THE REVELATIONS ABOUT FISA BUREAUCRACY IN FBI'S FISA FIX FILING

The government submitted the filing ordered by now (thankfully) former FISA presiding Judge Rosemary Collyer on Friday, explaining how it'll avoid the problems identified in the DOJ IG Report on Carter Page. As I'll show in a follow-up, I believe the changes — with one possible exception — are worthwhile, if inadequate to the task.

In this post, however, I'd like to lay out what the filing reveals about two aspects of the FISA process that I did not know before.

Other agencies and state and local law enforcement can use FISA: While minimization procedures have revealed that FBI can *share* FISA information with other agencies, including state and local authorities, this filing reveals those other agencies can serve as the affiant for FISA applications.

> Agents from other federal law enforcement agencies or state or local law enforcement officers serving on a Joint Terrorism Task Force with the FBI may, in some cases, act as the declarants for applications submitted by the FBI after reviewing receiving the necessary training. In the case of state or local law enforcement officers, such officers are deputized as Special Deputy United States Marshals for this purpose. (4)

I've never heard of this before and there are a whole lot of questions this raises, both about whether non-DOJ agencies are submitting FISA applications (CIA would be unsurprising, but ICE would be alarming and under this administration,

not at all crazy), but also about the accountability for people who aren't Federal employees. How many "Special Deputy United States Marshals" does SDNY have, for example, and was FISA used during the worst excesses of its intelligence program?

The timeline of updates to the Woods Procedures: The filing explains (I'm sure some of this is public, but it's laid out here as well) that the Woods Procedures have been updated:

- On February 2, 2006, FBI reminded its agents they need to,"create, maintain, and update a sub-file that contains all materials that document the support for each factual assertion contained in FISA applications." Given the timing, this change may have been part of the effort to clean up Stellar Wind, which had been used to substantiate FISA applications without notice for the previous five years.
- On March 24, 2006, DOJ's OIPR advised the court about the sub-file requirement, though focused especially on ensuring that, "the federal official currently handling the source (or the federal official who is responsible for liaison to another entity who is handling the source) [confirms] that the source remains reliable, and

that all material information regarding the reliability of the source is reported accurately in the FISA application." This would have been the period when the FBI was cleaning up after Katrina Leung, one of the worst double agents in recent history, so may have pertained to her reporting.

- In February 2009, NSD and FBI together required the FBI to remove any asserted fact for which there is no documentation, and do so retroactively. It also implemented quarterly accuracy reviews that have since been made semi-annual. The Section 215 disclosures in this same time period suggest Bush got sloppy in its last years, so this may have reflected a need to clean that up, too.
- August 2016. There was an update to the Woods Procedure and 2009 Memorandum in 2016, but the filing doesn't describe it (or why).

How OI's accuracy reviews work:

As DOJ has revealed in the past, OI's Oversight Section does FISA oversight reviews at 25-30 (of the 56) Field offices a year. They review the compliance with minimization and querying

procedures, the latter of which only recently got imposed.

In addition, they do an accuracy review of a subset of FISA applications that reviews:

- The facts establishing probable cause to believe that the target is a foreign power or agent thereof
- The verification process that the targeted facilities are used by, owned by, possessed by, or in transit to or from the target
- The basis for the US person status of the target
- The factual accuracy of the related criminal matters section, such as types of criminal investigative techniques used (e.g., subpoenas) and dates of pertinent actions in the criminal case

As the filing makes clear, "these accuracy reviews do not check for the completeness of the facts included in the application," which is the real source of the problems identified in the Page application. Right now, OI is "considering" expanding a subset of reviews to check for completeness, but is not committing to doing so.

Two things are of interest here. The definition of FISA "facilities," has long been of interest, not least because the government likes to pretend it consists mostly of phone numbers and email addresses. Indeed, 2007, FISC approved a broad definition of "facility" that can be used to target suspects of a terrorist group (and, presumably now, other clandestine networks), in large numbers. The language in this bullet all

comes from statute, but the use of "about to be used," would support the kind of monitoring of a new computer or phone we've heard of. This language also might support the monitoring of Amazon and bank accounts. The validation of facilities (both to be sure Page was still using them and to sustain FISA coverage to be able to get to new ones) was something important to the renewal process of Page's FISAs.

The language on criminal matters reveals how the FBI deals with parallel investigations, such as the one that happened with Keith Gartenlaub (where they government used both criminal subpoenas and FISA searches, which ultimately led to a child porn prosecution unrelated to any FISA suspicion). I knew this section existed, but thought it did so just to comply with a statutory requirement, when targeting US persons, that their clandestine activities may involve violating criminal statute. But this language makes it clear that this part of the FISA application also serves to provide notice of such parallel proceedings. Given that the FBI has to declare that they can't obtain information under FISA via other means, this raises more questions about the degree to which FISA can serve as an additive authority for certain kinds of investigations that will let the FBI use techniques they wouldn't use otherwise.

The section on OI reviews also reveals that they review FISA applications before information from an application is used in a proceeding against someone picked up in it.

> OI has also, as a matter of general practice, conducted accuracy reviews ofFISA applications for which the FBI has requested affirmative use ofFISA-obtained or -derived information in a proceeding against an aggrieved person.

It's hard to tell whether this is a good thing or a bad thing. That's because it doesn't necessarily help the defendant. After all, if

the OI review discovers problems with FISA applications, then DOJ would be more likely to parallel construct the prosecution, thereby burying a problematic part of the investigation. And a review at the period when FBI is already considering using it in a proceeding is too late in the process to protect the civil liberties of the person who is aggrieved if there was a problem with the application.

The section describing these reviews also reveals that, “in enumerated exceptions,” the FBI doesn’t have to rely on “the most authoritative document that exists” in the Woods Procedure. A footnote makes clear that one of the areas where the application itself may not include everything in the underlying documentation is human sources, which permits the lawyer submitting the application to ask a human source coordinator to verify the application matches the underlying documentation. Remember that the language about Christopher Steele used in the Carter Page application didn’t come from his handling agent’s assessment, but it came from a serialized intelligence report based off his reporting. That’s not what this describes, but may be one of the reasons the FBI took that shortcut.