

CROSS FILINGS: NSD FIGURES OUT HOW WOODS PROCEDURES ARE SUPPOSED TO WORK

JustSecurity has an odd panel on FISA yesterday reviewing the DOJ IG Memo showing that Carter Page's FISA applications were actually *better than average* with respect to compliance with Woods Procedures. It includes Andrew McCabe (who signed the last, most problematic, Carter Page application) and Mary McCord (who was involved in the review process for three of the applications, and even told McCabe they needed more information on Christopher Steele before the first one), but it doesn't disclose their roles in the process. It also doesn't include defense attorneys among its experts, who might provide more context about problems identified with FISA long before the Page investigation.

I'm particularly interested in McCord's comments. She likens this to what happened in the wake of *Brady v Maryland*, and then again in the wake of Ted Stevens' trial, as prosecutors came to a more proactive view on discovery (she doesn't explain how prosecutors fucked up so badly on the Stevens case if any cultural change had really happened).

While I applaud McCord for taking a more skeptical view of the Page surveillance at several points (as described in the DOJ IG Report), her focus on Brady and her confidence in cultural change is misplaced, in my opinion.

As bmaz would and has been screaming, Brady isn't actually the standard here. Franks is. He has argued that the affidavits targeting Page would never have reached the standard under Franks, and thus if Page were treated like any other defendant (of course, he was never

charged), these affidavits would have passed muster.

I would respond to bmaz that you'd never even get to a Franks hearing because no defendant has ever gotten review of their application. Now that Ric Grenell has declassified the bulk of Carter Page's applications, it should be far easier to declassify applications going forward. Liza Goitein included providing review to defendants among her recommendations for reforms next month, but none of the other panelists did.

But all the panelists seem to have missed something that happened at the same time as the memo was released. As I noted in my own review of the MAM, NSD (which McCord led for a key period during which Page was surveilled) has been doing their reviews in such a way as to make the Woods Procedures useless. They were giving FBI Agents four weeks advance notice before conducting a review, which meant they never did what DOJ IG did – see whether the FISA file had the paperwork that under the Woods Procedure it should have.

Before any of these reviews happen, the field offices are told which applications will be reviewed, which gives the case agents a chance to pull together the documentary support for the application.

Thus, prior to the FBI CDC or NSD OI review, field offices are given advance notification of which FISA application(s) will be reviewed and are expected to compile documentary evidence to support the relevant FISA.

If the Woods Procedures were being followed, it should never be the case that the FBI needs to compile documentary evidence before the review; the entire point of it is to ensure the documentary evidence is in the file

before any application gets submitted. Once you discover that all the FBI and OI reviews get advance notice, you're not really reviewing Woods Procedures, it seems to me, you're reviewing paperwork accuracy.

[snip]

To check the accuracy of the Woods Files, they should *with no notice* obtain a subset of them, as DOJ IG just did, and see whether the claims in the report are documented in the Woods File, and only after that do their onsite reviews (with notice, to see if there was documentation somewhere that had not been included in the file). That might actually be a better way of identifying where there might be other kinds of problems with the application.

It turns out, on the same day that DOJ IG released their MAM, NSD submitted a FISA filing updating James Boasberg on what they're doing with reviews.

The panel deals with the DOJ IG Management Advisory Memorandum showing that Carter Page's applications were in no way unique, with regards to Woods Procedure violations; in fact, his application had *fewer* Woods Procedure violations, on average, than the 29 applications DOJ IG reviewed. Much of the discussion focuses on

The results (rightly) look really stinky for the FBI. But in fact, the MAM revealed that NSD – McCord's old department, which thus far had (possibly for jurisdictional reasons) avoided most criticism for FISA – was conducting reviews that made the Woods Files largely useless as an oversight tool (and therefore as a guarantee of accuracy). That's because Office of Intelligence has been giving FBI Field Offices four weeks advance warning about which files they're going to review.

DOJ IG describes its finding that these results aren't being used in better fashion.

(4) FBI and NSD officials we interviewed indicated to us 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 enhancements to training and improvements in the process, or increased accountability measures.

At least given their description, however, I think they've found something else. They've confirmed that – contrary to DOJ's description to FISC that,

OI also conducts accuracy reviews of a subset of cases as part of these oversight reviews to ensure compliance with the Woods Procedures and to ensure the accuracy of the facts in the applicable FISA application.

OI is actually only doing the latter part, measuring the accuracy of the facts in an applicable FISA application. To check the accuracy of the Woods Files, they should *with no notice* obtain a subset of them, as DOJ IG just did, and see whether the claims in the report are documented in the Woods File, and only after that do their onsite reviews (with notice, to see if there was documentation somewhere that had not been included in the file).

As I lay out in a timeline below, DOJ was submitting a response to the FISA Court on April

3, even as DOJ IG was releasing its MAM. In that response (therefore three days before my post), they said they'd stop giving advance notice for the accuracy reviews, which will make Woods Procedures newly useful.

NSD has determined that commencing with accuracy reviews starting after September 30, 2020, it will not inform the FBI field offices undergoing NSD oversight reviews which applications will be subjected to accuracy reviews in advance of those reviews. This date is subject to current operational limitations the coronavirus outbreak is imposing. NSD would not apply this change in practice to accuracy reviews conducted in response to a request to use FISA information in a criminal proceeding, given the need to identify particular information from particular collections that is subject to use. NSD also would not apply this change in practice to completeness reviews (discussed further below); because of the pre-review coordination that is contemplated for those reviews.

NSD will expect that the relevant FBI field offices have ready, upon NSD's arrival, the accuracy sub-files for the most recent applications for all FISAs seeking electronic surveillance or physical search. NSD will then, on its arrival, inform the FBI field office of the application(s) that will be subject to an accuracy review. If the case will also be subject to a completeness review, pre-coordination, as detailed below, will be necessary. The Government assesses that implementing this change in practice will encourage case agents in all FISA matters to be more vigilant about applying the accuracy procedures in their day-to-day work.

In addition, although NSD's accuracy

reviews allow NSD to assess individual compliance with the accuracy procedures, NSD's historical practice has been to allow agents to obtain documentation during a review that may be missing from the accuracy sub-file. NSD only assesses the errors or omissions identified once the agent has been given the opportunity to gather any additional required documentation. While the Government believes that, in order to appropriately assess the accuracy of an application's content, it should continue to allow agents to gather additional documentation during the accuracy review, it assesses that this historical practice has not allowed for the evaluation of how effective agents have been at complying with the requirement to maintain an accuracy sub-file, complete with all required documentation.

As a result, NSD will tally and report as a part of its accuracy review process all facts for which any documentation, or appropriate documentation, was not a part of the accuracy sub-file at the time the accuracy review commenced. Agents will still be given the opportunity to gather such documentation during or after the accuracy review, so that NSD can assess if the application contains any inaccuracies with respect to the application's content. NSD will include these additional findings in its summaries of accuracy reviews (discussed herein) and also will include such findings in its biannual reports to the Court regarding its accuracy and completeness review findings. NSD assesses that by implementing this additional metric, it will encourage case agents to be more vigilant about adhering to the FBI's accuracy procedures.

It's rare that a bureaucracy of any sort – much less government, much less part of government that pertains to national security – recognizes that its paperwork isn't serving the function it is supposed to. But here, even though DOJ IG didn't make this observation, NSD figured it out and committed to change their processes.

There are more comments about NSD's review processes that deserve more attention. For example, I said that NSD should start reporting the results of its accuracy (and the new completeness) reviews in its Semiannual FISA Reports (which currently focus only on 702). As part of a seeming effort to rebut Amicus David Kris' comment that DOJ has the resources to do oversight right, the filing suggested that other oversight obligations take up too much time to dedicate more time to traditional FISA reviews (though NSD did increase attorney resources in OI's oversight section by 50%).

(U) OI's Oversight Section, which is responsible for oversight and compliance relating to the IC's implementation of FISA authorities, currently has approximately 20 attorneys and must rely on assistance from the Operations Section of OI to staff the existing accuracy reviews. Moreover, OI's Oversight Section conducts oversight of other FISA authorities, including at other IC agencies, and conducts oversight of FBI's implementation of its Attorney General's Guidelines for Domestic FBI Operations. The latter involves conducting onsite National Security Reviews at approximately 15 FBI field offices annually. In addition, OI's oversight and compliance responsibilities with respect to the IC's implementation of Section 702 consumes substantial OI resources. 14 Furthermore, the Oversight Section fulfills statutorily-required reporting obligations to Congress on behalf of the Department. These reports, which

describe, in detail, the Government's use of FISA authorities and all identified compliance incidents, run hundreds of pages in the aggregate and most must be completed twice a year. As the Court is aware, the Oversight Section also investigates and reports to the Court all FISA compliance incidents involving IC agencies. Additionally, among other responsibilities, the Oversight Section prepares quarterly reports for the Court to inform the Court about certain Section 702 compliance incidents and provide updates on previously reported Section 702 compliance incidents. The Oversight Section also conducts onsite reviews at multiple IC agencies.

It seems like this process could be more streamlined, though. It also seems like you don't need attorneys to do all these reviews. Accuracy and completeness are not legal issues, they're reading issues.

Ultimately, the way to ensure that smart changes by NSD actually have the desired effect is to give any defendant against whom FISA information is used in prosecution review of his or her FISA file. But it remarkable to see that McCord's successor, John Demers, is actually making the kinds of changes that could make the Woods Files function the way they've been supposed to for two decades.

Timeline

- March 23: FBI Associate Deputy Director of FBI responds to draft MAM
- March 27: Associate Deputy Attorney General Brad Weinsheimer responds to draft MAM

- March 30: DOJ IG completes a Management Advisory Memorandum on its efforts to clean up FISA
- March 31: DOJ IG publicly releases the MAM
- April 3: James Boasberg orders the government to report whether errors found in the 29 applications that DOJ IG reviewed are material
- April 3: DOJ National Security Division submits Response to March 5 order incorporating changes to Woods Procedure reviews
- April 6: I point out that NSD should change how they do Woods Procedure reviews