Durham Russia Probe Acquittals Show Need For FISA Reform

By **Kevin Carroll** (November 30, 2022)

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Both trial defendants in special counsel John Durham's investigation of FBI misconduct in its probe of Russian interference in the 2016 U.S. presidential election were acquitted on May 31 and Oct. 18, respectively.

Juries found bureau sources Michael Sussman and Igor Danchenko not guilty of making knowing and willful materially false statements to federal law enforcement.

FBI lawyer Kevin Clinesmith previously pled guilty to that same crime — Title 18 of the U.S. Code, Section 1001 — related to a Foreign Intelligence Surveillance Act application for court authorization to eavesdrop on President Donald Trump's campaign adviser Carter Page.

Durham is one of the most respected prosecutors of his generation, and his demonstrated past good judgment should earn him the benefit of the doubt regarding his exercise of discretion in cases where much of the investigative record remains classified.

At the same time, a perception that the FBI mishandled its Crossfire Hurricane investigation and related investigations may yet have policy impact. Already, U.S. House of Representatives Judiciary Committee Ranking Member Jim Jordan, R-Ohio, is calling for FISA not to be reauthorized, while Rep. Paul Gosar, R-Ariz., goes so far as to propose defunding the bureau.

FISA needs reform, but policy proposals such as Jordan's and Gosar's are ill-advised. A far better course would be to add an important safeguard to FISA, to make sure that only operationally trained intelligence personnel — not lawyers or analysts — conduct counterespionage investigations, and to refrain from misapplying the false statements statute to human sources.

Intelligence comes in several forms, including human intelligence from spies; imagery intelligence from satellites and reconnaissance aircraft; measurements and signatures from technical sensors; and signals intelligence from intercepted and decoded email and voice communications.

Whatever the merits of the criticisms of FISA from the left or the right, the reality is that any modern president — in executing constitutional duties as commander in chief of the armed forces and author of U.S. foreign policy, pursuant to the treaty-making power[1] — is going to make use of signals intelligence.

The Allies might not have prevailed in World War II had they not broken German and Japanese codes; certainly, the war would have gone on for more years, costing millions more lives, if Prime Minister Winston Churchill and President Franklin Roosevelt had lacked discreet access to enemy communications.

Signals intelligence can provide leaders with strategic warning of planned attacks. Even in peacetime, U.S. policymakers find great utility in reading transcribed intercepts of their foreign counterparts' communications about diplomatic matters.

Beyond national security, American law enforcement has engaged in wiretapping since the 19th century. There was little regulation in this area until 1939, when the U.S. Supreme Court held in Nardone v. U.S.[2] that the Communications Act, by which the Federal Communications Commission mandated common carriers to require appropriate authorization to intercept communications,[3] applied to federal law enforcement.

The court had previously declined in 1928 to find that the Fourth Amendment barred the use of evidence from warrantless wiretapping in Olmstead v. U.S.[4]

FISA, introduced by Sen. Ted Kennedy, was enacted in 1978 in response to intelligence community misconduct revealed by the congressional Church and Pike Committees in 1975-76. It limited presidential power to collect signals intelligence inside the U.S. by placing such operations under the supervision of federal judges who sit by designation on the Foreign Intelligence Surveillance Court, or FISC.

Some argue that the statute is unconstitutional because it judicially limits executive power in a core national security area, and the statute bows to reality in allowing the attorney general to authorize emergency surveillance without reference to the courts.

When they enacted FISA, then-President Jimmy Carter and the 95th Congress focused on pursuing Cold War foreign enemies while protecting domestic political dissidents' rights.

They did not think of stateless terror groups using mobile phones to send emails. Unfortunately, the government did not intercept communications originating overseas from known al-Qaeda members to the future 9/11 hijackers inside the U.S., before these terrorists killed nearly 3,000 people in New York, Virginia and Pennsylvania in 2001.

As a result, the aperture for FISA collection substantially widened under President George W. Bush. In the aftermath of the attack, the National Security Agency implemented what became known, after its disclosure by The New York Times, as the Terrorist Surveillance Program,[5] and by the end of 2001, collection expanded further via a statutory revision to FISA through the Patriot Act.

Changes allowed the government to obtain a court order to eavesdrop on the communications of "a group engaged in international terrorism" when "a significant purpose of the surveillance is to obtain foreign intelligence information."[6] Previously, intelligence collection needed to be the primary purpose for such surveillance.

This led to an artificial bifurcation of FBI investigations as being either criminal or national security-related, a distinction that is difficult to make regarding international terrorism, which is both a crime that may be prosecuted by the U.S. Department of Justice, and an act of war to be prevented by the CIA or avenged by the military.[7]

Inevitably, FISA — like any tool citizens give to the fallible people who comprise our government — is misused from time to time. Despite repeated good faith efforts toward better compliance, congressionally mandated audits again and again find the NSA and FBI misusing FISA,[8][9] angering civil libertarians and privacy advocates in both parties.

Presidents long engaged in surveillance of political rivals. President Richard Nixon believed, probably inaccurately, that Lyndon Johnson bugged his campaign plane in 1968, and Nixon's campaign attempted to bug Democratic National Committee headquarters in 1972.

Attorney General Robert Kennedy authorized electronic surveillance of Martin Luther King Jr. — ostensibly because the civil rights leader associated with a known American Communist Party member,[10] but in practice, these bugs and wiretaps were used to threaten King with the exposure of his extramarital affairs.[11]

The late U.S. Circuit Judge Laurence Silberman, tasked when he served as deputy attorney general to review J. Edgar Hoover's secret files after the FBI director's death, was appalled by the dirt Hoover collected on prominent persons, in part to curry favor with the presidents of both parties that he served. Silberman, a law-and-order conservative, stated that this assignment was "the single worst experience of my long governmental service" and described what the FBI had done as "heinous."[12]

FISA sought to end such misconduct. And yet, during President Barack Obama's administration, FISC-authorized surveillance of Israeli officials led to collection of their conversations with Republican members of Congress and leaders of American Jewish groups who shared doubts about U.S. policy toward Iran.

This incident has been characterized as an inappropriate practice known as reverse targeting, which allows the government to listen to Americans' communications in ways courts would never allow.

Republican suspicions of FISA now center upon the FISC's authorization of surveillance on Trump campaign aide Carter Page. Page, a former U.S. naval intelligence junior officer, was approached by Russian intelligence to spy for Moscow.

While Page informed the government about his relationships with known Russian intelligence officers, it appears he did not inform them about all of his contacts with one such officer. Yet Page did cooperate at some level with the government against the Russians.[13]

Page then suddenly appeared as an unlikely foreign policy adviser to candidate Trump, understandably triggering U.S. intelligence's concerns about clandestine Russian influence on that campaign, given Trump's public remarks about Vladimir Putin.[14] The FBI reasonably sought, and obtained, FISC authorization to surveil Page to determine if he was an agent under Russian control.

No evidence developed through the surveillance suggested that Page was working for the Russians. Yet, when the FBI sought to reauthorize the FISA coverage during the Trump administration, bureau lawyer Clinesmith altered an email regarding Page by inserting the words "not a source," when the email had in fact confirmed Page's relationship with the government.

Clinesmith's supervisor relied on the altered email in signing the FISA renewal application. Misinformed by the government, the court extended the authorization. This was the solid case in which Durham obtained a guilty plea from Clinesmith for his false statement.

Clinesmith's misconduct could just as well have happened in an ordinary search warrant application to a federal magistrate in a regular criminal case. But the fact that his false statement was made in a FISA application related to Trump has congressional Republicans concerned,[15] and some of a mind to not reauthorize FISA. Yet the government's need for signals intelligence will not go away.

Foreign adversaries will continue to target senior officials of both parties as possible witting

or unwitting intelligence sources. U.S. Senate Select Committee on Intelligence Member Dianne Feinstein, D-Calif., and House Permanent Select Committee on Intelligence Member Eric Swalwell, D-Calif., for example, were targeted by Chinese intelligence: Feinstein's chauffeur was a Chinese agent,[16] as was a suspected paramour of Swalwell.[17]

Russian intelligence similarly targeted officials of the National Rifle Association,[18] which is closely aligned with the Republican Party.

The FBI will need both human and signals intelligence to uncover hostile intelligence officers clandestinely seeking to suborn American politicians, and then to offer these politicians defensive briefings. This is reportedly what happened in Swalwell's case,[19] whereupon he broke off his liaison.[20]

However, without guardrails, signals intelligence collection for claimed national security purposes will inevitably stray toward political blackmail. Yet Putin's close associate Yevgeny Prigozhin recently admitted that Russia has interfered in U.S. elections: "[W]e are interfering, and we will continue to interfere. Carefully, accurately, surgically and in our own way, as we know how to do."[21]

As the FBI and DOJ will sooner or later be called upon again to investigate a counterintelligence matter related to a political candidate, some statutory rules for agents and prosecutors are better than no rules at all. What can be done to reform FISA?

Traditional criminal search warrant applications are ex parte affairs in which magistrates rely upon law enforcement and its affiants to tell the truth. No defense lawyers are in chambers to argue against the issuance of warrants.

However, magistrates have considerable experience with criminal law and procedure. Warrant applications are sometimes denied. Criminal evidence will eventually be provided to defense attorneys under the U.S. Supreme Court's 1963 decision in Brady v. Maryland,[22] and unlawfully obtained evidence is subject to suppression hearings before being used at trial.

In contrast, FISC judges and law clerks rely entirely upon Justice Department assertions about national security. While the chief justice hand-picks FISC judges from the district court bench, few jurists have significant prior experience with intelligence. For many years, the FISC never denied an application, denying only one of 8,164 applications from 2009-13,[23] for example. Moreover, the existence of FISA surveillance is rarely revealed to a target.

This closed system is ripe for abuse. Although FISA was amended in 2015 to allow amicus curiae to argue against the government, amici have had little influence in increasing the adversarial process, as FISC can choose when to use them, and it determines the scope of their arguments.

As a needed safeguard, the government should welcome the addition of security-cleared federal public defenders into the FISA application process to argue to the FISC, and the appellate FISC Court of Review when appropriate, that the Fourth Amendment prohibits granting a particular application.

Federal public defenders, some of whom have extensive experience defending national security cases, should put the government to its proof before the FISC and FISC Court of

Review.

Many FISA applications have strong bases and are routinely renewed for good reasons; e.g., anyone who followed Trump national security adviser Michael Flynn's case might come away with the impression that there is continuous FISA coverage of the Russian embassy in Washington.

But good defenders likely would have raised concerns about what was effectively surveillance of U.S. elected officials and American Jewish leaders speaking to Israeli diplomats about public policy. They also would have pressed the DOJ about whether Page was or was not a CIA source.

Durham's hard, failed cases against Sussman and Danchenko raise different concerns. They pose questions about whether lawyers and analysts of any security service, trained neither as criminal investigators nor human intelligence case officers, should be conducting counterespionage operations, and relatedly, misapplying Section 1001 to intelligence sources.

In the Sussman and Danchenko cases, alleged false statements were given by human sources providing purported counterintelligence information to bureau officials, not trained as so-called 1811s: the badge-and-gun criminal investigators who are graduates of the FBI Academy, or equivalent credentialing courses such as the Federal Law Enforcement Training Center.

Nor were these bureau officials graduates of the Field Tradecraft Course that trains CIA and military officers, and a few law enforcement personnel including some FBI agents, in espionage.

The Field Tradecraft Course takes about five months to certify its graduates in the rudiments of the recruitment cycle: first spotting, assessing and developing potential human sources based on their access to adversaries' classified information, their motivations and vulnerabilities for sharing it with the U.S., and their suitability for a clandestine relationship with our intelligence services; and then recruiting, handling and gently retiring such spies.

Denied-area operations against hard targets such as the Russians require many more months of challenging counter-surveillance training.

Instead, the reportedly false information about Russia's Alfa Bank having a secret computer link to the Trump Organization,[24] and Trump's colorful sexual exploits in Moscow,[25] was received by the general counsel of, and an analyst for, the FBI in the Sussman and Danchenko cases — James Baker and Brian Auten.

Despite other undoubted professional qualifications, neither man had the training or experience trying to handle intelligence sources, especially so-called walk-ins, a species of informant that presents both opportunities and dangers. Some of the best sources and worst double-agents ever encountered by U.S. intelligence were walk-ins.[26]

Litigators are apt to think that they can easily master other professions, and intelligence analysts often assume they can conduct operations, while few would think a criminal investigator or intelligence operations officer could try a case, argue an appeal, or write and brief an intelligence assessment for the president. These are separate, equally difficult and important jobs.

Here, the analyst erred when he offered Danchenko a success fee of $1 million if he could somehow prove salacious allegations against Trump.[27] Analysts perform the vital task of reaching informed judgments, based upon studying all-source information gathered by intelligence collectors, and briefing their conclusions to policymakers. It is a very academic discipline. Analysts are not trained to recruit and handle spies.

The FBI should never make this mistake again. The bureau should only allow its trained agents to receive reports and conduct investigations.

Where foreign counterintelligence operations are involved, it should earlier and more closely involve the CIA — whose officers, by the same token, would be ill-advised to try to investigate bank robberies, kidnappings or homicides by themselves.

The precedent of prosecuting human intelligence sources for false statements is a poor one. The CIA's mantra is that every source's interaction with the agency should be a positive one, so that the informed word on the street is that it's safe to speak in confidence to its case officers.

If the DOJ prosecutes sources whom it later determines — only in the department's view — to have lied to the FBI, potential sources will wisely stop speaking to the bureau.

A New York City Police Department first-grade detective once joked to me that if he and his colleagues had access to Section 1001 as the FBI did, that police department would successfully close 100% of its cases. The DOJ is now too reliant on the false statements statute as an easy button to make stand-alone prosecutions in cases in which other crimes cannot be proven.

Forbearing from bringing such charges against intelligence sources is a good place to begin reforming that bad practice.

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[1] U.S. Const. Art. II, Sect. 2.

[2] 308 U.S. 338 (1939).

[3] 47 U.S.C. § 229(b)(1)(A).

[4] 277 U.S. 438 (1928).

[5] See J. Risen, Bush Lets U.S. Spy on Callers Without Courts, New York Times (Dec. 16, 2005).

[6] 50 U.S.C. §1801(a)(4), §1804(a)(6)(b).

[7] See Richard Henry Seamon and William Dylan Gardner, The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement, 28 Harv. J.L. Pol'y 319 (2005) for an extensive discussion on the effects of the differing purpose tests.

[8] See, e.g., NSA Office of the Inspector General Releases Three Reports (Feb. 17, 2016), available at https://www.nsa.gov/Portals/75/documents/news-features/declassified-documents/ig-reports/3IGReports-Sealed.pdf.

[9] See DOJ OIG Releases Audit Report on the FBI's Execution of its Woods Procedures for Applications Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons (Sep. 30, 2021), available at https://oig.justice.gov/news/doj-oig-releases-audit-report-fbis-execution-its-woods-procedures-applications-filed-foreign.

[10] See D. Garrow, The FBI and Martin Luther King, The Atlantic (Jul.-Aug. 2022).

[11] See Documentary Exposes How The FBI Tried To Destroy MLK With Wiretaps, Blackmail, NPR (Jan. 18, 2021).

[12] L. Silberman, Hoover's Institution, Wall Street Journal (Jul. 20, 2005).

[13] See Office of the Inspector General, U.S. Department of Justice, Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation (Dec. 2019) at 125, 158.

[14] See, e.g., A. Kaczynski, 80 times Trump talked about Putin, CNN (Mar. 2017).

[15] See M. Matishak, House GOP group prepping for surveillance renewal fight, The Record (Oct. 5, 2022).

[16] See M. Thiessen, Explain the Chinese spy, Sen. Feinstein, Washington Post (Aug. 9, 2018).

[17] See A. Phillips, What we know about Rep. Eric Swalwell's ties to an alleged Chinese spy, Washington Post (Dec. 11, 2020).

[18] See R. Helderman, Russian agent's guilty plea intensifies spotlight on relationship with NRA, Washington Post (Dec. 13, 2018).

[19] See B. Allen-Ebrahimian, Suspected Chinese spy targeted California politicians, Axios (Dec. 8, 2020).

[20] See Y. Steinbuch, Swalwell mum on sex with China spy, but family remains Facebook friends with honeytrap, New York Post (Dec. 9, 2020).

[21] Russia's Prigozhin admits interfering in U.S. elections, Reuters (Nov. 7, 2022).

[22] 373 U.S. 83 (1963).

[23] See C. Schultz, The FISA Court Has Only Denied an NSA Request Once in the Past 5 Years, Smithsonian Magazine (May 1, 2014).

[24] See J. Dunleavy, FBI opened Alfa-Bank inquiry based on 'referral' from DOJ — but it

came from Sussmann, Washington Examiner (May 23, 2022).

[25] See J. Ross, Christopher Steele: Yes, Trump's Pee Tape 'Probably' Exists, Daily Beast (Oct. 18, 2021).

[26] On the one hand, John Walker, a U.S. Navy cryptographer who sold naval communications codes to the Soviets from 1967-85, whose espionage might have caused the U.S. to lose a hot war with the USSR, was simply turned in to the FBI by a phone call from his bitter ex-wife. See P. Earley, Family of Spies, Bantam, New York (1989).

On the other, Cuba distracted U.S. intelligence and wasted its limited resources with as many as twenty double agents walking in to American embassies and volunteering bogus counterterrorism information in the months after 9/11. See J. Tamayo, Embassy walk-ins were Cuba spies sent to mislead U.S., South Florida Sun-Sentinel (Oct. 20, 2009).

[27] See M. Cohen, FBI offered Christopher Steele $1 million to prove dossier claims, CNN (Oct. 14, 2022).