DOJ INSPECTOR GENERAL REPORT ON THE TENSIONS CREATED BY PARALLEL CONSTRUCTION

Before you read this report on tensions between FBI Office of General Counsel's National Security and Cyber Law Branch (NSCLB) and DOJ's National Security Division (NSD), remember the following things:

- In significant part because of jurisdictional limitations, DOJ Inspector General blamed FBI for *everything* that went wrong with the Carter Page FISA applications, and in the wake of that report, Bill Barr, Trump, and his allies in Congress used it to damage the career every single person at FBI who had been involved with the Russian investigation (except for the two guys who made multiple mistakes in dismissing the Alfa Bank allegations).
- John Durham then used that damage to attempt to coerce testimony, sometimes false, from FBI figures in his never-ending witch-hunt.
- For the same jurisdictional

limitations, any abuse John Durham engages in or Andrew DeFilippis engaged in can only be reviewed by DOJ's feckless Office of Professional Responsibility, not by DOJ IG.

- After that report, DOJ IG developed proof that Carter Page was not special; by some measures, his FISA application was *better* than those of people who hadn't been fired by a future President for precisely the same foreign ties that the FISA was meant to assess.
- The NSD then dismissed those findings from DOJ IG, largely by adopting a standard different from the one that had been adopted with Carter Page (it's unclear whether DOJ IG is still trying to resolve these discrepancies or not).
- None of the stuff that happened thus far addresses the substantive problems with the Page applications.

The report talks about the "historically strained" relationship between these two sets of lawyers, without laying out the role that the Carter Page review — and the Trump DOJ's use of DOJ IG to punish his enemies generally — did to make things worse.

That tension plays out in the report. For

example, Horowitz only provides recommendations to NSCLB and FBI's OGC, not NSD. In each case, FBI is directed to coordinate with NSD, without the counterpart recommendation. The tension is particularly critical to something that DOJ IG cannot, therefore, recommend: That NSD have access to FBI case files, which would allow them to play a more proactive role in the vetting of FISA applications. It would also make NSD share in accountability for any problems that arise (as they should have with Page), though, and unsurprisingly NSD doesn't want that.

> NSCLB attorneys expressed their concern that although NSD attorneys assist agents in drafting the FISA applications submitted to the FISC, they do not share accountability when compliance incidents are reported to the FISC. Although NSCLB officials acknowledged the oversight role that NSD has related to FISA, they emphasized the need for FISA to be a team effort and not an adversarial relationship and stated their belief that the number of compliance incidents would be reduced if NSD would review the FISA-related documents housed in the FBI's IT systems. However, according to NSCLB attorneys, NSD has expressed disinterest in ensuring FISA compliance on the front end and has said that it is the agent's responsibility to identify in the first instance, anything that is necessary to be reported to the FISC. We were also told by NSCLB attorneys that NSD has said that it is concerned that an appearance of NSD attorneys having knowledge of the underlying documents would imply that they have full knowledge of all of the supporting documents, which would not be practicably feasible for them to have.
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> A senior NSD official that we spoke with told us that NSD has limited resources, and it does not have direct access to FBI systems.

NSD wants none of this accountability and DOJ IG can't make them.

For all the tensions, though, it's a fascinating report, as useful for providing both historical and bureaucratic background on this process as anything else. Much of this tension arises out of DOJ's admitted parallel construction — using alternative sources for certain facts to protect sources and methods. There's even a paragraph that describes NSCLB's role as such (though not by name).

> For instance, we were told that NSD relies on NSCLB to review documents such as search warrants and criminal complaint affidavits for law enforcement or other sensitivity concerns before they are filed with the court by prosecutors. When this process is not followed, it can become particularly problematic if NSCLB later finds that sensitive information was contained in the court filing. For example, if the FBI used a sensitive platform to obtain information, prosecutors may decide that a description of the platform is needed to support the search warrant or complaint. In such instances, NSCLB may ask prosecutors to anonymize that information. However, if NSCLB does not review the case agent's draft affidavit in support of a search warrant or complaint before the agent provides it to the prosecutor, sensitive information may be exposed. Also, senior NSCLB officials told us that including an NSCLB attorney early in this process can provide an effective means of ensuring prosecutors have information necessary to support their case. Specifically, NSCLB can help identify which information may be difficult to use from a classification and sensitivity perspective and provide suggestions to obtain the information from an independent source without implicating

> sensitive techniques.

The report claims the particular roles of each side are not well-defined. I'm not convinced that's the case, though. As described, NSCLB protects national security and the secrets that go along with that (including secret intelligence techniques). And NSD fulfills the needs of prosecutions as well as "protect[ing] FISA as a tool so the FBI can continue to use it."

In one telling explanation,

> NSCLB senior officials highlighted the fact that criminal prosecution is not necessarily the FBI's aim in every national security investigation and that the FBI sometimes appropriately pursues investigations with the aim of disrupting threats or collecting intelligence.20

These are tensions, but they are not necessarily bad tensions. And it doesn't seem like this report considers how this compares to the relationship between a prosecutor and a case agent where there are none of the national security (and classification) concerns.

In any case, the report attributes that tension for two radically different understandings about the standards involved in two FISA concepts, including one — material facts that must be disclosed to the FISA Court — that was at the core of the Carter Page case.

In the case of materiality, the FBI seems to be playing dumb (perhaps to avoid opening a whole historical can of worms given the aftermath of the Page IG Report).

> The 2009 Accuracy Memorandum defined material facts as, "those facts that are relevant to the outcome of the probable cause determination." The FBI had interpreted this standard as facts that

> are outcome determinative, or facts that would invalidate the legal determination. However, NSD had applied a broader standard than the FBI, with NSD's interpretation of material facts being facts that are capable of influencing the requested legal determination. An NSD senior official told us that the FBI's viewpoint was based on the FBI's involvement in the criminal law enforcement arena where the threshold for materiality in a criminal search warrant is outcome determinative. This official also stated that most material errors reported to the FISC do not invalidate the legal determination, and that the FISC still expects for these types of errors to be reported to them.
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> Senior NSD officials stated NSD had applied the same standard for at least 15 years and NSCLB had known of NSD's application of the standard because it was reflected in previous Rule 13 notices filed with the FISC. For example, in the OIG's report on the FBI's Crossfire Hurricane Investigation, NSD supervisors stated that "NSD will consider a fact or omission material if the information is capable of influencing the court's probable cause determination, but NSD will err on the side of disclosure and advise the court of information that NSD believes the court would want to know."41 Similarly, in a FISC filing on January 10, 2020, NSD referred to this statement in the OIG report while describing its oversight and reporting practices when errors or omissions are identified.42 However, senior NSCLB officials told us that NSCLB was first made aware of NSD's interpretation of the materiality standard in the OIG's Crossfire Hurricane Investigation report and NSD's subsequent January 2020 FISC filing.43

In the case of the claimed differing understand of querying techniques under 702 (in which, by my read, both sides were pretending this hasn't dramatically changed as FISC became aware of how 702 collection was really used), NSD seems to engage in the knowing bullshit.

> In contrast, NSD told us that the query standard has been the same since 2008. A senior NSD official stated that the FBI had a fundamental misunderstanding of the standard and that compliance incidents were not identified sooner because NSD can only review a limited sample of the FBI's queries and NSD improved upon its ability to identify non-compliant queries over time.

I knew the standard the FBI was using. It is not credible that I knew what it was and NSD did not.

In both cases, this claimed disagreement seems to be an effort to avoid applying the standards adopted post-Page to the FISA approach (and not just on individualized orders) applied before then.

The report confirms something that had been obvious from heavily redacted sections of the last several 702 reauthorizations: FBI had been using 702 collection (and FISA collection generally) to vet potential confidential human sources.

> For example, we were told disputes occurred related to queries conducted for vetting purposes.52 Specifically, according to the FBI, it was concerned that as a result of the change to the query standard it could no longer perform vetting queries on raw FISA information before developing a confidential human source (CHS). FBI officials told us that it was important for agents to be able to query all of its databases, including FISA data, to

> determine whether the FBI has any derogatory or nefarious information about a potential CHS. However, because of the implementation of the 2018 standard, the FBI is no longer able to conduct these queries because they would violate the standard (unless the FBI has a basis to believe the subject has criminal intent or is a threat to national security). According to the FBI, because its goal is to uncover any derogatory information about a potential CHS prior to establishing a relationship, many agents continue to believe that it is irresponsible to engage in a CHS relationship without conducting a complete query of the FBI's records as "smoking gun" information on a potential CHS could exist only in FISA systems. Nevertheless, these FBI officials told us that they recognize that they have been unsuccessful when presenting these arguments to NSD and the FISC and, as noted below, they follow NSD's latest revision of query standard guidance.

Using back door searches to vet informants is an approved use on the NSA and, probably, CIA side. In the FBI context, my understanding is that informants understand they're exchanging Fourth Amendment protections as part of their relationship with the FBI. Perhaps if the FBI had simply made this public, it could have been an approved use. Instead, we're playing all these games about the application.

The report describes — but doesn't really address — how the tension between NSCLB and NSD undermined National Security Reviews which,

> examine (1) whether sufficient predication exists for FBI preliminary and full investigations, (2) whether a sufficient authorized purpose exists for assessments, (3) whether tools utilized during or prior to the assessment are

> permitted, and (4) all aspects of National Security Letters issued by the FBI.

There was a huge backlog of these until NSD hurriedly closed a bunch of them in 2020, which is the kind of thing that when Bush did them with FISA tools in 2008 was itself a symptom. So, too, may be some policy memos that happened in Lisa Monaco's first days and John Demers' last ones.

The section I found to be most interesting (and one that DOJ IG could not or chose not to address in recommendations) pertains to the tension over declassification of material for prosecutions.

> According to the FBI's Declassification of Classified National Security Information Policy Guide, NSCLB must participate in the approval of discretionary declassification decisions concerning FBI classified information. NSCLB assists in ensuring that the declassification of either FISA derived material or other FBI classified information is: (1) necessary to protect threats against national security; (2) will not include classified materials obtained from foreign governments; (3) will not include classified materials obtained from other U.S. agencies (unless authorized by the originating agency); (4) will not reveal any sensitive or special techniques; and (5) will not adversely impact other FBI investigations.
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> [snip]
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> Despite the FBI's limited support role, NSD and DOJ staff we spoke with told us that they believe NSCLB has involved itself inappropriately in discovery matters. For example, an NSD senior official told us that NSCLB has

> attempted to second guess discovery decisions made by prosecutors. This NSD official believed that NSCLB's role is not to participate in the determination of how the prosecutors choose to protect a piece of classified information, but instead to identify information that is classified, its level of classification, and how a declaration from the owner of that information would explain to a court why the information presents a national security concern. According to this official, NSCLB may rightfully conclude the information is too sensitive to provide in discovery and, as a result, prosecutors may have to dismiss that case. However, we were told that discovery issues do not generally reach that point. We also were told by some AUSAs that they have had to remind NSCLB attorneys that AUSAs have the discovery obligations to courts and will make discoverability determinations.
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> An official from one USAO told us that, while it is understood that satisfying discovery obligations is the responsibility of the prosecutor, the FBI's interest in protecting its equities may justify challenging a prosecutor's discovery decisions. The official explained that such back and forth may be necessary to reach a balance between the needs of discovery and the protection of sensitive information; however, when the FBI's role in the process extends into making assessments of what is discoverable it can slow the process down and necessitate the prosecutor asserting authority over discovery decisions.
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> [snip]
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> By contrast, senior NSCLB officials noted that several factors outside of NSCLB's control can cause the

> declassification process to take a considerable amount of time. According to these officials, the FBI addresses the risk of disclosing information that could cause significant harm to the American public by using a thorough, deliberate process which can be impacted by the volume of information, the sensitivities involved, and the resources available to conduct a review. In defending NSCLB's role in the discovery process, a senior NSCLB official expressed the view that AUSAs tend to err on the side of making material discoverable, even when it involves national security information, and do not appreciate how the disclosure of information may affect other FBI or USIC operations. This official told us that NSD often prefers to declassify all information that could be relevant, necessary, or discoverable to ease the prosecution of the case or the discovery process. .

This is, in my opinion, the description of what lawyers for an intelligence agency would do. That seems to be the role NSCLB is playing, for better or worse. In light of the cases described out of which the more specific tensions arise, I find the complaint that NSCLB is delaying discovery rather telling. If prosecutors choose to make a case that NSCLB believes would have been better handled via disruption, for example, or are entirely frivolous, such tensions are bound to surface. That said, if FBI's General Counsel's Office has been coopted people trying to protect sources and methods, NSD lawyers are going to look like the only ones guarding due process (though I'm sure they would with CIA's lawyers, too).

There's a lot of worthwhile observations in this report. But it's hard to shake the conclusion that the most important takeaway is that DOJ cannot continue to have such asymmetry in the

oversight that FBI and DOJ experience.