

**FISA Reform Opinion by David Kris**  
**August 2020**

Thank you for the request to provide input to the Privacy and Civil Liberties Oversight Board (PCLOB) regarding the Foreign Intelligence Surveillance Act (FISA) and the exercise of FISA authorities. I am happy to do so. However, in light of the fact that normal prepublication review is not currently available, I will limit my input to previously cleared and obviously unclassified information (this submission has been reviewed and cleared).

**1. Findings by the DOJ Inspector General.** My comments on this topic are principally set forth in a long essay, [Further Thoughts on the Crossfire Hurricane Report](#), which was published in December 2019, and in the *amicus curiae* [brief](#) that I filed with the FISA Court in January 2020. I recently summarized those two documents in a shorter essay, [What Hard National Security Choices Would a Biden Administration Face?](#), published in May 2020:

A Biden administration will need to confront two big issues under the Foreign Intelligence Surveillance Act (FISA). First, of course, accuracy reform at the FBI, stemming from the Justice Department inspector general’s investigation into the FBI’s probe into Russian election interference, known as [Crossfire Hurricane](#), and the inspector general’s initial [memo](#) on the broader audit of FISA accuracy—both of which found significant problems. In light of my role as *amicus curiae* in the FISA Court on FBI accuracy, I will limit myself to excerpts from the public [brief](#) I filed in January 2020 and the *Lawfare* [post](#) I wrote in December 2019, before my appointment, which together make clear that the issues with FISA are significant and enduring. (I am writing here solely in my individual and personal capacity, of course, not as an *amicus* or for other amici or the court.)

In the December 2019 *Lawfare* post, I opined that the FBI’s “errors in the FISA applications on Carter Page were significant and serious”; that they were “not, in my experience, the kind of errors you would expect to find in every case”; and that indeed “the closest case to Crossfire Hurricane that I can think of arose almost 20 years ago,” meaning that the failures in the Page case were the worst in a generation. I explained how the FBI’s conduct in Crossfire Hurricane was, in several specified ways, “not acceptable ... not acceptable ... not acceptable ... not acceptable [and] ... certainly not acceptable.” Anticipating the inspector general’s broader audit, which at that time was still pending but which later identified significant problems in several other FISA cases, I explained that “the most likely explanation for a pattern of FISA failures—if that is what the audit finds—will be cultural,” and that “more will be required” because “[e]nsuring accuracy and fidelity to facts and rules is not a one-and-done undertaking.”

I made similar points in my *amicus* brief in January, arguing that the various “[c]orrective Actions” being proposed by the FBI to address accuracy issues were “insufficient and must be expanded and improved in order to provide the required assurance [of accuracy] to the Court.” In particular, I identified a need for change in three main areas:

improved FISA standards and procedures, expanded training, and broader audits and accuracy reviews. The FBI and the FISA Court later [accepted](#) many of these proposals for additional reforms.

Going forward, among the most significant issues for a possible Biden administration will be how to use field agents as FISA declarants, swearing the truth of information provided by the FBI to the FISA Court (the Justice Department [advised](#) the FISA Court that it will do this but not how it will be done); possible disclosure of FISA declarations under the [Jencks Act](#) if those field-agent declarants testify in criminal cases or other proceedings; and how to overcome the challenges of finding errors of omission rather than commission in FISA applications. (Although it is out of scope for this post, a broader review of permissible law enforcement investigative methods—including the use of deception—would also be possible.)

These difficult and wide-ranging issues will not be fully resolved fully by November 2020 or by January 2021. Apart from addressing the many and varied particular reforms now underway, a Biden administration will likely feel the need to foster continued cultural change at the FBI, including cooperation with the National Security Division and relations with the FISA Court. The FBI has richly earned some—but certainly not all—of the criticism it has endured over the past several years, and it will take a deft combination of carrots and sticks to make the necessary improvements in the months and years ahead. This reflects the fact that, despite its well-documented problems, the bureau remains a world-class law enforcement, security and intelligence agency staffed by a large number of dedicated and patriotic public servants.

I should emphasize one point in the analysis above that may be of particular interest to the PCLOB and that may not be as widely understood as I assumed would be the case. For many years, civil libertarians have argued (to no avail) that properly cleared defense counsel should be able to review the affidavits underlying FISA applications that produce evidence to be used in a proceeding against their clients. My discussion of the Jencks Act is meant to highlight the idea that using field agents as FISA affiants might produce that result.

**2. FISA Statute, including technological issues.** My foremost technological concern for FISA and related surveillance authorities is the growing indeterminacy of location on the internet and other networks. Even after the FISA Amendments Act of 2008 (FAA), FISA and other surveillance (collection) rules depend significantly on the government’s ability to determine the location of communicants, and in some cases the location of other things. To the extent that such determinations cannot be made consistently, reliably, and quickly, the rules will tend to fail. I addressed this concern in depth in a paper published in February 2016, [Trends and Predictions in Foreign Intelligence Surveillance](#) (see pages 22-25). I also discussed it, and several related technological developments, in [Digital Divergence](#), a paper that was published in May 2017. There, I argued that advancing digital network technology challenges both privacy and security, and I tried to be very specific both as to the relevant challenges and the possible

legislative and other remedies for those challenges, including as to FISA. I will not repeat the discussion here, but I hope that you will find it useful.

A related concern is the way in which technological changes, and legislative responses to those changes, tend to increase the complexity of the rules governing surveillance. I addressed this in a series of four blog posts, [Thoughts on a Blue-Sky Overhaul of Surveillance Laws](#), that was published in May 2013. There, I discussed the problem of location-indeterminacy, the partial solution to that problem embodied in the FAA, the increased legal and operational complexity created by the FAA, the threats to security and privacy triggered by that complexity, the arguments in favor of undertaking a blue-sky (total) overhaul of our surveillance laws, and the enormous risks involved in that undertaking. I continue to believe that location-based paradigms for regulating surveillance are fragile in light of technological and other developments, and I continue to be tempted by the idea of a blue-sky overhaul, but I also continue to be more than a little pessimistic about our present ability to accomplish it and develop a viable replacement paradigm.

**3. Operational Environment, including impact of expired FISA authorities and proposed reforms to FISA.** My comments on this topic are principally set forth in the May 2020 [Biden](#) essay cited above:

Three provisions of FISA have sunset—allowing [roving wiretaps](#), [lone wolf](#) surveillance targets and compelled production of [tangible things](#). The Justice Department [says](#) the lack of these authorities is limiting investigations. Either Congress will enact new legislation to reauthorize these three provisions or it will not. If a new law is passed, it will come with many new requirements and issues that will need to be addressed—perhaps more new requirements than are in [this House bill](#), which was supported by a bipartisan group that included [Attorney General William Barr and the leadership of the House Judiciary Committee](#). The Senate recently passed an [amended version](#) of the House bill, expanding the new requirements, which the [Justice Department has strongly opposed](#) on the grounds that it “would unacceptably degrade our ability to conduct surveillance of terrorists, spies and other national security threats”—and as of this writing the House has not acted on the Senate amendments. On May 26, the President [tweeted](#), “I hope all Republican House Members vote NO on FISA until such time as our Country is able to determine how and why the greatest political, criminal, and subversive scandal in USA history took place!” If new legislation is not enacted, the lack of FISA authority will have ongoing investigative impact—particularly concerning tangible things—and will create pressure to use other authorities more aggressively, including national security letters and grand jury subpoenas, which could create other problems. For example, national security letters have, in the past, produced their own [inspector general reports](#) documenting misuse.

For now, my assessment is that the Department of Justice (DOJ) would rather live with the sunsets than accept the limits added to the Senate bill. That preference may or may not be wise, but I think it is likely to control for the remainder of the 116<sup>th</sup> Congress. The reasons are

evident from the developments described above: (1) the Department wanted the three FISA provisions renewed; (2) it supported the House renewal bill but opposed the Senate bill on the grounds that it contained too many restrictions; (3) it then apparently asked the President to threaten a veto, and he complied via Twitter; but (4) the President effectively opposed the legislation on the grounds that the renewal bills contained too few restrictions rather than too many; at which point (5) the legislative enterprise appeared to collapse. I doubt it will be revived until after the election.

I hope these comments, which again are limited by the relative unavailability of prepublication review, are helpful to the PCLOB.

-- David S. Kris