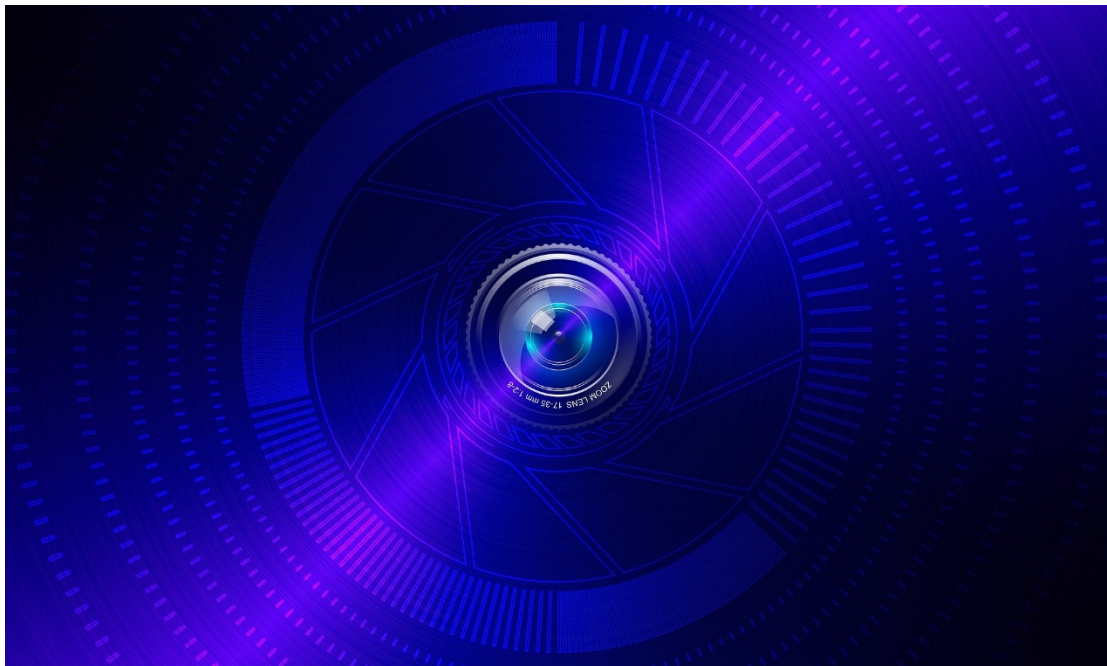




**The FBI's FISA Process Is Broken, But It Won't Be Fixed
by Legislative Manipulation of the FISA Statute**



**A Center for Ethics and the Rule of Law (CERL) Report
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A variety of issues requiring attention have understandably been subordinated on both the congressional calendar and in the national conscience in the wake of the COVID-19 pandemic. One of those issues is legislative consideration of three now-expired surveillance authorities and other matters relating to the Foreign Intelligence Surveillance Act (FISA).

A Brief Summary of the Current Legislative Status of FISA "Reform"

When FISA was last addressed in the U.S. Capitol on March 16, 2020, the Senate had passed a measure (S. 3501) authorizing a 77-day extension of three expiring FISA provisions: the "lone wolf" surveillance authority, the roving wiretap surveillance authority, and the business records authority that includes the ability to acquire call detail records (CDRs). The Senate bill, passed a day after these FISA authorities had expired, retroactively sought to resuscitate the expired provisions and was intended as a stopgap until more comprehensive FISA legislation could be considered in the Senate. The House, which had passed its own comprehensive bill on FISA "reform" (H.R. 6172—the "USA FREEDOM Reauthorization Act of 2020") just days earlier, was in recess at the time the Senate passed S. 3501 and never took action on it. Consequently, no FISA "reform" legislation has passed both houses of Congress, and the three FISA authorities scheduled to sunset on March 15, 2020 expired.¹

The comprehensive legislation passed by the House (H.R. 6172) on March 10, 2020, contained a number of changes to FISA, some of which can be directly traced to the report of the Justice Department's Inspector General (DoJ IG) Michael Horowitz that was publicly released in redacted form on December 9, 2019.²

¹ A more detailed recounting of the mid-March legislative maneuvering affecting FISA is available in George Croner, *Why Congress Should Not Wait to Enact FISA Reform*, Center for Ethics and the Rule of Law, March 31, 2020. Available at <https://www.law.upenn.edu/live/news/9917-why-congress-should-not-wait-to-enact-fisa-reform/news/cerl-news>.

² *Report on Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation*, Department of Justice, December 9, 2019 (the "Horowitz Report"). Available at <https://www.washingtonpost.com/context/read-the-inspector-general-s-report-on-the-trump-russia-investigation/f97e93ca-d5b4-4d8f-a37f-8b2cdfdc88/>.

Among other provisions, the House bill would:

- extend until December 2023 the sunset date for the three now-expired FISA authorities identified above (although in extending the business records authority the House bill simultaneously would terminate its use to conduct ongoing “bulk” collection of telephone metadata (CDRs));
- prescribe new measures to guide the use of FISA in certain settings, including a requirement that the U.S. Attorney General sign off on any FISA-based surveillance of federal elected officials and candidates;
- enhance penalties for lying to the FISA court;
- revise and expand the FISA provisions that govern the government’s obligation to disclose exculpatory evidence in judicial proceedings;
- clarify the scope of the Foreign Intelligence Surveillance Court’s (FISC) contempt power; and
- supplement the *amicus curiae* counsel made available to the FISC (and the Foreign Intelligence Surveillance Court of Review (FISCR)) in the USA Freedom Act of 2015 with authority to also retain “Independent Legal Advisors” to “assist the courts in all aspects of considering any matter before the courts.”

By March 16, 2020, when the Senate passed S. 3501 rather than proceed to a vote on the FISA reform bill passed by the House, the nation was in the full throes of dealing with the COVID-19 pandemic. It is now apparent that further substantive action on FISA will likely be tabled until the pandemic recedes and some measure of normalcy returns to the legislative process. When that debate resumes, however, the landscape will have shifted in the wake of a second report by the DoJ IG that expands his highly critical assessment of the FBI’s FISA application process.

The Other Shoe Drops: A “Management Advisory” from the DoJ IG to the FBI

On March 30, 2020, two weeks after the last congressional action on FISA, the DoJ IG released a “*Management Advisory Memorandum for the Director of the Federal Bureau of Investigation Regarding the Execution of the Woods Procedures for Applications Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons*” (the “IG Woods Memo”). Although cumbersome titled, the IG Woods Memo contains the results of DoJ IG Horowitz’s review of a random selection of FBI FISA applications culled from FBI field offices. It provides the findings revealed by this additional review of FBI FISA files that had been promised by the DoJ IG after the release of his earlier conclusions in the Horowitz Report relating to the four FISA applications used by the FBI to obtain the authority to surveil Carter Page in connection with its

Crossfire Hurricane investigation into Russian interference in the 2016 U.S. presidential election.

Before addressing the substantive findings contained in the IG Woods Memo, an explanation of the origins of the FBI's "Woods" files is instructive given the content of those Carter Page FISA applications and the circumstances precipitating DoJ IG Horowitz's review of both the Page applications and those addressed in the IG Woods Memo.

FBI counsel Michael Woods originated the eponymous "Woods Procedures," which were first implemented by the FBI in 2001 in response to serious concerns expressed by the FISC as to the accuracy of factual statements contained in "some 75 [FBI FISA] applications"³ submitted to the court with Justice Department approval. They focus on ensuring accuracy in three areas: the specific factual information supporting probable cause, the existence and nature of any related criminal investigations or prosecutions involving the target of the FISA application, and the existence and nature of any ongoing asset relationship between that FISA target and the FBI.

The Woods Procedures require FBI agents and supervisors to undertake specific steps before filing a FISA application that include determining whether the target is the subject of a past or current criminal investigation, recording the negative or positive results from a search of FBI databases on the target, and a thorough review of the FISA application for factual accuracy. Implemented properly, the Woods Procedures will produce a file containing all the material that corroborates the factual statements made in the accompanying FISA application or, conversely, that diminishes the reliability of factual information contained in that application. FBI training materials specify that "everyone in the FISA process" on the case agent's signature on the Woods form verifying that the factual assertions contained in the application are accurate. Thus, if faithfully observed, the Woods Procedures (and the "Woods File" containing the results of the inquiries required by those procedures) should obviate "significant errors" like those the DoJ IG identified in the Carter Page FISA applications.

The findings in the IG Woods Memo were highly anticipated as a barometer of whether those "significant errors" in the Page FISA applications were limited to the preparation of those particular applications or instead reflected broader, more pervasive problems in the FBI FISA application process. The results have now confirmed that there is a serious problem within the FBI extending well beyond the Carter Page FISA applications and that those problems are of sufficient scope to significantly undermine any confidence in a FISA application prepared by the Bureau. Certainly, the FISC thinks so: in a sternly worded order issued within days of the release of the IG Woods Memo, the court demanded further information and explanations for the new shortcomings identified by DoJ IG Horowitz regarding the FBI FISA application process.⁴ And when Congress ultimately resumes substantive debate on FISA, the contents of the IG Woods

³ The particulars of the FISC's concerns regarding the accuracy of the FBI's FISA applications are recounted in its decision *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F.Supp.2d 611 (FISC 2002).

⁴ *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, Docket No. Misc. 19-02, April 3, 2020. Available at <https://www.fisc.uscourts.gov/sites/default/files/Misc%2019%2002%20Order%20PJ%20JEB%20200403.pdf>.

Memo, which had not yet been released at the time the House passed H.R. 6172, will undoubtedly influence that debate and perhaps the final content of any legislation that ultimately is sent to the president for signature.

The parameters of the review conducted by the DoJ IG are helpful in understanding and contextualizing his findings. As an initial step, he identified eight FBI field offices of varying sizes (from the 56 field offices the FBI operates nationwide) and reviewed "a judgmentally selected sample" of 29 FISA applications relating to U.S. Persons originated by the selected field offices. The applications covered both counterintelligence and counterterrorism investigations, and the sample was selected from a dataset provided by the FBI containing more than 700 applications relating to U.S. Persons submitted by those eight field offices over a five-year period (October 2014 to September 2019). The proportion of counterintelligence and counterterrorism applications within the sample roughly modeled the ratio of those case types within that total of FBI FISA applications. The court-authorized surveillance had been completed for all the applications reviewed.

The review by the DoJ IG consisted solely in determining whether the contents of the FBI's Woods File associated with each application supported the statements of fact contained in that FISA application; the review did not seek to determine whether support existed elsewhere for factual assertions in the FISA application (such as in the case file) nor did it seek to ascertain whether relevant information had been omitted from the application. Notably, the review made no judgments assessing the materiality of the errors identified nor does the IG Woods Memo speculate as to whether potential errors would have influenced the FBI's decision to file the application or the FISC's decision to approve the FISA application. The DoJ IG also noted that the review was limited solely to assessing the FBI's execution of its Woods Procedures, which are not functionally focused on affirming the completeness of the information contained in any particular FISA application.

The DoJ IG reviewed the selected applications and met with those available case agents or supervisors who were responsible for them to assess whether the FBI complied with its Woods Procedures. Additionally, he obtained and reviewed information from the FBI and the Justice Department's National Security Division (NSD) about their FISA application oversight mechanisms. In addition to interviewing FBI and NSD officials, DoJ IG Horowitz reviewed 34 FBI and NSD accuracy review reports (also covering the period from October 2014 to September 2019) that originated from the same eight FBI field offices selected by the DoJ IG and that collectively addressed a total of 42 U.S. Person FISA applications.

The findings contained in the IG Woods Memo are a serious indictment of the FBI's FISA applications process. Among other disclosures, the Memo reveals that: (1) the DoJ IG could not review original Woods Files for four of the 29 selected FISA applications because the FBI has not been able to locate those Files, and in three of these instances does not know if they ever existed; (2) for those Woods Files that were available, the testing conducted by the DoJ IG identified apparent errors or inadequately supported facts in *all* of the 25 applications reviewed, and interviews that had been completed with available agents or supervisors in field

offices by the time the IG Woods Memo was finalized generally confirmed the issues identified by the testing; (3) existing FBI and NSD oversight mechanisms also identified deficiencies in documentary support and application accuracy similar to those identified in the reviews of the Woods Files; and (4) the FBI and NSD officials interviewed indicated that there were no efforts by the FBI to use existing FBI and NSD oversight mechanisms to perform comprehensive, strategic assessments of the efficacy of the Woods Procedures or FISA accuracy, to include identifying the need for enhanced training and improved accountability measures. Collectively, these findings led the DoJ IG to declare that he “[did] not have confidence that the FBI has executed its Woods Procedures in compliance with FBI policy, or that the process is working as it was intended to help achieve the ‘scrupulously accurate’ standard for FISA applications.”

The FISC immediately recognized the import of these DoJ IG findings in an order issued on April 3, 2020, by James Boasberg, the FISC’s presiding judge. Commenting on the DoJ IG’s “lack of confidence that the Woods Procedures are working as intended,” the court observed:

“It would be an understatement to note that such lack of confidence appears well-founded. None of the 29 cases reviewed had a Woods File that did what it is supposed to do: support each fact proffered to the Court. For four of the 29 applications, the FBI cannot even find the Woods File. For three of those four, the FBI could not say whether a Woods File ever existed. The OIG, moreover, ‘identified apparent errors or inadequately supported facts’ in all 25 applications for which the Woods Files could be produced. Interviews with FBI personnel ‘generally have confirmed’ those deficiencies, not dispelled them.”

The court then ordered a series of measures requiring the FBI to provide explanations and suggested corrective measures for the deficiencies noted with respect to the 29 cases reviewed by the DoJ IG, including providing the court with “the names of the targets and docket numbers” for all 29 applications. Judge Boasberg further ruled that the government must “assess to what extent those 29 applications involved material misstatements or omissions” and “assess whether any such material misstatements and omissions render invalid, in whole or in part, authorizations granted by the Court for that target in the reviewed docket or other dockets,” prioritizing those cases where no Woods File has been found. Then, noting that the IG Woods Memo provides “reason for systemic concern,” the FISC commanded that starting no later than June 15, 2020, and at two-month intervals thereafter the “government shall report on the progress of efforts to account for and ensure the proper maintenance of Woods Files for all dockets beginning on or after January 1, 2015.”

The Outlook for FISA ‘Reform’ Now

The maneuvering that preceded the passage of S. 3501 in the Senate provided ample evidence that achieving consensus on FISA “reform” legislation in that body was already problematic. Passage of the comprehensive FISA bill by the House (H.R. 6172) on March 11, 2020, had been achieved only through a rare example of bipartisan cooperation. But despite having the backing of the Attorney General, H.R. 6172 immediately encountered headwinds when it was sent to

the Senate. On March 16, 2020, *Politico* reported that Senate Majority Leader Mitch McConnell (R-KY) had scrapped an initial procedural vote on the House bill in favor of a deal “with civil libertarian hard-liners who oppose the House bill, including Senators Mike Lee (R-UT) and Rand Paul (R-KY),” to substitute S. 3501 and its 77-day extension of the three expiring FISA surveillance authorities for substantive consideration of H.R. 6172 or broader debate on FISA reform.⁵ As part of that agreement, Senators Lee and Paul also secured a package of amendment votes if, as, and when the Senate takes up H.R. 6172.

Senators Lee and Paul are no friends of FISA, and they have often been joined in their antipathy for FISA by senators from both ends of the ideological spectrum. During the 2017 debate over the renewal of FISA Section 702, a bill sponsored by longtime FISA critic Senator Ron Wyden (D-OR) that would have seriously undermined Section 702, was co-sponsored by Senators Paul and Lee, both of whom received scores above 0.75 (where 1.0 represents the most conservative score) from GovTrack’s 2017 “Ideology Score.” (GovTrack is an independent, nonpartisan congressional tracking service.) Concomitantly, the curious 2017 consortium backing Wyden’s proposed FISA legislation also counted Senators Baldwin (D-WI), Sanders (I-VT), and Warren (D-MA) as co-sponsors; their GovTrack “Ideology Scores” were 0.28, 0.06, and 0.23, respectively. Wyden’s own GovTrack score in 2017 was 0.23; in GovTrack’s most recent (2019) Ideology Score, he posts a 0.17.

The 2017 Wyden bill did not become law, but the debate over Section 702 confirmed that FISA has the decidedly dubious distinction of fostering opposition from each end of the ideological spectrum. Not coincidentally, Senator Wyden already has introduced his own FISA “reform” legislation (S. 3242) titled *Safeguarding Americans’ Private Records Act of 2020*.⁶ Co-sponsors include senators with these 2019 GovTrack Ideology Scores: Markey (D-MA) (0.10), Leahy (D-VT) (0.21), Baldwin (0.23); but another co-sponsor is Senator Steve Daines (R-MT) (whose GovTrack comes in at 0.84 and who appears in campaign advertisements in a photo with Donald Trump carrying the caption “Senator Steve Daines of Montana has always been one of my biggest allies in the Senate.”) The Senate wrestled for days before reaching agreement on the content of a critically needed COVID-19 economic stimulus bill but, apparently, opposition to FISA is one of the few topics that bridges the partisan ideological divide.

All of this suggests that when the Senate ultimately returns its attention to FISA there will be a contingent intent on changing the statute in ways extending well beyond the content of the House bill. Indeed, Senator Paul already has described the bipartisan House bill (H.R. 6172) as “weak sauce diluted [and] made impotent by A.G. Barr” and has long sought to prohibit FISA surveillance from being employed, and the fruits of any FISA surveillance from being used in

⁵ Andrew Desiderio and Martin Matishak, *Senate GOP Punts on Surveillance Bill Amid Coronavirus Crisis*, *Politico*, March 16, 2020. Available at <https://www.politico.com/news/2020/03/16/senate-short-term-extension-spy-programs-132401#>.

⁶ A more detailed recounting of the content of the *Safeguarding Americans’ Private Records Act of 2020* is found in George Croner, *The “Reforming” Begins: An Analysis of Whether the ‘Safeguarding Americans’ Private Records Act of 2020’ Improves FISA*, March 11, 2020. Available at <https://www.law.upenn.edu/live/files/10230-safeguarding-americans-private-records-act-of>.

court, against any American citizen.⁷ While such stark views rarely have posed an impediment to the passage of prudent national security legislation in the past, the FBI, through its now-exposed abysmal handling of FISA applications, has provided a cudgel to those who have long sought to neuter FISA.

By way of example, prior to the last minute maneuvering on FISA legislation in mid-March, Senator Wyden's Safeguarding Americans' Private Records Act of 2020 was dead in the water. Introduced in January 2020, it was immediately referred to the Senate Judiciary Committee and has not moved a legislative inch since. However, given the collapse of the effort to get the House's comprehensive FISA reform bill (H.R. 6172) to a vote in the Senate, the bulls-eye that has been painted on FISA by senators from both the left and the right, and the sustenance given to these FISA opponents by the findings of the DOJ IG, it is virtually certain that when FISA returns to the legislative calendar the statute is unlikely to find the friendly "fair winds and following seas" sought by every mariner. Whether that environment gives new traction to Wyden's Safeguarding Americans' Private Records bill, fosters amendments to the House's FISA bill (the "USA FREEDOM Reauthorization Act of 2020") or precipitates new legislation not yet publicly announced, FISA would seem to be in for a bumpy ride.

But several factors still suggest that significantly altering the statute that has served for over 40 years as the governing standard for foreign intelligence electronic surveillance in the United States is ill-advised. Legislative action rarely offers the best mechanism for detailed management of a program as complex as FISA. More importantly, an often unacknowledged truism of the DOJ IG's reporting is that the problems revealed, and they are assuredly significant failures, relate to the FBI's *execution* of the FISA statute, not to any substantive defect in the FISA statute itself.

In all the reporting, congressional testimony, and discussion engendered by DOJ IG Horowitz's work, no part of the FISA statute has been identified as the root cause of, or even a contributor to, the FBI's failings. No shortcoming in FISA's Title I (governing "Electronic Surveillance Within the United States for Foreign Intelligence Purposes") allowed the FBI to initiate questionable electronic surveillance, and none of the proponents promoting FISA reform has identified such a subsisting defect in the FISA statute itself. Nonetheless, this reality will not prevent change; the sheer magnitude of the failures in the FBI's FISA process, with its now well-documented sloppiness and neglect, are seen in the Capitol as requiring legislative action. This was true even before DOJ IG Horowitz released the IG Woods Memo, the contents of which will only fuel the call for a congressional response.

Several markers should, however, guide Congress and serve to distinguish legitimate action from opportunistic efforts to neuter FISA. It bears remembering that before the DOJ IG's investigative work, the only FISA matter actually requiring legislative action was consideration of the renewal of the three FISA authorities (the lone wolf, roving wiretap, and business records

⁷ Jordain Carney, *Rand Paul rails against 'weak sauce' surveillance deal: 'Big disappointment.'* The Hill, March 10, 2020. Available at <https://thehill.com/policy/national-security/486930-rand-paul-rails-against-weak-sauce-surveillance-deal-big>.

authorities) due to expire on December 15, 2019, and later extended to March 15, 2020. Those three provisions have expired, and Congress should certainly take up their renewal. As noted earlier, the House's comprehensive FISA bill (H.R. 6172), for example, would extend all three authorities through December 2023 with the exception that the authority to collect Call Detail Records (CDRs) on an ongoing basis is terminated. Conversely, any proposal that seeks to modify, for example, the Section 702 surveillance program in the name of FISA "reform" or as a purported "response" to the work of the DoJ IG is inadvisable. Section 702 had nothing to do with any of the FISA surveillances, Carter Page or otherwise, reviewed by the DoJ IG; indeed, by definition, Section 702 surveillance cannot be directed at Americans. Moreover, after extensive debate, Congress reauthorized Section 702 as recently as January 2018, setting a new sunset date for December 2023. The lesson is that Congress must resist any urge to neuter FISA as a response to punishing the FBI for its egregious execution of the statute.

If one pragmatically accepts that Congress will "reform" FISA in a way that goes beyond simply extending the three FISA authorities that have now expired, the House's USA FREEDOM Reauthorization Act of 2020 represents a measured congressional response. Without digressing into a detailed analysis of its provisions, the House's USA FREEDOM Reauthorization Act of 2020 would change FISA in a number of areas extending beyond the three FISA authorities that expired on March 15, 2020. Some of those changes are understandable and represent arguable improvements, others not so much; but, on the whole, the bill is a reasonably measured legislative effort to improve FISA without impairing its utility as the fundamental authority for conducting foreign intelligence electronic surveillance in the United States. More to the point, whatever one's view of H.R. 6172, the release of the IG Woods Memo coupled with the hostility to FISA already held by a number of senators suggest that, when FISA returns to the congressional agenda, the House bill is likely to represent the least disruptive level of FISA "reform" that can now be expected.

But pragmatism is not the only reason to view H.R. 6172 as likely the best achievable outcome of any FISA "reform" effort. The simple truth is that legislative action is not an effective or efficient way to micromanage a statute as complex as FISA or the collection programs operating under its authority. Whatever congressional "reform" of FISA ultimately looks like, it will largely end legislative involvement with the statute until the next set of FISA sunset dates arrives. Yes, there will be congressional oversight conducted by the Intelligence Committees and, to a lesser extent, the Judiciary Committees, but there will be no day-to-day legislative scrutiny.

In contrast, the FISC has been intimately involved in demanding accountability from the FBI for its past FISA misconduct while also initiating, or requiring that the FBI (and DoJ) initiate, comprehensive reforms designed to redress the environment in which that past misconduct occurred. While Congress has failed to achieve any consensus on what should be done to "fix" FISA and the FBI's failures, the FISC to date has entered three comprehensive orders prescribing the measures the court insists the FBI take both to remedy past misconduct and protect against its recurrence, and setting specific dates for the accomplishment of these measures.

Federal judges, like those who populate the FISC, are well acquainted with the process of overseeing corrective action taken to remedy past misconduct, and the FISC's response to the findings of the DoJ IG reflects this experience. The FISC is far better positioned than Congress to provide contemporaneous scrutiny of the FBI's efforts and initiate any immediate corrective measures that may be necessary to assure that future FISA applications submitted by the FBI meet the "scrupulously accurate" standard that FBI regulations require.

Of course there are those, especially those unfamiliar with the mechanics of the FISA process and the *ex parte* nature of FISC proceedings, who will insist that the FISC is ill suited to oversee reform because it was the unwitting dupe of the FBI's misconduct in the first place. But the FISC cannot rationally be held responsible for errors that are entirely attributable to the FBI withholding material information from the court in violation of every existing FISA standard, including the FBI's own procedures and regulations. As the FISC observed:

The question the [DoJ] OIG Report squarely tees up is simple: how do we keep this from happening again? As noted in the Court's December Order, only when the government fully and accurately provides all information in its possession that is material to whether probable cause exists can the Court's review effectively serve as a check on Executive Branch decisions to conduct surveillance. Without facts that are both accurate and complete, the Court is necessarily hamstrung in its ability to balance the interests of national security with those of personal privacy.⁸

To be sure, every governmental authority exercised by humans, which is to say every governmental authority, is inherently susceptible to abuse. And as recent events have made painfully clear, deceit and omission will corrupt the FISA application process as surely as any other. But gutting FISA is not the answer any more than the negligent approval of a product by the Food and Drug Administration would justify curtailing the powers of the FDA to enforce the Food, Drug & Cosmetic Act. Organized society cannot neuter government powers simply because they can conceivably be abused; those powers exist precisely to protect that society, especially in crisis. Instead, a vigilant society identifies the misuse of those powers, rids its government of those who misused the power, and takes the corrective measures necessary to prevent a recurrence.

The errors and omissions identified by the DoJ IG surely need redress. Prudent congressional action is one element of potential "reform" but must be considered in the context of acknowledging that no structural flaw in FISA precipitated the FBI's failings. This should produce legislation that operates on FISA more with a scalpel than a chain saw. Thereafter, the remediation of the "significant flaws" and other errors exposed by the DoJ IG's findings is best accomplished by vigorous executive branch action such as training, oversight, and a rigorously

⁸ *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, Docket No. Misc. 19-02, March 5, 2020 (Corrected Opinion and Order). Available at <https://www.uscourts.gov/sites/default/files/Misc%2019%2002%20Corrected%20Opinion%20and%20Order%20JEB%20200305.pdf>.

enforced internal regulatory process as well as exacting judicial scrutiny. Notable steps already have been taken in this remedial process. It remains to be seen whether Congress will have both the wisdom to recognize that continued remediation is best achieved by the FISC and the executive branch complemented by appropriate congressional oversight, and the self-restraint to avoid crippling the statute that governs the exercise of some of the nation's most important foreign intelligence, counterintelligence, and counterterrorism tools.

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