opening sensitive investigations relating to political candidates and campaigns.<sup>60</sup> In essence, the memo requires that investigations of presidential candidates, campaigns, and senior staff be notified to and approved by the Attorney General in writing. Investigations of congressional campaigns, candidates, and foreign contributors require approval from the Assistant AG and US Attorney.

These are steps in the right direction, but they are insufficient. The AG's memo ensures supervision from someone who will appreciate the risk of an appearance of impropriety. But it also increases the risk of an appearance of impropriety. Ask yourself how comfortable Democrats would be to discover that an investigation into Chinese influence on the Biden campaign went forward under the supervision of Attorney General Bill Barr. Or how much comfort the Trump team would get from the involvement in its investigation by Deputy Attorney General Yates, who famously broke a long Justice Department tradition by refusing to defend the

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<sup>58</sup>See S. Baker, *Skating on Stilts* 39-69 (Hoover Inst. Press 2010) <https://www.skatingonstilts.com/files/chapter-3---skating-on-stilts-by-stewart-baker-1.pdf> .

<sup>59</sup> OIG Report at xiii.

<sup>60</sup> Attorney General Memorandum re Additional Requirements for the Opening of Certain Sensitive Matters (Feb. 5, 2020) [http://www.msnbc.com/sites/msnbc/files/barr\\_memo\\_200205.pdf](http://www.msnbc.com/sites/msnbc/files/barr_memo_200205.pdf)

President's first immigration order when she was a holdover acting AG. The nicest thing either would say about that arrangement is that it gives rise to an appearance of impropriety.

What measures would not? The best I can do is to suggest the designation in such cases of a senior career official – in advance – to police for political bias, first in the investigation and again in the prosecution of the matter. The red-team oversight official would have full authority to review and approve the opening and any other steps of significance in the investigation and charging decision. He or she would be expected to report to the highest political official with responsibility for approving the matter under the AG's guidelines before the case goes forward. This creates a devil's advocate without the problems we are likely to see from the proliferation of amici at the FISA court. It does not answer the very realistic question of where the devil's advocate will go after having burned all of his or her bridges at the bureau and in the department. The Attorney General's supplemental reforms memo takes a good step in this direction.<sup>61</sup> It requires that search and surveillance measures aimed at officials or candidates and campaigns be reviewed by a special agent from a field office not involved in the investigation. (Whether this will protect the reviewing agent from retaliation or create a "logrolling" temptation is unknown, but if it works, it may be superior to my proposal for a more permanently designated reviewer.)

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### **Press reports in FISA applications**

It would be a comfort if the only source of bias in the Carter Page application came from Steele's paid lobbying. That is a solvable problem. It's true that the Steele dossier provided about a third of the application's case against Carter Page, as well as the most serious allegations. But another third is sourced, not to official or classified information, but to press reports. It is surprising how much the Page application relies on press reports to make its case. It's easy to understand the temptation to use press reports. Press stories can supply background without requiring that the government research and vouch for things that "everybody knows." For exactly that reason, though, it's a dangerous practice. Inserting media reports into a probable cause application lets the investigators smuggle facts into the application without vouching for them. To take an extreme example, the application's summary of a Yahoo! News article from September 23, 2016, tells the court that, according to the reporter, "U.S. officials received intelligence reports" about Page's activities in Moscow.<sup>62</sup> Instead of telling the court that the government had received such reports, a fact that would need to be verified, the FBI relies on Yahoo! News for that fact. Worse, the story is based on a leak, in this case from Steele. This illustrates another risk, that using press reports to make FISA cases will encourage investigators to leak information to the press that is not fully supported by evidence and then rely on the press reports to bolster an otherwise flimsy application. The use of journalism in FISA applications in future should be accompanied by an explanation of why press reports rather than the results of investigation are being offered.

The current method of citing press reports also prevents the FISA court from being able to evaluate the risk of partisan bias in an application. Today, it appears that all press reports are

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<sup>61</sup> Attorney General Memorandum on Supplemental Reforms to Enhance Compliance, Oversight, and Accountability with Respect to Certain Foreign Intelligence Activities of the Federal Bureau of Investigation (August 31, 2020)

[https://www.justice.gov/ag/page/file/1311701/download?utm\\_medium=email&utm\\_source=govdelivery](https://www.justice.gov/ag/page/file/1311701/download?utm_medium=email&utm_source=govdelivery)

<sup>62</sup> Id. at 22

attributed to an “identified news organization” without actually ever identifying the news organization in question. In the Page application, one of those organizations is The Washington Post. Another is Yahoo! News. To most of us, the Washington Post and Yahoo! News have different levels of credibility, and very likely different political biases. As American media declines and grows more partisan, the court needs to know the source of any story presented to it. It matters whether the story comes from Breitbart or from RT.

The impact of media bias can be seen in the Page application itself, which relies on a Washington Post article claiming that the Trump campaign “worked behind the scenes to make sure [the GOP platform] would not call for giving weapons to Ukraine to fight Russian and rebel forces.”<sup>63</sup> The story leaves the impression that Trump’s team weakened the GOP platform on Ukraine, although it doesn’t quite say so, probably because that’s not true. The Washington Examiner offered more detailed – and Trump-friendly -- version of events in 2017,<sup>64</sup> when Byron York reported that the original draft of the platform, while tough on Russia, said nothing about aid to Ukraine. and that it was a delegate for defeated candidate Ted Cruz who urged an amendment saying weapons should be provided to Ukraine. Losing candidates’ delegates usually get short shrift in platform negotiations, but the Trump team compromised, proposing to add a plank with a softer, more general plank call for “appropriate assistance” to Ukraine’s armed forces and “greater coordination with NATO defense planning.” The end result was to make the platform tougher, though not quite as tough as the Cruz delegate wanted.<sup>65</sup>

It seems clear that the FBI never verified the Washington Post report and never learned the more nuanced story of the platform plank. Instead, it accepted the most biased version of the story as true, saying the “FBI assesses that, following Page’s meetings in Russia, Page helped influence [Republican] and [Trump’s] campaign *to alter their platforms to be more sympathetic to the Russian cause.*”<sup>66</sup> This formulation is more aggressively anti-Trump than even the Washington Post opinion piece on which the application relies. Not surprisingly, after a long investigation, Robert Mueller offered no support for this “assessment.”<sup>67</sup>

It’s also no surprise that the Washington Post story would leave out facts favorable to Trump, whose candidacy finally broke media claims to neutrality between Presidential candidates. The problem is not so much the media’s bias but the fact that Post writer’s bias coincided so neatly with the FBI’s goal in the application – to paint Trump’s campaign as inexplicably pro-Russian. The application was able to smuggle the Post writer’s opinion and his slant on the facts into the

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<sup>63</sup> Id. at 21. Rogin, Trump campaign guts GOP’s anti-Russia stance on Ukraine, Washington Post (July 18, 2016) [https://www.washingtonpost.com/opinions/global-opinions/trump-campaign-guts-gops-anti-russia-stance-on-ukraine/2016/07/18/98adb3b0-4cf3-11e6-a7d8-13d06b37f256\\_story.html](https://www.washingtonpost.com/opinions/global-opinions/trump-campaign-guts-gops-anti-russia-stance-on-ukraine/2016/07/18/98adb3b0-4cf3-11e6-a7d8-13d06b37f256_story.html)

<sup>64</sup> Byron York, How pundits got key part of Trump-Russia story all wrong, Washington Examiner (March 18 2017) <https://www.washingtonexaminer.com/byron-york-how-pundits-got-key-part-of-trump-russia-story-all-wrong> ; Byron York, What really happened with the GOP platform and Russia, Washington Examiner (Nov. 26, 2017) <https://www.washingtonexaminer.com/byron-york-what-really-happened-with-the-gop-platform-and-russia>

<sup>65</sup> <https://www.washingtonexaminer.com/byron-york-what-really-happened-with-the-gop-platform-and-russia> ; see also Mueller report at 131.

<sup>66</sup> FISA application 21-22

<sup>67</sup> Special Counsel Robert S. Mueller, Report On The Investigation Into Russian Interference In The 2016 Presidential Election, U.S. Department of Justice, at 123, <https://www.justice.gov/storage/report.pdf> (hereinafter cited as “Mueller Report”).

application without presenting a more balanced version -- or even disclosing that the piece was in fact labeled as opinion.

It is time to discard whatever cautionary principle has anonymized press reports in FISA applications. Indeed, any open source material of this kind should be appended to the application. We can no longer ignore the differences in the quality and partisan leanings of news outlets. Naming the source of press reports may not eliminate bias, but it does allow the court to make its own evaluation of the source. Indeed, given the proliferation of alternative perspectives on virtually every story that makes the news these days, it might be prudent to require that the appendices also include the most credible alternative media take on any story relied upon in the application.

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### **Trump's surprise victory**

More broadly, the practice of relying on press reports for facts that have not been independently verified by the FBI should be discouraged, perhaps by requiring the bureau to explain why it believes any press reports it cites to be both true and yet not independently verifiable.

For all its flaws, the Carter Page application went to the FISA court largely as the FBI prepared it. Many lawyers reviewed it, and they did so with a recognition that the application risked being controversial. But there is no sign that Justice lawyers seriously challenged the completeness or accuracy of its representations, with the notable exception of Stu Evans's valiant fight to understand and explain Steele's role as the DNC's paid oppo researcher. The application was hustled through the last stages of review. The "read copy" (advance draft) of the application went to the FISA court on October 19. In the next two days, the FBI completed the Woods procedures; the FBI's general counsel briefed the director; the director and the deputy attorney general approved and signed the application; the FBI answered several questions from the FISA court legal advisor; and the FISA court granted the intercept order.

Ten days later, Steele's last leak about the investigation fizzled in Mother Jones. And a week after that, Donald Trump was elected President, to the surprise and consternation of almost everyone in Washington -- media, government officials, and Never-Trump Republicans alike.

Among those most surprised and disconcerted, of course, were members of the Obama administration. Their initial measured reaction to Donald Trump's victory would soon give way to anger at his norm-breaking performance, and their anger would lead to uses of national security authorities that many would reasonably view as partisan abuse, particularly in the case of Michael Flynn.

### **Michael Flynn takes center stage**

Michael Flynn was well-known to the Obama team, which had cut short his tenure as head of DOD's intelligence service because of doubts about his management of DIA and his policy alignment with the administration. After leaving the administration, he had demonstrated

questionable judgment in accepting funds from authoritarian regimes like Putin's Russia's and Erdogan's Turkey. Perhaps even worse from the outgoing administration's point of view, Flynn was a barrier to its last foreign policy goals.

With the election, President Obama had lost his clout on domestic policy, but he still spoke for the United States on the international stage, and he intended to use that authority in two groundbreaking ways before January 20, 2017. He would impose harsh sanctions on Russia for its hacking and leaking of the DNC emails, and he would reset the U.S.-Israel relationship by letting the United Nations condemn Israeli settlements on the West Bank. Knowing that President-elect Trump would not support either of these steps, Obama wanted both of them done quickly. Michael Flynn was one of the few Trump advisers who might have enough experience in government to get in their way.

The Obama administration was right to worry. By December 22, the Trump team was united against the UN resolution on Israel, and Flynn was working the phones, asking foreign ambassadors, including Russia's Ambassador Kislyak, to vote against it.<sup>68</sup> And when President Obama imposed sanctions on Russia, Flynn again talked to Kislyak,<sup>69</sup> asking that Russia not overreact. Putin seems to have interpreted Flynn's request as a hint that the sanctions might be lifted under Trump if Putin laid low. To the surprise even of Russia's foreign minister, who had just publicly recommended a harsh response, Putin announced the next day that he would not engage in tit-for-tat retaliation.<sup>70</sup> It was a very public signal that, for Putin, power in Washington had already changed hands.

It's hard to leave political office, to abandon all its perks and power. But it may be even harder to find yourself still in the office and watching your power visibly drain to another. Maybe that's why Flynn's calls got under the Obama administration's skin.

They were private calls, of course, which raises the question how they came to the attention of the outgoing administration. The answer may lie in a contretemps with Israel a year earlier, and in an odd corner of FISA law.

### **The Obama Administration and reverse targeting of FISA taps**

It should be easy to say whose communications can be intercepted under FISA. The statute says the proper target of a FISA tap is an agent of a foreign power. Agents of a foreign power fall into two categories. Americans who've become spies or terrorists are agents of a foreign power. But so is a foreign national who is openly employed by his government. It is therefore widely assumed that foreign officials and diplomats are lawful targets for FISA wiretaps. This is not a controversial idea, at least not here at home.

What is more controversial is using FISA to wiretap Americans who talk to foreign officials. Thus, when Michael Flynn spoke to Amb. Kislyak, the government had authority to monitor

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<sup>68</sup> Mueller Report at 167-168; <https://www.timesofisrael.com/flynn-timeline-it-all-began-with-a-un-resolution-condemning-israeli-settlements/>

<sup>69</sup> Mueller Report at 169-170

<sup>70</sup> <https://www.nytimes.com/2016/12/30/world/europe/russia-diplomats-us-hacking.html>

Kislyak's calls but no authority to target Flynn.<sup>71</sup> Of course the government can't tap Kislyak without also tapping Flynn. FISA law solves the problem by asking who the government is targeting. It's ok to pick up Flynn's side of the conversation as long as Kislyak is really the target of the surveillance. By the same token, it's illegal to use intercepts of a foreign official just to overhear the Americans he talks to.

As the Obama administration had found in 2015, however, intercepting the communications of foreign officials sometimes yields a bumper crop of domestic political intelligence, even if no one crosses the blurry line between targeting foreign agents and "reverse targeting" Americans. That year, when the Obama administration's position on Iran diverged dramatically from that of Israel, and that of the Republican Congress, the domestic political advantage of wiretapping Israeli officials, including Prime Minister Netanyahu, was driven home at the highest levels of the White House.

According to a deeply reported *Wall Street Journal* article, when the Israeli government communicated with pro-Israel American lobbyists and politicians, they were sometimes intercepted, and those intercepts offered a rich vein of political intelligence about where Republicans stood, what they were planning, and even whether they had the votes to overturn the administration's policies.<sup>72</sup> Despite its great partisan value, administration officials concluded that the surveillance was a lawful use of intelligence authorities as long as the the National Security Agency was making an intelligence judgment about which intercepts should be delivered to the White House:

White House officials believed the intercepted information could be valuable to counter Mr. Netanyahu's campaign. They also recognized that asking for it was politically risky. So, wary of a paper trail stemming from a request, the White House let the NSA decide what to share and what to withhold, officials said. "We didn't say, 'Do it,'" a senior U.S. official said. "We didn't say, 'Don't do it.'"

In fact, according the Journal, NSA delivered almost everything the White House had an interest in, omitting only some Israeli-American "trash talk" about the administration. The names of the Americans may have been masked, but they could have been lawfully unmasked "to understand the context of the intelligence" if they weren't in fact easy to guess. In any event, the intercepts reportedly had genuine intelligence value – Israel was after all trying to overturn the decision of the American President. But they were also a remarkably convenient way to keep domestic political opponents on their back foot: "We began to notice the White House was responding immediately, sometimes within 24 hours, to specific conversations we were having," one pro-Israel operative told another reporter. "At first, we thought it was a coincidence being amplified

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<sup>71</sup> To be clear, I have no classified knowledge whether Kislyak was or was not a FISA target. There has, however, been a flood of leaks and declassifications that point overwhelmingly toward that conclusion.

<sup>72</sup> Adam Entous & Danny Yadron, U.S. Spy Net on Israel Snares Congress, *Wall Street Journal*, December 29, 2015, <https://www.wsj.com/articles/u-s-spy-net-on-israel-snares-congress-1451425210>. See also Nolan D. McCaskill, U.S. Spying on Israel Swept Up Members of Congress, *Politico*, December 29, 2015, <https://www.politico.com/story/2015/12/spying-israel-congress-netanyahu-217207>

by our own paranoia. After a while, it simply became our working assumption that we were being spied on.”<sup>73</sup>

### **Michael Flynn in the cross-hairs**

So, the next year, with that experience fresh in mind, it would have been natural for the Obama administration to take a similarly keen interest in another Israeli-American attempt to thwart an Obama initiative.<sup>74</sup> Perhaps the White House ran the same game plan, letting NSA or the Director of National Intelligence decide which Kislyak calls would have value for the administration. (Others with some firsthand knowledge of the event have suggested to me that the calls were found when FBI or other counterintelligence officers asked for an explanation of Putin’s change of heart. That could be. Such a query could be a perfectly legitimate basis for targeting Russian officials, or it could be a clever bit of reverse targeting by people who were more interested in whether members of Team Trump had called the Russians.)

Whatever the process, it certainly didn’t take Obama White House long to learn the contents of those calls and to react. On January 5, 2017, President Obama, Vice President Biden, and National Security Adviser Susan Rice pulled aside FBI Director Comey and Deputy Attorney General Sally Yates for a meeting on Flynn and the results of Crossfire Hurricane.<sup>75</sup> The President already knew about the intercept of Flynn’s calls, Yates has testified, but she did not.<sup>76</sup> In all the accounts of the meeting, there’s no sign any of the participants cared what the ambassador had said; as with the Israeli intercepts, it was the American side of the conversation that had the Obama White House exercised.

According to one set of notes (and probably the more credible set), the Vice President suggested that Flynn’s calls implicated the Logan Act, which makes it a felony for private parties’ to negotiate on behalf of the United States. (Yates also remembers remarks about Flynn and the Logan Act but attributes them to Comey.<sup>77</sup>) The suggestion that Flynn faced criminal liability under the act is preposterous, no one has been successfully prosecuted under the centuries-old statute, and it certainly doesn’t prevent an incoming administration from talking to foreign leaders before inauguration day. Nonetheless, it could have seemed like a good vehicle for expressing the resentment of an administration finally realizing that even foreign leaders were shifting their gaze to the new team. Whatever the subjective state of mind in the White House, it

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<sup>73</sup> <https://www.tabletmag.com/sections/news/articles/did-the-obama-administrations-abuse-of-foreign-intelligence-collection-start-before-trump>

<sup>74</sup> <https://www.timesofisrael.com/israeli-official-accuses-obama-kerry-of-abandoning-israel/> ; <https://www.factcheck.org/2017/12/michael-flynn-russia-timeline/>

<sup>75</sup> Among the reasons for skepticism about the Rice email to herself is the existence of another set of notes about the meeting. They were recorded by Peter Strzok, who wasn’t there, but with a level of detail about who said what that suggest they were the result of a debrief from a participant, likely Comey. <https://www.politico.com/f/?id=00000161-c538-d933-a3e9-d7b99b660002> The Strzok notes agree with Rice’s email in terms of participants and broad topics, but they don’t contain any reference to excluding law enforcement topics, nor do they include the President’s alleged instruction, and Comey’s word for word reassurance, that the Flynn matter be handled “by the book.” Instead, the Strzok notes have the President saying “Make sure you look at things & have the right people on it,” a considerably more ambiguous direction. <https://www.scribd.com/document/466809620/Peter-Strzok-s-Notes-Confirm-Obama-Personally-Ordered-Hit-On-Michael-Flynn>

<sup>76</sup> <https://www.rev.com/blog/transcripts/senate-judiciary-committee-hearing-transcript-august-5-sally-yates>

<sup>77</sup> <https://www.rev.com/blog/transcripts/senate-judiciary-committee-hearing-transcript-august-5-sally-yates>

is clear that from that day forward, Flynn had a target on his back. Indeed, President Obama himself raised questions at the meeting about whether intelligence should be withheld from the incoming team; Flynn was the only candidate for such an exclusion.

**‘From a national security perspective, however ...’**

At this point a reader alert for abuse of power might ask how the FBI director and Deputy Attorney General came to be briefing the White House on the results of an FBI/Justice investigation. Isn't there supposed to be a wall between law enforcement and the White House to keep the President from encouraging the investigation and prosecution of his political enemies? There is, but in Flynn's case the wall turned out to be conveniently porous. One set of notes about the meeting was an email written by Susan Rice's to herself two weeks after the meeting and minutes before she had to surrender her classified computer as part of the transition. The message was prepared at the insistence of the White House Counsel's office,<sup>78</sup> and it reads like an effort to put the meeting in the best possible legal light. It goes to great lengths to lay out the justification for an inquiry into this particular FBI investigation: "The President stressed that he is not asking about, initiating or instructing anything from a law enforcement perspective. He reiterated that our law enforcement team needs to proceed as it normally would by the book. From a national security perspective, however..." From a national security perspective, the President had some questions he wanted answered. Director Comey, in Susan Rice's recounting, was quick to adopt the same catechism: "Director Comey affirmed that he is proceeding 'by the book' as it relates to law enforcement. From a national security perspective, however," he was happy to talk about the intercepts of Flynn.<sup>79</sup>

(Remarkably, no one seems to have been exactly sure what "national security perspective" justified this discussion or the continued "counterintelligence" investigation. Deputy Attorney General Yates has offered two ideas. First, that Flynn's conversations were "essentially neutering" the Obama sanctions. This of course was a deeply partisan divide between the incoming and outgoing administration, and it comes perilously close to saying that the Trump policy was a counterintelligence concern. It is just the ridiculous Logan Act theory dressed up as a counterintelligence concern. Second, she has suggested that, because the Russians had a record of the call, they might be able to blackmail Flynn by threatening to expose as false his reported statement to Vice President Pence that he hadn't discussed sanctions.<sup>80</sup> Of course the US also had a record of the call, so as *kompromat*, this has a distinctly Dr. Evil air: "If you don't want me to tell the Vice President something he already knows about you, you'll have to give me One. Million. Dollars.")

The Rice email to herself says nothing about a discussion of the Logan Act; it could not if its purpose was to show that the January 5 meeting was "by the book." Peter Strzok's notes, though secondhand, say that the Vice President bringing up the Logan Act. And Deputy Attorney General Yates has testified that Director Comey addressed the Logan Act. That is of course

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<sup>78</sup> <https://www.politico.com/f/?id=00000161-c538-d933-a3e9-d7b99b660002>

<sup>79</sup> <https://thehill.com/policy/national-security/498593-read-susan-rices-email-discussing-michael-flynn-and-russia>

<sup>80</sup> Senate Judiciary Committee Hearing Transcript August 5: Sally Yates

<https://www.rev.com/blog/transcripts/senate-judiciary-committee-hearing-transcript-august-5-sally-yates>

inconsistent with Rice's claim that no one wanted to talk about law enforcement. And it is inconsistent with the notion that criminal investigations touching on political adversaries should be kept out of the White House for fear of leaks, smears, and politicized efforts to gin up unfounded investigations.

### **Leaking FISA intercepts**

That seems like a reasonable fear in light of the radical turn taken by Michael Flynn's prospects after the January 5 meeting. On January 4, the FBI field office had already circulated a memo closing the counterintelligence case on Flynn because of "the absence of any derogatory information."<sup>81</sup>

After the January 5 White House meeting, though, there was no more talk of closing the case. Instead, Flynn was in the FBI's crosshairs.

First came leaks. By January 12, a "senior U.S. government official" had spoken to David Ignatius of the *Washington Post* and revealed the Flynn calls. Tellingly, the article was the first to raise the question whether the calls violated the Logan Act.<sup>82</sup> It is not unreasonable to conclude that the White House had not only encouraged a criminal investigation of Flynn under the Logan Act but had also leaked his exposure to the press – along with the contents of a wiretap that was lawful only if the target was Kislyak and not Flynn. (There are, of course, other candidates for the leak, including Justice, the FBI, and the intelligence agencies that handled the intercept. But if the goal of U.S. intelligence law is to prevent the appearance of politicized use of intelligence, it clearly failed in this case.)

By January 14, the risible Logan Act notion was getting serious consideration from major press outlets, and on January 15, Vice President Pence, perhaps spooked by the Logan Act claims, had denied that the calls had covered sanctions.<sup>83</sup> Then came a series of rapid and extraordinary investigative decisions. On January 24, just after the inauguration, FBI investigators interviewed Flynn about the Kislyak calls without alerting the new administration's White House counsel, the

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<sup>81</sup>That day Peter Strzok put a hold on the termination because of interest on the FBI's "7th floor" (presumably because Comey and McCabe had become aware of the recently circulated Flynn intercepts) <https://static1.squarespace.com/static/5e80e0d236405d1c7b8eae9/t/5eb4b4abfa9e604b19e3cae4/1588901092641/D oc.198+Flynn+Governments++Motion+to+DISMISS+against+Michael+T.+Flynn.pdf> See also Hoonhout, Records Show Strzok Intervened when FBI Moved to Close Flynn Investigation Due to Lack of 'Derogatory Information' National Review (April 30, 2020) <https://www.nationalreview.com/news/records-show-peter-strzok-intervened-when-fbi-moved-to-close-investigation-of-flynn-after-finding-no-derogatory-information/>

<sup>82</sup> <https://www.nytimes.com/2017/02/09/us/flynn-is-said-to-have-talked-to-russians-about-sanctions-before-trump-took-office.html>

<sup>83</sup> Face the Nation, CBS News (January 15, 2017), <https://www.cbsnews.com/news/face-the-nation-transcript-january-15-2017-pence-manchin-gingrich/>. The Trump transition team was unapologetically engaging with foreign leaders in late December on both Russia sanctions and the UN Israel resolution. The entire Trump transition leadership participated in briefings on President Obama's sanctions, and Flynn's upcoming call with Kislyak were part of the discussion. Mueller Report at 25. It is implausible that other high ranking officials were unaware that Flynn would be urging moderation in Russia's response. No one raised the Logan Act at the time. That didn't happen until January 12, in the Ignatius Washington Post story. I cannot help speculating that the Trump team, including the President, overestimated the risk of Logan Act prosecution and simply ordered everyone to deny that sanctions had been discussed with Kislyak.

Justice Department, or Flynn himself that the interview posed legal risks for him. Flynn seems to have known the agents had transcripts of the calls but denied talking about sanctions, possibly due to a faulty memory or perhaps in order not to contradict the White House's Logan Act defense.<sup>84</sup>

Two days later, on January 26, Deputy Attorney General Yates met with the Trump administration's White House counsel, bringing up the results of Flynn's FBI interview as well as the Logan Act.<sup>85</sup> Then, on February 9, a group of "current and former American officials" leaked a story to both the New York Times and the Washington Post saying that the calls had been intercepted and that they covered sanctions.<sup>86</sup> The explicit leak of the contents of a FISA wiretap to attack an American was unprecedented.

It also worked. It ended Flynn's career in government. He was forced to resign less than a week later. And the FBI interview eventually became the basis of Robert Mueller's decision to charge him with false statements.

### **Lessons for a nonpolitical national security infrastructure**

Much of this would not have violated the law. Political actors in the White House didn't have to ask that any Kislyak calls with Flynn be reported to them; there was almost certainly enough foreign intelligence value in the calls to more or less guarantee that the National Security Agency would deliver them without a request. As with the Netanyahu-GOP taps, the White House was benefiting from hands-free reverse targeting. And it didn't have to be briefed on the details of a criminal investigation of its political enemy; it could ask for a national security briefing on the same investigation.

If there is room for argument about the targeting, there is none about the leak. That the motive was political is hard to deny. Given the sourcing ("current and former" officials), the leakers almost certainly included outgoing Obama officials who had access by virtue of their national security responsibilities, though it may have included either holdover or career officials as well. (It could event, though I am skeptical, have been the result of infighting among Trump aides.) Whatever their source, the leaks became far more likely once Flynn's intercepted conversations with Kislyak were used for political purposes, as was true of earlier Netanyahu conversations with Republicans in Congress. Partisan politics at that level is a rough game, where gossip and leaks abound, so if the Obama administration lawfully used the U.S. foreign intelligence apparatus for political purposes it also inevitably exposed the intelligence to a far greater risk of compromise.

The dark interpretation of these events is certainly plausible enough to ask what can be done to make sure FISA intercepts are never used in this way. Again, if we focus our attention on

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<sup>84</sup> FBI interview with Michael Flynn on Jan. 24, 2017, filed by Special Counsel's Office in United States v. Michael T. Flynn, Crim No. 17-232(EGS)(Dec. 17, 2018) <https://apps.washingtonpost.com/g/documents/local/fbi-interview-with-michael-flynn-on-jan-24-2017/3356/>

<sup>85</sup> Mueller Report at 32-33.

<sup>86</sup> Flynn discussed sanctions with Russians before Trump took office, contrary to assertions: reports, Agence France-Press (February 10, 2017).

politically motivated use of FISA, we can avoid encumbering the vast bulk of intelligence procedures with new craft. Only occasionally will foreign governments contact politicians or an incoming administration to lobby against the existing administration. But when a FISA intercept is obtained in such a case, additional protections on dissemination are needed. No political appointee, perhaps no one at all, should be given access to conversations between FISA targets and American politicians without being required to record their access and their foreign intelligence purpose in seeking access. The same should apply to any request to unmask the identity of Americans in such contexts. These records should be available for audit by a cleared person appointed by the majority and minority chairs of the House and Senate intelligence committees. And if the contents of those calls are leaked to the press, Congress should make clear that the intercepted American can sue the reporter and the media owner to learn the source of the leak. (Media defenders say that it's the government's job to stop leaks, but that argument holds little water when there's reason to believe that the leak had official imprimatur.)

More generally, on the assumption that there will be more efforts by foreign adversaries to take advantage of our deepening partisan divide, we can expect more cases in which legitimate national security interests will coincide with the partisan interest of the administration pursuing the investigation. As Bill Barr has suggested, such investigations should always be deemed sensitive investigative matters, and they belong in a special class with procedures aimed at reducing the risk of partisan misuse. First, they should not routinely be briefed at the White House on a "From a national security perspective, however" basis. Wherever possible, there should be notice to the leaders of both parties in Congress, possibly by the same, soon-to-be-unemployable career official who oversees FISA intercepts that present the same risk of mixed motives.

Finally, it is surely time to repeal the Logan Act, or to turn it into a civil statute that allows the government to seek an injunction and enforce it with the contempt power.