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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT

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CLERK OF COURT

(U) IN RE CARTER W. PAGE, A U.S. PERSON

Docket Numbers: 16-1182, 17-0052, 17-0375, & 17-0679

**(U) GOVERNMENT'S MOTION TO PERMIT THE DISCLOSURE OF
INFORMATION CONTAINED IN THE CLASSIFIED APPENDIX TO THE REPORT
ON MATTERS RELATED TO INTELLIGENCE ACTIVITIES AND INVESTIGATIONS
ARISING OUT OF THE 2016 PRESIDENTIAL CAMPAIGNS**

(U) By this motion, the Government, through the undersigned Department of Justice (DOJ) attorney, seeks an order authorizing the disclosure of certain specified information acquired from one or more of the four Foreign Intelligence Surveillance Act (FISA) applications targeting Carter W. Page (Page) in docket numbers 2016-1182, 2017-0052, 2017-0375, and 2017-0679 (the Page FISAs) as comporting with Sections 1801(h)(1), 1809(a)(2), 1821(4)(A), and 1827(a)(2) of FISA.

(U) Special Counsel John H. Durham has closed his investigation into potential crimes relating to intelligence activities and investigations arising out of the 2016 presidential campaigns, including the FBI's Crossfire Hurricane investigation, and has prepared a final report titled, *Report on Matters Related to Intelligence Activities and Investigations Arising out of the 2016 Presidential Campaigns* (the Report). Although the Report is unclassified, a classified appendix to the Report includes information collected pursuant to the Page FISAs in three paragraphs. In this motion, the Government proposes parameters for the use and disclosure of

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Classified by: Assistant Attorney General for National Security
Derived From: DOJ/NSI SCG-1, 1.6; FBI NSICG INV
Declassify on: 20480607

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the classified appendix and explains why such limited use and disclosure of Page FISA information is consistent with the relevant statutory provisions. *See* 50 U.S.C. §§ 1801(h)(1), 1809(a)(2), 1821(4)(A), and 1827(a)(2). This Court previously authorized the use and disclosure of Page FISA information where “necessary to remedy or deter the types of harm at which §§ 1809 and 1827 are addressed,” *In Re Carter W. Page*, docket nos. 16-1182, 17-52, 17-375, 17-679, dated June 25, 2020 (J. Boasberg) (June 25, 2020 Order), and the Government requests an Order authorizing the use and disclosure of the Page FISA information in the classified appendix on those same grounds.

I. (U) BACKGROUND

(U) On December 9, 2019, the DOJ Office of the Inspector General (OIG) released a report titled, *Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation* (the OIG Report), which detailed material omissions and misstatements with respect to the Page FISAs.¹ As set forth therein, DOJ assessed that at least as of the time of the third and fourth applications targeting Page in docket numbers 17-375 and 17-679, if not earlier, there was insufficient predication to establish probable cause to believe that Page was acting as an agent of a foreign power. On January 7, 2020, the Court ordered the Government to provide information regarding the handling and disposition of information acquired pursuant to the Page FISAs, and an explanation as to why the retention of such information, and any contemplated use or disclosure of it, comports with Sections 1801(h)(1), 1809(a)(2), 1821(4)(A),

¹ (U) *See also* letters submitted by the Government pursuant to Rule 13(a) of the Court’s Rules of Procedure dated July 12, 2018, October 25, 2019, November 27, 2019 and December 9, 2019.

and 1827(a)(2) of FISA.² The Government filed an initial Response on February 5, 2020 (February 5 Response), and three Supplemental Responses on February 28 (February 28 Response), April 17, 2020 (April 17 Response), and October 21, 2020 (October 21 Response).

(U) On June 25, 2020, the Court issued an Opinion and Order Regarding the Use and Disclosure of Information obtained or derived from the Page FISAs, which found that the criminal provisions in Sections 1809(a)(2) and 1827(a)(2) applied to the use or disclosure of information acquired from the above dockets.³ Beginning with a previously recognized exception to Sections 1809(a)(2) and 1827(a)(2) for actions necessary to mitigate or prevent the very harms those sections are designed to address, the Court set parameters for the use or disclosure of Page FISA information in five limited circumstances described by the Government and analyzed by the Court.⁴ Of particular relevance here, the fifth circumstance authorized the

² (U) It is a criminal offense to “intentionally” engage in “electronic surveillance under color of law except as authorized by” statute, or disclose “information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance” that had not been properly authorized. § 1809(a). It is similarly an offense to intentionally conduct a physical search under color of law within the United States to obtain foreign intelligence information “except as authorized by statute,” or to intentionally disclose or use information obtained by such a search “knowing or having reason to know that the information was obtained through physical search not authorized by statute [...]” § 1827(a).

³ (U) The Office of the Director of National Intelligence, in consultation with DOJ and the FBI, publically released a declassified and redacted version of the Court’s Opinion on September 11, 2020. The publically released Opinion can be found at https://www.intelligence.gov/assets/documents/702%20Documents/declassified/June_2020_FISC_Opinion.pdf

⁴ (U) More specifically, following its analysis of applicable FBI minimization procedures as required by FISA (Sections 1801(h)(1) and 1821(a)(2)), as well as Sections 1809(a)(2) and 1827(a)(2) and certain limited exceptions to those criminal provisions of the Act, the Court set parameters for the use or disclosure of Page FISA information in the following five circumstances: (1) certain identified ongoing third-party litigation pursuant to the Freedom of Information Act (FOIA); (2) ongoing and anticipated FOIA and civil litigation with Page; (3) FBI review of the conduct of its personnel involved in the Page investigation; (4) DOJ OIG monitoring of the implementation of one of the

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use or disclosure of Page FISA information “as necessary to investigate or prosecute potential crimes relating to the conduct of the Page or Crossfire Hurricane investigations,” and noted that this paragraph applied to, but was not limited to, “the review being lead by United States Attorney Durham.” *Id.* at 21. The Court also required that the Government file a written report on the retention, use, or disclosure of Page FISA information every six months (the Semi-Annual Reports). *Id.*

(U) In the January 27, 2023 Semi-Annual Report, the Government advised that Special Counsel Durham was concluding his investigation and would likely be sharing Page FISA information with Government agencies for the purposes of vetting a draft memorandum, but that the Government would inform the Court if the final memorandum included Page FISA information before it was made public. Special Counsel Durham has produced an unclassified report and a classified appendix to the report, and limited Page FISA information is included in the classified appendix. In particular, limited Page FISA information is described in sections of the classified appendix addressing how the FBI assessed, explained, or excluded potentially relevant information from the Page FISA applications. The unclassified report and classified appendix have been provided by Special Counsel Durham to the Attorney General and Office of the Deputy Attorney General. The unclassified report was publicly released on May 15, 2023.

[REDACTED] On page 25 of the Classified Appendix, one paragraph refers to a communication involving Page made in 2016. That communication was publicly discussed in part during Page’s testimony before the United States House Permanent Select Committee on

recommendations (Recommendation 9) stemming from the OIG Report; and (5) the investigation and prosecution of Government personnel relating to the Crossfire Hurricane investigations. *Id.* at 20-21.

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Intelligence (HPSCI) on November 2017, and is quoted in the publicly available United States Senate Select Committee on Intelligence's (SSCI) *Report on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election*, vol. 5, at 549 (SSCI Report). The Classified Appendix refers to FBI assessments discussed in the first Page renewal application based on this communication and also discusses information the communication did not contain. The other paragraphs that refer to Page FISA information are on pages 28-29 of the Classified Appendix and reference a [REDACTED]

II. (U) PROPOSED PARAMETERS FOR USE OR DISCLOSURE OF THE LIMITED PAGE FISA INFORMATION IN THE CLASSIFIED APPENDIX

(U) While the Report has been publicly released, the unredacted version of the classified appendix will only be disclosed within the executive branch to the Office of the Attorney General (OAG) and the Office of the Deputy Attorney General (ODAG), which have supervisory authority over the investigation led by Special Counsel Durham; the Office of the Director and Deputy Director of the FBI, who have a need to understand the decisions made by Special Counsel Durham in his report, and the implications to the FBI of those decisions, including if they are relevant as part of any potential disciplinary review; and senior officials in the Department's Office of the Inspector General (OIG), who have oversight responsibilities for the Department, including the authority to initiate criminal investigations based on allegations of wrongdoing.⁵

(U) Additionally, the Government proposes keeping copies of the unredacted classified appendix stored in a U.S. Government Sensitive Compartmented Information Facility (SCIF) so

⁵ (U) In addition, limited personnel within DOJ's National Security Division (NSD) were provided a final draft copy of the classified appendix in order to prepare this motion.

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that the Page FISA information can be shared with select members of Congress with oversight responsibility for FISA. In particular, the Government recommends that members and limited staff of HPSCI, SSCI, the United States Senate Committee on the Judiciary (SJC), the House Judiciary Committee, and the Gang of Eight⁶ be given restricted access to the unredacted Classified Appendix. To ensure that the document is not further used or disclosed while retained in the U.S. Government SCIF, it will be kept secure with access only to those individuals needed to facilitate the review described above. Additionally, the above individuals will be able to view, but not remove, copy, or duplicate the document.

III. (U) THE PROPOSED LIMITED USE AND DISCLOSURE OF PAGE FISA MATERIAL IS CONSISTENT WITH SECTIONS 1801(h)(1), 1809(a)(2), 1821(4)(A), AND 1827(a)(2) OF FISA

(U) In its June 25, 2020 Order, the Court considered the permissibility of the Government's ongoing retention, use and disclosure of the Page FISA information in the five limited circumstances described above. Regarding retention, the Court noted that neither Sections 1802(h)(1) and 1821(4)(A), nor the FBI's underlying minimization procedures, explicitly required destruction. Nonetheless, the Court noted that it has previously ordered the destruction of information obtained through unauthorized electronic surveillance and/or physical search absent some permissible form of use or disclosure. June 25, 2020 Order at 7. The Court ultimately concluded that "some permissible forms of use and disclosure of Page FISA information" were reasonably anticipated and, accordingly, did not order the destruction of the

⁶ (U) Pursuant to 50 U.S.C. § 3093(c)(2), under "extraordinary circumstances" the President is entitled to limit access to certain intelligence information to eight members of Congress: the leaders of each of the two parties from both the House of Representatives and the Senate as well as the chair and ranking minority members of HPSCI and SSCI.

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Page FISA information. *Id.* The Government submits that the limited sharing described *supra* also constitutes permissible forms of use and disclosure of Page FISA information.

(U) First, the disclosure of the unredacted classified appendix to OAG, ODAG, the Office of the Director and Deputy Director of the FBI, and OIG logically falls within the fifth category set forth in the June 25, 2020 Order. There, the Court set parameters for the use or disclosure of Page FISA information “as necessary to investigate or prosecute potential crimes relating to the conduct of the Page or Crossfire Hurricane investigations...” *Id.* at 21. The Court noted that, “[t]his paragraph applies, but is not limited to, use by, and disclosure by or to, personnel engaged in the review being lead [sic] by United States Attorney Durham.” *Id.* An end of investigation report is an integral part of an investigation, as it explains the investigative findings and prosecutorial decisions of the investigative team. Special Counsel Durham has advised that the Page FISA information included in the classified appendix is necessary to understand his findings and decisions. Because OAG and ODAG have supervisory authority over the investigation, the FBI Office of the Director and Deputy Director need to understand the implications of Special Counsel Durham’s decisions, including if relevant to potential disciplinary reviews, and the OIG has oversight authority over the Department,⁷ disclosure of

⁷ (U) The Government assesses that the disclosure of the limited Page FISA information in the Classified Appendix to the OIG is consistent with both categories 4 and 5 of the Court’s June 25, 2020 Order. June 25, 2020 Order at 20-21. For example, category 5 applies to disclosures necessary to investigate or prosecute potential crimes relating to the conduct of the Page or Crossfire Hurricane investigations. *Id.* at 21. Some of the sub-parts of recommendations from the OIG’s investigation and report remain open. In addition, category 4 of the June 25, 2020 Order permits use or disclosure as necessary to assess the implementation of Recommendation 9 of the OIG report. *Id.* at 20. Recommendation 9 stated that the “FBI should review the performance of all employees who had responsibility for the preparation, review, or approval of the FISA applications [for Page], as well as the managers, supervisors, and senior officials in the chain of command of the Carter Page investigation.” *Id.* The limited Page FISA information described in sections of the Classified Appendix appears to have been included for the

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Page FISA information to certain individuals in these components comports with the parameters set forth in the June 25, 2020 Order.

(U) Second, although not expressly authorized by the June 25, 2020 Order, the Government believes that sharing the unredacted classified appendix with the members of Congress who have oversight responsibility for FISA, the FBI, and the Department of Justice (DOJ) is consistent with the FISA statute. The Government recognizes that it is “not free to depart from the plain meaning of §§ 1809(a)(2) and 1827(a)(2) simply to facilitate actions thought to be reasonable, or even laudable” and that the Court has limited use or disclosure of Page FISA information “only where it has been or can be demonstrated to be necessary to remedy or deter the types of harm at which §§ 1809 and 1827 are addressed.” *Id.* at 20. However, the Government has previously notified the Court of the disclosure of Page FISA material to Congress under the exception articulated in the June 25, 2020 Order. As reported in the October 21 Response, the Government explained that the FBI was sharing Page FISA information with SJC, which was investigating the conduct of Government personnel involved in the Crossfire Hurricane investigation. In particular, the Government noted that SJC’s Chief Investigative Counsel had been provided a document that contained Page FISA information, and that the FBI anticipated that witnesses called before SJC would be required to orally disclose Page FISA information in response to questions posed by the committee. As explained in the October 21

purpose of addressing how the FBI assessed, explained, or excluded potentially relevant information from the Page FISA applications. To the extent this represents new information to the OIG regarding how the FBI personnel assessed, explained, or excluded potentially relevant information from the Page FISA applications, it touches on the performance of FBI personnel who prepared the applications, which would be relevant to recommendation 9 of the OIG report.

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Response, such disclosures to SJC were consistent with the parameters for the use or disclosure of Page FISA information set forth in the June 25, 2020 Order.

(U) While there are not any active investigations by Congress into Crossfire Hurricane, Congress performs ongoing oversight of the FBI, DOJ, and the Government's use of its FISA authority. *See* 50 U.S.C. § 1871. To the extent that the classified appendix provides additional details about how the Government has exercised its authority under the FISA statute, that information is clearly vital to the Congressional oversight function. Indeed, the understanding of precisely what went wrong during Crossfire Hurricane will inform how Congress proceeds in attempting to prevent future unauthorized collections and violations of §§ 1809 and 1827.⁸ Moreover, even if the oversight committees do not reopen their prior investigations into Crossfire Hurricane based on information contained in the classified appendix, future hearings related to FISA may involve discussion of the Crossfire Hurricane investigation and the issues with the Page FISA applications.⁹ Accordingly, it is incumbent upon the Government to provide

⁸ (U) If the Government does not proactively provide access to the classified appendix to facilitate this oversight responsibility, it is likely that Congress will attempt to compel production of the classified appendix through other means. On May 16, 2023, the Attorney General received a letter from HPSCI requesting the transmittal of the classified appendix, noting that pursuant to "House Rule X, the Committee has jurisdiction over all intelligence and intelligence-related activities of the departments and agencies of the U.S. government" and advising that if the classified appendix is not produced in an "expeditious and satisfactory manner, you should expect the Committee to use its additional tools and authorities to satisfy our legislative and oversight requirements." *See Letter to the Attorney General from HPSCI Chairman Michael R. Turner and Ranking Member James A. Himes.*

⁹ (U) For example, in the April 27, 2023 Hearing, "Fixing FISA: How a law designed to Protect Americans Has Been Weaponized Against Them" held by the United States House Judiciary Subcommittee on Crime and Federal Government Surveillance, the opening statement by Chairman Andy Biggs categorized Crossfire Hurricane as a "pretext to illegally spy on Trump campaign associates" during the 2016 campaign, as recorded in a video available at <https://judiciary.house.gov/committee-activity/hearings/fixing-fisa-how-law-designed-protect-americans-has-been-weaponized>.

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a fulsome and accurate record of its investigations into the conduct of Government personnel. Congressional committees with direct FISA oversight authority need access to the Government's investigations of Crossfire Hurricane so they can make informed decisions on whether additional reforms or remedial measures are needed. The Government believes that the limited¹⁰ sharing of the Page FISA information in the classified appendix, some of which was already referred to in the public version of the SSCI Report, to select members of Congress and their staff will ultimately help prevent the types of harms at which Sections 1809 and 1827 are addressed, and therefore meets the implicit exception to those statutes recognized by this Court.

¹⁰ (U) As described *supra*, the parameters for disclosure of the Page FISA information recommended by the Government were designed to prevent any further disclosure of the material. The classified appendix would be retained in restricted access in a U.S. Government SCIF, and members of Congress and their staff granted access would not be permitted to remove, copy, or duplicate the document. Access to the Page FISA information would be provided only to facilitate Congress' lawful oversight of the Government's use of its FISA authority, and no further use or disclosure of the Page FISA information is requested or contemplated.

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IV. (U) CONCLUSION

(U) Accordingly, for the reasons more particularly described above, the Government requests that this Court issue an Order setting additional parameters for the use or disclosure of the limited Page FISA information contained in the classified appendix to the *Report on Matters Related to Intelligence Activities and Investigations Arising out of the 2016 Presidential Campaigns* to select members of Congress. A proposed Order is attached.

Dated: 6/7/23

Respectfully submitted,

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