

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

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January 16, 2020

The Honorable James E. Boasberg
Presiding Judge
U.S. Foreign Intelligence Surveillance Court
E. Barrett Prettyman Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Dear Judge Boasberg:

We respectfully write with questions about the Foreign Intelligence Surveillance Court's (FISC) commitment to protecting the civil liberties of American citizens when federal law-enforcement applies for electronic surveillance. We appreciate a prompt and thorough response to this important matter.

On December 9, 2019, the Justice Department Office of Inspector General (OIG) released a report documenting how the Obama Administration's Federal Bureau of Investigation (FBI) spied on Carter Page, a U.S. citizen associated with the campaign of then-candidate Donald J. Trump.¹ The OIG report details the FBI's "serious performance failures," including 17 "significant errors or omissions" in the FBI's four applications to electronically surveil Mr. Page under the Foreign Intelligence Surveillance Act (FISA).² The FISC approved each of the four applications, signing the final orders "as proposed by the government in their entirety, without holding a hearing."³ Justice Department Inspector General Michael Horowitz characterized the FBI's conduct as "illegal surveillance" of Mr. Page.⁴

On December 17, 2019, in response to the flagrant problems identified by the OIG report, then-FISC Presiding Judge Rosemary Collyer issued a public order highly critical of the FBI's misconduct.⁵ Judge Collyer wrote:

The FBI's handling of the Carter Page applications, as portrayed in the OIG report, was antithetical to the heightened duty of candor [to the FISC in *ex parte*

¹ Dep't of Justice Off. of Inspector Gen., Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation (Dec. 2019) [hereinafter "DOJ OIG FISA report"].

² *Id.* at xii, 378.

³ *Id.* at 156, 209, 219, 227.

⁴ "Examining the Inspector General's Report on Alleged Abuses of the Foreign Intelligence Surveillance Act": Hearing before the S. Comm. on the Judiciary, 116th Cong. (2019).

⁵ Order, *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, No. Misc. 19-02 (FISA Ct. Dec. 17, 2019).

proceedings]. The frequency with which representations made by FBI personnel turned out to be unsupported or contradicted by information in their possession, and with which they withheld information detrimental to their case, calls into question whether information contained in other FBI applications is reliable. The FISC expects the government to provide complete and accurate information in *every* filing with the Court. Without it, the FISC cannot properly ensure that the government conducts electronic surveillance for foreign intelligence purposes only when there is a sufficient factual basis.⁶

Judge Collyer required the FBI to explain in a sworn written submission how it would ensure that it no longer misleads the FISC in applications for electronic surveillance under FISA.⁷

On January 10, 2020, you appointed David Kris to serve as *amicus curiae* “to assist the Court in assessing the government’s response” to Judge Collyer’s order.⁸ If the FISC’s goal is to hold the FBI accountable for its serious misconduct, Mr. Kris does not appear to be an objective—or likely effective—*amicus curiae* for several reasons. At minimum, the selection of Mr. Kris creates a perception that he is too personally invested on the side of the FBI to ensure it effectuates meaningful reform.

First, Mr. Kris, a former senior Obama Justice Department official, has frequently defended the FBI’s existing electronic surveillance practices.⁹ In February 2018, as the House Permanent Select Committee on Intelligence (HPSCI) prepared to release a memorandum of findings about FISA abuses, Mr. Kris boasted about the rigorous process for FISA warrants.¹⁰ He wrote:

Based on my familiarity with the FISA process and the people who run it, I have high confidence that they would have provided the court with enough information to meaningfully assess [Christopher] Steele’s credibility and the provenance of the other information on which they relied.¹¹

Mr. Kris was wrong. After the HPSCI memorandum was publicly released, Mr. Kris wrote that its “claim that the FBI misled the court was itself misleading.”¹² The OIG report, of course, validated the findings of the HPSCI memorandum and showed that Mr. Kris’s “high confidence” in the FBI was misplaced.

Second, Mr. Kris has seemingly prejudged the FBI’s conduct with respect to Carter Page. In July 2018, after the government released redacted portions of FISA applications for Carter

⁶ *Id.* at 3 (emphasis in original).

⁷ *Id.* at 3-4.

⁸ Order Appointing an Amicus Curiae, *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, No. Misc. 19-02 (FISA Ct. Jan. 10, 2020).

⁹ See, e.g., Rachel Maddow (MSNBC television program July 23, 2018) (interview of David Kris).

¹⁰ David S. Kris, *The three dangers in releasing the Nunes memo*, Wash. Post, Feb. 2, 2018.

¹¹ *Id.*

¹² David Kris, *The irony of the Nunes memo*, Lawfare Blog, Mar. 1, 2018.

Page, Mr. Kris opined that the applications “already substantially undermine the President’s narrative and that of his proxies, and it seems to me very likely that if we get below the tip of the iceberg into the submerged parts and more is revealed it’s going to get worse, not better,” for Mr. Page.¹³ However, contrary to Mr. Kris’s views then, the OIG report and Inspector General Horowitz’s testimony confirmed that the FBI illegally surveilled Mr. Page.¹⁴ The allegations that Mr. Page acted as an agent of a foreign power have not been proven true.¹⁵ In fact, Inspector General Horowitz debunked Mr. Kris’s accusations, testifying that Mr. Page was “on the receiving end” of an unfair FISA process.¹⁶

Third, when the OIG report documented serious FBI misconduct, Mr. Kris seemed to minimize the FBI’s actions. Although he acknowledged in an interview that the FBI’s errors and omissions were “very significant and disturbing,” he also said that the FBI’s misconduct was not “political” and attributed it to sloppiness on the part of the FBI.¹⁷ Inspector General Horowitz testified, however, that the OIG review did not rule out political bias or intentional misconduct.¹⁸

As Judge Collyer wrote, the *ex parte* nature of the FISC requires a heightened duty of candor from the Justice Department and FBI in seeking electronic surveillance.¹⁹ The FISC too has a heightened responsibility to protect the civil liberties of American citizens in these *ex parte* proceedings. To assist us in understanding the reasons for your selection of Mr. Kris as *amicus curiae* and to better understand how the FISC could allow the FBI to commit such serious misconduct in *ex parte* proceedings, we ask that you provide the following information:

1. Please identify with specificity all the candidates you considered to serve as *amicus curiae* to assess the government’s response to Judge Collyer’s order dated December 17, 2019.
2. Please explain whether the FISC reviewed and considered Mr. Kris’s writings and statements about Carter Page and the FBI’s electronic surveillance of Mr. Page prior to appointing Mr. Kris as *amicus curiae*. If not, please explain why not.
3. Please explain whether the FISC reviewed and considered Mr. Kris’s writings and statements about the memorandum issued by the House Permanent Select Committee on

¹³ Rachel Maddow, *supra* note 9.

¹⁴ *Examining the Inspector General’s Report on Alleged Abuses of the Foreign Intelligence Surveillance Act*, *supra* note 4; DOJ OIG FISA report, *supra* note 1.

¹⁵ *See, e.g.*, U.S. Dep’t of Justice, Report on the Investigation into Russian Interference in the 2016 Presidential Election (Mar. 2019).

¹⁶ *See Examining the Inspector General’s Report on Alleged Abuses of the Foreign Intelligence Surveillance Act*, *supra* note 4 (statement of Michael E. Horowitz, Inspector Gen., Dep’t of Justice) (“I do not think the Department of Justice fairly treated these FISAs, and he [Carter Page] was on the receiving end . . .”).

¹⁷ Nat’l Pub. Radio, Former U.S. Assistant Attorney General for National Security on DOJ watchdog report (Dec. 9, 2019).

¹⁸ *Examining the Inspector General’s Report on Alleged Abuses of the Foreign Intelligence Surveillance Act*, *supra* note 4.

¹⁹ Order, *supra* note 5, at 2.

Intelligence dated January 18, 2018, prior to appointing Mr. Kris as *amicus curiae*. If not, please explain why not.

4. Please explain what specific steps the FISC will take to better protect the civil liberties of American citizens who are not represented in *ex parte* proceedings for electronic surveillance.
5. Please explain whether the FISC intends to review FBI filings in other matters to determine whether, as Judge Collyer wrote, “the government . . . provide[s] complete and accurate information in every filing with the Court.”²⁰ If not, please explain why not.
6. Please explain whether you believe that the FISC bears any responsibility for the FBI’s illegal surveillance of Carter Page.
7. Please explain with detail when the FISC first received any indication that information contained in the FBI’s surveillance applications for Carter Page was misleading or false. Please explain what actions, if any, the FISC took at that time to address the FBI’s misconduct.
8. Please explain whether the FISC conducted any internal review to examine the accuracy or validity of information contained in the FBI’s surveillance applications for Carter Page prior to the release of the Justice Department OIG’s report. If so, please explain the scope and process of the FISC review and any findings or information it generated.
9. Please explain with specificity what disciplinary action, if any, the FISC intends to pursue for attorneys who knowingly filed false or misleading information with the FISC with respect to applications to surveil Carter Page.

We respectfully ask that you provide a detailed answer to each question by number so that we may assess whether you have adequately addressed each topic. Please provide the requested information as soon as possible but no later than 5:00 p.m. on January 30, 2020.

²⁰ *Id.* at 3.

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The Committee on Oversight and Reform is authorized by the Rules of the House of Representatives to examine “any matter” at “any time.”²¹ If you have any questions about this request, please contact Committee staff at (202) 225-5074. Thank you for your prompt attention to this important matter.

Sincerely,



Jim Jordan
Ranking Member



Mark Meadows
Ranking Member
Subcommittee on Government Operations

cc: The Honorable Carolyn B. Maloney
Chairwoman

The Honorable Gerry Connolly
Ranking Member
Subcommittee on Government Operations

²¹ Rules of the House of Representatives, R. X, 116th Cong. (2019)