In a similar vein, Deputy Attorney General Rosenstein stated that "we do not hold press conferences to release derogatory information about the subject of a declined criminal investigation." He went on to say that "[d]erogatory information sometimes is disclosed in the course of criminal investigations and prosecutions, but we never release it gratuitously."[55]

### B. The FBI's Assessment and Investigation of Counterintelligence Matters

This subsection describes the requirements that apply to the FBI's assessments and investigations of counterintelligence matters. The *AGG-Dom* gives the FBI a broad mandate to "detect, obtain information about, and prevent and protect against federal crimes and threats to the national security."[56] These crimes and threats include espionage and other intelligence activities and foreign computer intrusions.[57] The *AGG-Dom* provides that "[t]hese Guidelines do not authorize investigating or collecting or maintaining information on United States persons solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of other rights secured by the Constitution or laws of the United States."[58]

The requirements of the *AGG-Dom* are implemented and expanded upon in FBI policy.[59] In its investigative activities, the FBI is to use less intrusive investigative techniques where feasible, and investigative activity is broken down into various levels. There are also requirements in separate guidelines approved by the Attorney General governing the FBI's use of confidential human sources ("CHSs").[60] In 2020, the Department imposed additional requirements for politically sensitive assessments and investigations and for applications under FISA.

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the unindicted . . . ."); *United States v. Anderson*, 55 F. Supp. 2d 1163 (D. Kan 1999); *United States v. Smith*, 992 F. Supp. 743 (D.N.J. 1998). The Fifth Circuit has stated:

> Nine of the ten persons named in the indictment were active in the Vietnam Veterans Against the War, an anti-war group. The naming of appellants as unindicted conspirators was not an isolated occurrence in time or context. . . . There is at least a strong suspicion that the stigmatization of appellants was part of an overall governmental tactic directed against disfavored persons and groups. Visiting opprobrium on persons by officially charging them with crimes while denying them a forum to vindicate their names, undertaken as extra-judicial punishment or to chill their expressions and associations, is not a governmental interest that we can accept or consider.

*United States v. Briggs*, 514 F.2d 794, 805-06 (5th Cir. 1975) (footnote omitted).

[55] Memorandum for the Attorney General from Rod J. Rosenstein, Deputy Attorney General, *Restoring Public Confidence in the FBI* at 1 (May 9, 2017).

[56] *AGG-Dom* § II.

[57] *Id.* § VII.S.

[58] *Id.* § I.C.3.

[59] *See* FBI, *Domestic Investigations and Operations Guide* (Mar. 3, 2016) (hereinafter "*DIOG*").

[60] These are discussed in Subsection 3 below.

### *1. Use of least intrusive means*

The President has directed that the Intelligence Community "shall use the least intrusive collection techniques feasible within the United States or directed against United States persons abroad."[61] The Intelligence Community includes the intelligence elements of the FBI. The *AGG-Dom* implements this provision and observes that:

> The conduct of investigations and other activities . . . may present choices between the use of different investigative methods that are each operationally sound and effective, but that are more or less intrusive, considering such factors as the effect on the privacy and civil liberties of individuals and potential damage to reputation.[62]

There is additional discussion of requirements for a "sensitive investigative matter" or "SIM," principally in the *DIOG*. One category of SIM is a matter involving a political candidate or a "domestic political organization or individual prominent in such an organization."[63] The definition of a SIM also includes "any other matter which, in the judgment of the official authorizing an investigation, should be brought to the attention of FBI Headquarters and other Department of Justice officials."[64] It goes on to explain:

- In a SIM, "particular care should be taken when considering whether the planned course of action is the least intrusive method if reasonable based on the circumstances of the investigation."[65]

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[61] Executive Order 12333 § 2.4 (Dec. 4, 1981).

[62] *AGG-Dom* § I.C.2.a.

[63] *DIOG* § 10.1.2.1; *see also AGG-Dom* § VII.N.

[64] *AGG-Dom* § VII.N. The *DIOG* says that, "[a]s a matter of FBI policy, 'judgment' means that the decision of the authorizing official is discretionary." *DIOG* § 10.1.2.1. For preliminary or full investigations involving SIMs, there are notice requirements:

> An FBI field office shall notify FBI Headquarters and the United States Attorney or other appropriate Department of Justice official of the initiation by the field office of a predicated investigation involving a sensitive investigative matter. If the investigation is initiated by FBI Headquarters, FBI Headquarters shall notify the United States Attorney or other appropriate Department of Justice official of the initiation of such an investigation. If the investigation concerns a threat to the national security, an official of the National Security Division must be notified. The notice shall identify all sensitive investigative matters involved in the investigation.

*AGG-Dom* § II.B.5.

[65] *DIOG* § 10.1.3.

- More generally, "when First Amendment rights are at stake, the choice and use of investigative methods should be focused in a manner that minimizes potential infringement of those rights."[66]
- "If . . . the threat is remote, the individual's involvement is speculative, and the probability of obtaining probative information is low, intrusive methods may not be justified, and, in fact, they may do more harm than good."[67]

The *DIOG* says that the FBI will "[a]pply best judgment to the circumstances at hand to select the most appropriate investigative means to achieve the investigative goal."[68] At the same time, it "shall not hesitate to use any lawful method . . . even if intrusive, where the degree of intrusiveness is warranted in light of the seriousness of a criminal or national security threat."[69] The factors that may support the use of more intrusive collection techniques include operational security.[70]

### 2. *Levels of investigation*

One significant way that the *AGG-Dom* and the *DIOG* implement the least intrusive means requirement is by describing four different levels of activity. The first is activity that the FBI may conduct without any formal opening or authorization process and is referred to as "activities authorized prior to opening an assessment."[71] The other, more formalized levels of activity are assessment, preliminary investigation, and full investigation. As the level increases, the FBI may use a broader range of techniques:

#### a. Activity authorized before opening an assessment

The *DIOG* states that "[w]hen initially processing a complaint, observation, or information," an FBI employee may take limited steps to evaluate the information. These include looking at government records and at commercially and publicly available information. The employee may also "[c]onduct a voluntary clarifying interview of the complainant or the person who initially furnished the information . . . for the sole purpose of eliminating confusion in the original allegation or information provided." The *DIOG* explains that "[t]hese activities may allow the FBI employee to resolve a matter without the need to conduct new investigative activity."[72] New investigative activity requires the opening of an assessment or predicated investigation.[73]

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[66] *Id.* § 4.4.4.

[67] *Id.*

[68] *Id.* § 4.1.1(F) (bolding omitted).

[69] *AGG-Dom* § I.C.2.a.

[70] *DIOG* § 4.4.4.

[71] *See id.* § 5.1.

[72] *DIOG* § 5.1.1.

[73] *Id.*

b. Assessment

The FBI may open an assessment if it has an authorized purpose and a clearly defined objective. No particular factual predication is required, but the basis for opening an assessment "cannot be arbitrary or groundless speculation." In addition to the techniques that are authorized without opening an assessment, in an assessment the FBI may recruit and use CHSs, conduct physical surveillance in 72-hour increments, and obtain some grand jury subpoenas. An FBI employee should be able to explain the reason for the use of particular investigative methods.[74]

c. Preliminary investigation

The factual predicate required to open a preliminary investigation is "information or an allegation" that a federal crime or threat to the national security "may be" occurring. Authorized investigative methods include undercover operations, trash covers, consensual monitoring, pen registers, national security letters, and polygraphs. The FBI may also conduct physical searches and use monitoring devices that do not require judicial authorization. A preliminary investigation is to last a relatively short time and lead either to closure or a full investigation.[75]

d. Full investigation

The standard for opening a full investigation is "an articulable factual basis for the investigation that reasonably indicates that . . . [a]n activity constituting a federal crime or a threat to the national security . . . is or may be occurring . . . and the investigation may obtain information relating to the activity."[76] The *DIOG* gives as examples of sufficient predication to open a full investigation:

- "[C]orroborated information from an intelligence agency" stating "that an individual is a member of a terrorist group."
- "[A]n analyst discovers on a blog a threat to a specific home builder and additional information connecting the blogger to a known terrorist group."[77]

The FBI may use "all lawful methods" in a full investigation, including court-authorized electronic surveillance and physical searches.[78]

*3. **The Confidential Human Source Guidelines***

In addition to the *AGG-Dom*, the Attorney General has approved separate guidelines governing the FBI's use of human sources. The guidelines in place at the time of Crossfire

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[74] *Id.* §§ 5.1; 18.5; 18.5.8.3.2.

[75] *See id.* § 6.7.2 ("Extensions of preliminary investigations beyond one year are discouraged and may only be approved . . . for 'good cause'"); *see also id.* § 6.7.2.1 (describing "good cause" and focusing on need to move to a full investigation or to closure); *AGG-Dom* § II.B.4.a.ii (requiring approval to extend a preliminary investigation beyond six months).

[76] *Id.* §§ II.B.3.a; II.B.4.b.i.

[77] *DIOG* § 7.5.

[78] *AGG-Dom* § II.B.4.b.ii; *see also id.* § V.A.11-13.

Hurricane required the validation of a CHS when the person was opened as a source.[79] Validation included documenting the person's criminal record and motivation for providing information."[80] Because a source's reliability can change, the guidelines directed the FBI to review each CHS's file "at least annually" and "ensure that all available information that might materially alter a prior validation assessment . . . is promptly reported" to a supervisor and documented.[81]

The guidelines also required that an FBI agent instruct the CHS.[82] Because the instructions are important, another agent or official was to be present as a witness.[83] The agent was to direct the CHS to provide truthful information and to "abide by the instructions of the FBI."[84] If the FBI compensated the CHS, the CHS was "liable for any taxes that may be owed."[85] The guidelines explained that "[t]he content and meaning of each of the . . . instructions must be clearly conveyed" to the CHS.[86] Immediately afterward, the agent "shall require" the CHS "to acknowledge his or her receipt and understanding of the instructions."[87]

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[79] *The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources* § II.A (Dec. 13, 2006), *as amended by* Attorney General Orders 3019-2008 (Nov. 26, 2008) and 3596-2015 (Nov. 18, 2015) (hereinafter "*2006 CHS Guidelines*"). In 2020, the Attorney General approved new CHS guidelines. *The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources* (Dec. 23, 2020) (hereinafter "*2020 CHS Guidelines*"). The *2020 Guidelines* are discussed below in Section III.B.5.b.

[80] The guidelines required the following information as part of the initial validation:

> whether the person has a criminal history, is reasonably believed to be the subject or target of a pending criminal investigation, is under arrest, or has been charged in a pending prosecution;
>
> the person's motivation for providing information or assistance, including any consideration sought from the government for this assistance; [and]
>
> . . . .
>
> any other information that is required to be documented . . . pursuant to . . . FBI policies.

*2006 CHS Guidelines* § II.A.3.c; A.3.d; A.3.f.

[81] *Id.* § II.C. The FBI was to establish procedures to ensure the prompt reporting of information that might alter a prior assessment. *See id.* § II.C.2.

[82] *Id.* § II.B.1.

[83] *Id.*

[84] *Id.* § II.B.1.a; B.1.d.

[85] *Id.* § II.B.2.f.

[86] *Id.* § II.B.3.

[87] *Id.*

The guidelines did not include an explicit requirement to document whether the person had previously been a source of an intelligence or law enforcement agency.[88] Moreover, the FBI was not required to seek or obtain the approval of the Department before using sources to record conversations and obtain information not only from targets of its investigations in Crossfire Hurricane (such as Page and Papadopoulos) but also from a senior campaign official to whom its sources had access.[89]

*4. **Analytic integrity***

The FBI's Counterintelligence Division is an operational component, whereas a separate Directorate of Intelligence provides analytic support.[90] The Counterintelligence Division's policy guidance says that "*[e]ffective* . . . operations are based on integration" of personnel from the two entities who work "toward common goals." Division personnel "must cultivate and develop relationships" with Directorate of Intelligence elements "in order to maximize operational performance." Case agents "should rely on" the Directorate of Intelligence "for strategic and tactical guidance on targeting priorities, *the generation of source debriefing packages, the evaluation of source reporting*, preparation of various raw intelligence dissemination products, and the identification of intelligence gaps."[91]

For the Intelligence Community as a whole, Congress has directed the Director of National Intelligence ("DNI") to assign a person or entity "to be responsible for ensuring that finished intelligence products . . . are timely, objective, independent of political considerations, based upon all sources of available intelligence, and employ the standards of proper analytic tradecraft."[92] The Intelligence Community's Analytic Standards say that analysts "must perform their functions with objectivity and with awareness of their own assumptions and reasoning."[93] They are to "employ reasoning techniques and practical mechanisms that reveal and mitigate bias."[94] Moreover, "[a]ll IC analytic products" should be "[i]ndependent of political consideration" and "not be distorted by . . . advocacy of a particular . . . agenda . . . or policy viewpoint."[95]

Responding to a congressional inquiry, the Intelligence Community's Analytic Ombudsman documented "a few incidents" from 2020 "where individuals, or groups of

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[88] *See id.* § II.A.3.

[89] *See AGG-Dom* §§ V.A.4; VII.O (authorizing consensual monitoring as a technique and requiring Department approval in a "sensitive monitoring circumstance," but not including the monitoring of campaign officials as such a circumstance); *see also Redacted OIG Review* at 30.

[90] The Directorate of Intelligence is part of the FBI's Intelligence Branch. *See FBI Leadership & Structure – Intelligence Branch*, https://www.fbi.gov/about/leadership-and-structure.

[91] FBI Counterintelligence Division, *Counterintelligence Division Policy Directive and Policy Guide* § 5.1 (Nov. 1, 2018) (emphases added).

[92] 50 U.S.C. § 3364(a).

[93] Intelligence Community Directive 203, *Analytic Standards* at 2 (Jan. 2, 2015).

[94] *Id.*

[95] *Id.*

individuals, [took] willful actions that . . . had the effect of politicizing intelligence, hindering objective analysis, or injecting bias into the intelligence process." The Ombudsman's assessment mentioned the reluctance of China analysts "to have their analysis brought forward because they tended to disagree with the Administration's policies." On the other hand, Russia analysts were frustrated because management was "slowing down or not wanting to take their analysis to customers, claiming that it was not well received."[96] The assessment also has a section entitled "historical context." It discusses the politicization of intelligence about Iraq in 2003, but it does not mention Crossfire Hurricane or the Carter Page FISA.[97] The assessment paraphrases former intelligence official Neil Wiley:

> [I]ntelligence is the only great function of state that does not come to top decision makers with an agenda . . . . The purpose of intelligence is to provide objective, unbiased, and policy-neutral assessments. We are, perhaps, most important to decision makers when we bring to them the bad news . . . . This . . . sometimes demands moral courage to carry out. Other institutions are inherently political and are much less likely to bring bad news. If we lose that objectivity, or even are perceived to have lost it, we have endangered the entire reason for us to exist.[98]

*5. **Recently upgraded protections***

a. Investigative activities

The *Sensitive Investigations Memorandum*, promulgated by the Attorney General in 2020, imposes additional approval requirements for politically sensitive activities. If the FBI takes "exploratory investigative steps relating to" a presidential candidate, a senior staff member, or an advisor, it must give prompt written notice to the appropriate Assistant Attorney General and U.S. Attorney. The Attorney General explained that "this includes any person who has been publicly announced by a campaign as a staffer or member of an official campaign advisory committee or group." The same notice requirement applies if the FBI opens an assessment of such a person. If the FBI opens either a preliminary or full investigation of such a person, then

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[96] Barry Zulauf, *Independent IC Analytic Ombudsman's [sic] on Politicization of Intelligence* at 3 (Jan. 6, 2021) (attached to letter from Zulauf to Senators Rubio and Warner (Jan. 6, 2021).

[97] *See id.* at 8.

[98] *Id.* at 9 (italics omitted).

notice to the Department is not enough; the Attorney General must approve the opening of the investigation.[99]

The memorandum also directs:

- Department components to "review their existing policies governing notification, consultation, and/or approval of politically sensitive investigations," provide a summary of those policies, and recommend "any necessary changes or updates."[100]
- The Department to study, after the 2020 elections, "its experiences and consider whether changes" to the requirements in the memorandum are necessary.[101]

The Attorney General recently reaffirmed the need to adhere to the requirements of the *Sensitive Investigations Memorandum* that govern "the opening of criminal and counter-intelligence investigations by the Department . . . related to politically sensitive individuals and entities."[102]

b. CHS guidelines and policy

In 2020, following various OIG reviews, the FBI undertook a "comprehensive review" of the *2006 CHS Guidelines* "to ensure that the FBI's source validation process was wholly refocused, revised, and improved across the FBI."[103] The *2020 CHS Guidelines* thus provide additional direction to the FBI in the handling of human sources. They require information about whether the CHS "is reasonably believed to be a current or former subject or target of an FBI investigation."[104] There is also a new requirement for information about a source's reporting relationship with other government agencies.[105] At the time when the Attorney General approved the *Guidelines*, he also directed that "pending further guidance" he or the Deputy Attorney General must approve "any use" of a CHS "to target a federal elected official or political campaign . . . for the purposes of investigating political or campaign activities."[106]

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[99] *Sensitive Investigations Memorandum* at 2 & n.3.

[100] *Id.* at 3.

[101] *Id.*

[102] Attorney General Memorandum, *Election Year Sensitivities* (May 25, 2022).

[103] Stephen C. Laycock, Memorandum to the Attorney General, *Re: Proposed Revisions to the Attorney General Guidelines Regarding the Use of FBI's Confidential Human Sources* (Dec. 23, 2020).

[104] *2020 CHS Guidelines* § II.A.3.c.

[105] *Id.* § II.A.3.d.

[106] Letter from Attorney General William Barr to FBI Director Christopher Wray (Dec. 23, 2020).

The FBI's *Confidential Human Source Policy Guide*[107] also includes new or strengthened requirements and implements portions of the *Sensitive Investigations Memorandum*. Its requirements include:

- Identifying the specific source-related activities in which FBI intelligence analysts and other non-agent personnel may engage.[108] For example, an intelligence analyst may only contact a CHS or a potential CHS in the presence of a case agent, and an analyst may only accompany an agent to a debriefing of a CHS with supervisory approval.[109]
- Requiring information about "[a]ll likely motivations the CHS could have for providing information."[110]
- Enhancing the requirements for source validation reviews.
- Requiring detailed information and additional approvals in a request to reopen a CHS who was previously closed for cause, either by the FBI or another agency.[111]

Finally, the *CHS Policy Guide* requires a CHS to be treated as "sensitive" and thus subject to more controls based on *either* the position the source holds or the position held by someone the source is reporting on.[112] So, for example, even though a CHS may not hold a position in a campaign, if the source is reporting on such a person he/she would still be treated as sensitive. Post-Crossfire Hurricane, the *Guide* now provides this example:

> A CHS with indirect access to a U.S. Presidential campaign is tasked to report on campaign activities involving possible cooperation with foreign entities to influence the outcome of a U.S. Presidential election. The CHS had only indirect access, but his or her affiliation nevertheless enabled the CHS to be tasked to collect information on the campaign.[113]

c. Defensive briefings

The OIG's review of Crossfire Hurricane discusses defensive briefings for those who may be targets of nefarious activities by foreign powers and, specifically at the time of the

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[107] FBI, *Confidential Human Source Policy Guide* (Dec. 15, 2021) (hereinafter "*CHS Policy Guide*").

[108] *Id.* §§ 2.2.3; 2.2.3.1.

[109] *Id.* § 2.2.3.1.

[110] *Id.*

[111] *Id.* §§ 4.3; 4.5.1; *see also* § 4.5.2 (when a closed CHS from one field office is opened in another, the new office "must promptly be provided with any information that reflects negatively upon the reliability of the CHS").

[112] *See id.* § 7.19; *see also* § 6.1 (explaining § 7.19). There is also now a requirement for approval by the Assistant Director of Intelligence. *See* § 7.19.2.1 (requiring an electronic communication to the Assistant Director of the Directorate of Intelligence before the approval request goes to the Director and the Department).

[113] *Id.* § 7.19.1.3.

investigation, the possibility of conducting a defensive briefing for the Trump campaign on Russian activities. The *Review* says that:

> We did not identify any Department or FBI policy that applied to this decision and therefore determined that the decision whether to conduct defensive briefings in lieu of opening an investigation, or at any time during an investigation, was a judgment call that is left to the discretion of FBI officials.

It went on to suggest that it would be desirable to give "senior Department leadership the opportunity . . . to consult with the FBI about whether to conduct a defensive briefing in a circumstance such as this one."[114]

The Department and the FBI have taken steps to address this issue. First, the Attorney General has instructed the FBI Director to promulgate procedures concerning defensive briefings. The purpose of this requirement is "[t]o address concerns" that U.S. persons "may become unwitting participants in an effort by a foreign power to influence an election or the policy or conduct" of the government.[115] Second, the FBI has established a Foreign Influence Defensive Briefing Board ("FIDBB"). The FBI is

> continuing [its] newly implemented review process for malign foreign influence defensive briefings, and in particular briefings to Legislative and Executive Branch officials. This will encompass actions taken after receipt of specific threat information that identifies malign foreign influence operations – that is, foreign operations that are subversive, undeclared, coercive, or criminal – including convening the [FIDBB] to evaluate whether and how to provide defensive briefings to affected parties. *To determine whether notification is warranted and appropriate in each case, the FIDBB uses consistent, standardized criteria* guided by principles that include, for example, the protection of sources and methods and the integrity and independence of ongoing criminal investigations and prosecutions.[116]

### C. The Foreign Intelligence Surveillance Act ("FISA")

FISA permits the government to seek authority from the FISC to use a range of investigative techniques.[117] For the installation and use of pen register and trap and trace devices, which are relatively unintrusive, FISA requires that the information likely to be obtained

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[114] *See Redacted OIG Review* at 348 & n.482.

[115] Attorney General Memorandum, *Supplemental Reforms to Enhance Compliance, Oversight, and Accountability with Respect to Certain Foreign Intelligence Activities of the Federal Bureau of Investigation* at 3 (Aug. 31, 2020) (hereinafter "*Supplemental Reforms Memorandum*").

[116] *See Redacted OIG Review*, Appendix 2, The FBI's Response to the Report, at 433 (Dec. 6, 2019) (emphasis added).

[117] FISA contains provisions related to numerous intelligence collection activities. The principal provisions of the statute are codified at 50 U.S.C. §§ 1801-1812; 1821-1829; 1841-1846; 1861-1864; 1871-1874; 1881-1881g; 1885-1885c.

is relevant to an FBI investigation.[118] For electronic surveillance, which is among the most intrusive techniques available to the FBI, the requirements are more extensive. We describe below some of the findings required by the statute, FISA's First Amendment proviso, and the certification by a high-ranking Executive Branch official.[119] This subsection concludes by summarizing some of the Executive Branch's requirements for FISA applications, many of which have been added in recent years.

*1. **Required findings***

FISA requires the government submit an application to the FISC describing the target of the surveillance, the techniques that will be used, and other matters.[120] An FBI agent or other federal official swears to the truth of the facts in the application.[121]

The FISC may authorize electronic surveillance if there is probable cause to believe that the target of the surveillance is an agent of a foreign power.[122] For a U.S. person, there are at least two additional related requirements. First, as the House Intelligence Committee's 1978 report on FISA explains, "[a]s a matter of principle . . . no United States citizen . . . should be targeted for electronic surveillance . . . absent some showing that he at least may violate the laws of our society."[123] Second, the person must be knowingly engaged in the specified conduct. Thus, a U.S. person may be an agent of a foreign power if the person is knowingly engaged in clandestine intelligence gathering activities on behalf of a foreign power, or knowingly helping another person in such activities, provided that the activities involve or may involve a violation of U.S. criminal law.[124]

The *House Report* goes on to explain how foreign powers may engage both in intelligence gathering and other nefarious intelligence activities:

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[118] *See* 50 U.S.C. §1842(c) (requiring that the applicant certify that "the information likely to be obtained . . . is relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the [F]irst [A]mendment").

[119] This subsection focuses on those provisions of FISA and related procedures most relevant to the Crossfire Hurricane investigation and to the observations in section V. It discusses FISA's requirements for electronic surveillance. FISA contains comparable provisions governing physical searches conducted for foreign intelligence purposes. *See* 50 U.S.C. §§ 1821-25. As pertinent to this report, Carter Page was a target of both electronic surveillance and physical search.

[120] *See* 50 U.S.C. § 1804(a).

[121] *See id.* ("Each application for an order approving electronic surveillance . . . shall be made by a Federal officer in writing upon oath or affirmation to a judge").

[122] *Id.* § 1805(a)(2)(A).

[123] H.R. Rep. No. 95-1283, 95th Cong., 2d Sess., Pt. 1, at 36 (1978) (hereinafter "*House Report*"). The *Report* also says that a citizen "should be able to know that his government cannot invade his privacy with the most intrusive techniques if he conducts himself lawfully."

[124] *See* 50 U.S.C. §§ 1801(b)(2)(A) and (E).

> Not only do foreign powers engage in spying in the United States to obtain information, they also engage in activities which are intended to harm the Nation's security by affecting the course of our Government, the course of public opinion, or the activities of individuals. Such activities may include political action (recruiting, bribery or influencing of public officials to act in favor of the foreign power), disguised propaganda (including the planting of false or misleading articles or stories), and harassment, intimidation, or even assassination of individuals who oppose the foreign power. Such activity can undermine our democratic institutions as well as directly threaten the peace and safety of our citizens.[125]

Consistent with this discussion, a U.S. person engaged in political action or other non-intelligence gathering activity also may fall within the definition of an agent of a foreign power. This is the case if the person knowingly aids or abets, or conspires with:

> any person who . . . pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in *other clandestine intelligence activities* for or on behalf of such foreign power, which activities *involve or are about to involve* a violation of the criminal statutes of the United States.[126]

Because these other activities may come closer to activity protected by the First Amendment, the required level of criminal involvement is higher in this definition. The *House Report* explains that:

> [T]he activities engaged in must presently involve or be about to involve a violation of Federal criminal law. Again, this is a higher standard than is found in the other definitions, where the activities "may" involve a violation of law. In this area where there is close [sic] line between protected First Amendment activity and the activity giving rise to surveillance, it is most important that where surveillance does occur the activity be such that it involves or is about to involve a violation of a Federal criminal statute.[127]

The *House Report* also discusses the "aiding or abetting" provision at length and says that FISA:

> allows surveillance of any person, including a U.S. person, who knowingly aids or abets any person in the conduct of activities described . . . . The knowledge requirement is applicable to both the status of the person being aided by the proposed subject of the surveillance *and the nature of the activity being promoted.* This standard requires the Government to establish probable cause that the prospective target knows both that the person with whom he is conspiring or whom he is aiding or abetting is engaged in the described activities as an agent of

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[125] *House Report* at 41.

[126] 50 U.S.C. § 1801(b)(2)(B) (emphases added).

[127] *House Report* at 42.

> a foreign power and that his own conduct is assisting or furthering such activities.[128]

The Report goes on to explain how the earlier surveillance of Martin Luther King, which was justified based on his association with members of the Communist Party, would not meet this standard:

> An illustration of the "knowing" requirement is provided by the case of Dr. Martin Luther King. Dr. King was subjected to electronic surveillance on "national security grounds" when he continued to associate with two advisers whom the Government had apprised him were suspected of being American Communist Party members and by implication, agents of a foreign power. Dr. King's mere continued association and consultation with those advisers, despite the Government's warnings, would clearly not have been a sufficient basis under this bill to target Dr. King as the subject of electronic surveillance.
>
> Indeed, even if there had been probable cause to believe that the advisers alleged to be Communists were engaged in criminal clandestine intelligence activity for a foreign power within the meaning of this section, and even if there were probable cause to believe Dr. King was aware they were acting for a foreign power, *it would also have been necessary under this bill to establish probable cause that Dr. King was knowingly engaged in furthering his advisers' criminal clandestine intelligence activities.* Absent one or more of these required showings, Dr. King could not have been found to be one who knowingly aids or abets a foreign agent.
>
> As noted above, however, the "knowing" requirement can be satisfied by circumstantial evidence, and there is no requirement for the Government to disprove lack of knowledge where the circumstances were such that a reasonable man would know what he was doing.[129]

The King excerpt underscores the need for the target to be knowingly furthering the criminal clandestine intelligence activities of those whom he is aiding, but it also explains that such knowledge may be inferred.

### *2. Protection of First Amendment activities*

In enacting FISA, Congress recognized that "there may often be a narrow line between covert action and lawful activities undertaken by Americans in the exercise of their [F]irst [A]mendment rights."[130] FISA thus includes a provision similar to the one found in the *AGG-Dom* and prohibits any U.S. person from being "considered . . . an agent of a foreign power solely upon the basis of activities protected by the [F]irst [A]mendment."[131] The *House Report* explains that "[t]his provision is intended to reinforce the intent of the committee that lawful

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[128] *Id.* at 44 (emphasis added).

[129] *Id.* at 44-45 (emphases added).

[130] *House Report* at 41.

[131] 50 U.S.C. § 1805(a)(2)(A); *cf. AGG-Dom* § I.C.3.

political activities should never be the sole basis for a finding of probable cause to believe that a U.S. person is . . . an agent of a foreign power."[132]

### *3. Certification by Executive Branch official*

An application for electronic surveillance under FISA requires a certification by the Director of the FBI or a similar official. The official must certify that a significant purpose of the electronic surveillance is to obtain foreign intelligence information.[133] One definition of foreign intelligence found in the statute is "information with respect to a foreign power or foreign territory that . . . is necessary to . . . the national defense or security of the United States . . . or the conduct of the foreign affairs of the United States."[134] The *House Report* says that this category includes information necessary to national defense or security and the conduct of foreign affairs.[135] It does "not include information solely about the views . . . or activities of . . . private citizens concerning the foreign affairs or national defense of the United States."[136] Another definition of foreign intelligence is information "necessary . . . to protect against . . . clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power."[137] The certifying official must designate the type or types of foreign intelligence information sought, and include an explanation of the basis for that certification.[138]

The official must also certify that the foreign intelligence sought cannot be obtained by normal investigative techniques, and the official must explain the basis for that certification.[139] In other words, the official must explain why the government cannot obtain the information sought through other, less intrusive techniques, such as checking government records and publicly available information, interviewing the target of the surveillance, or using informants. "This requirement," the *House Report* says, "is particularly important in those cases when U.S. citizens or resident aliens are the target of the surveillance."[140]

The certification requirement thus applies to the purpose of the surveillance and to the use of electronic surveillance as an investigative technique. By its terms, it does not apply to the accuracy of the factual information in the application. That is addressed by the sworn statement of an FBI agent or other federal official,[141] and by the Executive Branch requirements described below.

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[132] *House Report* at 80.

[133] 50 U.S.C. § 1804(a)(6)(B).

[134] *Id.* § 1801(e)(2).

[135] *House Report* at 49.

[136] *Id.*

[137] 50 U.S.C. § 1801(e)(1)(C).

[138] *Id.* §§ 1804(a)(6)(D) and (a)(6) (E)(i).

[139] *Id.* §§ 1804(a)(6)(C) and (a)(6)(E)(ii).

[140] *House Report* at 76.

[141] *See supra* § III.C.1.

### *4. Executive Branch requirements*

Over 20 years ago, the FBI adopted procedures designed to ensure the accuracy of the information contained in FISA applications. These are often referred to as the "Woods Procedures," after their principal author.[142] The recent OIG reviews of the Page and other FISA applications raised concerns about compliance with the Woods Procedures and the accuracy and completeness of the information in FISA applications.[143] As a result, the Department has made numerous filings with the FISC, and the FISC has also directed that changes be made:[144]

- For all applications, the FBI now requires that both an agent and a supervisor must affirm that the Office of Intelligence ("OI") of NSD, which represents the Government before the FISC, "has been apprised of all information that might reasonably call into question the accuracy of the information in the application or otherwise raise doubts about the requested probable cause findings or the theory of the case."[145]
- Before the government files an application for electronic surveillance of a federal elected official, a candidate for federal office, or a staffer of such a person, the Attorney General has directed that an FBI field office not involved in the investigation must "review[] the case file and evaluate[] the proposed filing for accuracy and completeness."[146]

The Attorney General also has imposed other limitations on applications for electronic surveillance in politically sensitive matters:

- Defensive briefings. Before the government files an application with the FISC, the FBI Director must consider "conducting a defensive briefing of the target." Then, either the FBI must conduct a briefing or, "if the Director determines that such a briefing is not appropriate," the Director must document that determination in writing.[147] This is in addition to the general requirement described above for the FBI to establish procedures for defensive briefings.
- Duration of surveillance. The maximum duration the government may seek from the FISC for a surveillance is 60 days. This is shorter than the statutorily permitted 90-day maximum for surveillance of a U.S. person. In addition, every 30 days, the government

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[142] For a description of the Woods Procedures and a discussion of accuracy issues and the FISC, *see* 1 David Kris & Douglas Wilson, *National Security Investigations & Prosecutions* § 6.3 (2019).

[143] *E.g., Redacted OIG Review* at viii-x; *Audit of 29 Applications* at i.

[144] *See, e.g., In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, Corrected Op. and Order at 4, Misc. No. 19-02 (FISC Mar. 5, 2020); *In re Carter W. Page,* Order Regarding Handling and Disposition of Information at 1, Nos. 16-1182, 17-52, 17-375, and 17-679 (FISC Jan. 7, 2020).

[145] Declaration of Christopher W. Wray, *In Re Accuracy Concerns*, Docket No. Misc. 19-02, at 3 (Jan. 10, 2020) (hereinafter "*Wray Declaration*").

[146] *Supplemental Reforms Memorandum* at 2.

[147] *Id.*

must report to the FISC "on the results of the approved surveillance and the continued need for such authority."[148]

## D. Statutes Used to Evaluate Possible Criminal Conduct

This section begins with a brief description of the burden of proof that the government faces in every criminal case. It then describes the principal statutes that we considered to evaluate possible criminal conduct and exactly what must be proven beyond a reasonable doubt in order for a jury to convict.

### *1. Standard of proof beyond a reasonable doubt*

The government has the burden of proving that a defendant committed any criminal offense beyond a reasonable doubt. A standard jury instruction on reasonable doubt is:

> The government has the burden of proving [name of defendant] guilty beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not, or, in some cases, that its truth is highly probable. In criminal cases such as this one, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Reasonable doubt, as the name implies, is a doubt based on reason—a doubt for which you have a reason based upon the evidence or lack of evidence in the case. If, after careful, honest, and impartial consideration of all the evidence, you cannot say that you are firmly convinced of the defendant's guilt, then you have a reasonable doubt.
>
> Reasonable doubt is the kind of doubt that would cause a reasonable person, after careful and thoughtful reflection, to hesitate to act in the graver or more important matters in life. However, it is not an imaginary doubt, nor a doubt based on speculation or guesswork; it is a doubt based on reason. The government is not required to prove guilt beyond all doubt, or to a mathematical or scientific certainty. Its burden is to prove guilt beyond a reasonable doubt.[149]

### *2. False statements*

The principal federal statute criminalizing false statements to government investigators is 18 U.S.C. § 1001. As relevant here, subsection 1001(a)(2) makes it a crime "in any matter within the jurisdiction of the executive . . . branch of the Government" knowingly and willfully to "make [] any materially false, fictitious, or fraudulent statement or representation." The government must prove five elements beyond a reasonable doubt to obtain a conviction under this provision:

> *First*, the defendant made a statement or representation;
>
> *Second*, the statement or representation was false, fictitious or fraudulent;
>
> *Third*, this statement or representation was material;

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[148] *Id.* at 3.

[149] *Criminal Jury Instructions for the District of Columbia* 2.108 (5th ed. 2014).

*Fourth*, the false, fictitious or fraudulent statement was made knowingly and willfully; and

*Fifth*, the statement or representation was made in a matter within the jurisdiction of the executive branch of the government.[150]

The *Mueller Report* contains additional discussion of these requirements:

> An FBI investigation is a matter within the Executive Branch's jurisdiction. *United States v. Rodgers*, 466 U.S. 475, 479 (1984). The statute also applies to a subset of legislative branch actions—*viz.*, administrative matters and "investigation[s] or review[s]" conducted by a congressional committee or subcommittee. 18 U.S.C. § 1001(c)(1) and (2); *see United States v. Pickett*, 353 F.3d 62, 66 (D.C. Cir. 2004).
>
> Whether the statement was made to law enforcement or congressional investigators, the government must prove beyond a reasonable doubt the same basic non-jurisdictional elements: the statement was false, fictitious, or fraudulent; the defendant knew both that it was false and that it was unlawful to make a false statement; and the false statement was material. *See, e.g., United States v. Smith*, 831 F.3d 1207, 1222 n.2[7] (9th Cir. 2017) (listing elements); *see also* Ninth Circuit Pattern Instruction 8.73 & cmt. (explaining that the section 1001 jury instruction was modified in light of the Department of Justice's position that the phrase "knowingly and willfully" in the statute requires the defendant's knowledge that his or her conduct was unlawful). In the D.C. Circuit, the government must prove that the statement was actually false; a statement that is misleading but "literally true" does not satisfy section 1001(a)(2). *See United States v. Milton*, 8 F.3d 39, 45 (D.C. Cir. 1993); *United States v. Dale*, 991 F.2d 819, 832-33 & n.22 (D.C. Cir. 1993). For that false statement to qualify as "material," it must have a natural tendency to influence, or be capable of influencing, a discrete decision or any other function of the agency to which it is addressed. *See United States v. Gaudin*, 515 U.S. 506, 509 (1995); *United States v. Moore*, 612 F.3d 698, 701 (D.C. Cir. 2010).[151]

*3.* ***Perjury***

18 U.S.C. § 1621 provides that:

> Whoever--
>
> (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and

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[150] *See generally* 2 *Modern Federal Jury Instructions* ¶ 36.01, Instruction 36-9: "Elements of the Offense."

[151] 1 *Mueller Report* at 191-92.

> contrary to such oath states or subscribes any material matter which he does not believe to be true; or
>
> (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;
>
> is guilty of perjury . . . .

18 U.S.C. § 1623(a) provides that:

> Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

The Department's *Criminal Resources Manual* states that sections 1621 and 1623 share four common elements. The government must prove each element beyond a reasonable doubt. The Manual summarizes these elements as follows:

> The first element of a perjury offense is that the defendant must be under oath during his testimony, declaration or certification, unless the perjurious statement is an unsworn declaration permitted by 28 U.S.C. § 1746.
>
> The second essential element . . . is that the defendant must have made a false statement.
>
> The third element . . . is proof of specific intent, that is, that the defendant made the false statement with knowledge of its falsity, rather than as a result of confusion, mistake or faulty memory.
>
> The false statement must be material to the proceedings.[152]

In addition to the text quoted above, the Manual explains each of the requirements in more detail as well as the differences among the statutory provisions.

*4. **Falsification of records***

18 U.S.C. § 1519 imposes criminal liability on any person who:

> knowingly . . . falsifies [] or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or

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[152] U.S. Department of Justice, *Criminal Resources Manual* §§ 1744-48, Elements of Perjury (Dec. 7, 2018) (archived content), https://www.justice.gov/archives/usam/criminal-resource-manual-1744-elements-perjury.

agency of the United States . . . or in relation to or contemplation of any such matter.

The government must prove three elements beyond a reasonable doubt to obtain a conviction under section 1519:

*First*, the defendant knowingly falsified a document;

*Second*, the defendant did so with the intent to impede, obstruct, or influence an investigation [or] the proper administration of a matter; and

*Third*, the investigation or matter was within the jurisdiction of the Department, the FBI, or another federal department or agency.[153]

### *5. Obstruction of justice*

There are several statutes that cover conduct intended to obstruct or impede government investigations.[154] 18 U.S.C. § 1512(c)(2) is an omnibus obstruction-of-justice provision that covers a range of obstructive acts directed at pending or contemplated official proceedings. 18 U.S.C. §§ 1503 and 1505 also offer broad protection against obstructive acts directed at pending grand jury, judicial, administrative, and congressional proceedings, and they are supplemented by a provision in section 1512(b) aimed specifically at conduct intended to prevent or hinder the communication to law enforcement of information related to a federal crime. The *Mueller Report* describes these requirements and noted that "[t]hree basic elements are common to the obstruction statutes pertinent to the Office's charging decisions: an obstructive act; some form of nexus between the obstructive act and an official proceeding; and criminal (*i.e.*, corrupt) intent."[155]

### *6. Violation of civil rights*

18 U.S.C. § 242 makes it a crime for anyone, acting under color of law, willfully to deprive any person of a right secured by the Constitution or laws of the United States. The government must prove three elements beyond a reasonable doubt to obtain a conviction under section 242:

*First*, the defendant deprived the person of an identified right, such as the right to due process of law, secured by the Constitution or laws of the United States.

*Second*, the defendant acted willfully, that is, the defendant committed such act or acts with a bad purpose to disobey or disregard the law, specifically intending to deprive the person of that right. To find that the defendant was acting willfully, it is not necessary for the government to prove that the defendant knew the specific constitutional provision or federal law that his or her conduct violated. But the defendant must have a specific intent to deprive the person of a right protected by the Constitution or federal law.

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[153] *See generally Model Crim. Jury Instr.* 8th Cir. 6.18.1519 (2020).

[154] *See* 18 U.S.C. §§ 1503, 1505, 1512(b)(3), 1512(c)(2).

[155] 1 *Mueller Report* at 192.

*Third*, the defendant acted under color of law. Acting "under color of law" means acts done under any state law, county or city ordinance, or other governmental regulation, and acts done according to a custom of some governmental agency. It means that the defendant acted in his or her official capacity or else claimed to do so, but abused or misused his or her power by going beyond the bounds of lawful authority.[156]

*7. **Conspiracy to violate civil rights***

18 U.S.C. § 241 makes it a crime to conspire to deprive a person of his or her civil rights. The government must prove three elements beyond a reasonable doubt to obtain a conviction under section 241:

*First*, the defendant entered into a conspiracy to injure, oppress, threaten, or intimidate a named victim;

*Second*, the defendant intended to interfere with the named victim's exercise or enjoyment of a right that is secured (or protected) by the Constitution (or laws) of the United States; and

*Third*, the named victim was present in any state, district, or territory of the United States.[157]

*8. **General conspiracy statute***

A conspiracy under 18 U.S.C. § 371 requires the government to prove four elements beyond a reasonable doubt:

*First*, two or more persons in some way agreed to try to accomplish a shared and unlawful plan;

*Second*, the defendant knew the unlawful purpose of the plan and willfully joined in it;

*Third*, during the conspiracy, one of the conspirators knowingly engaged in at least one overt act as described in the indictment; and

*Fourth*, the overt act was committed at or about the time alleged and with the purpose of carrying out or accomplishing some object of the conspiracy.[158]

In addition to criminalizing an agreement whose object is to violate a federal criminal law, section 371 also criminalizes a conspiracy "to defraud the United States, or any agency thereof for any manner or for any purpose." This may also include interfering with the performance of official duties by government officials.[159]

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[156] *See, e.g., Pattern Crim. Jury Instr.* 5th Cir. 2.12 (2019).

[157] *See Modern Federal Jury Instructions-Criminal*, LexisNexis Form 485-17-33 (Elements of the Offense).

[158] *See, e.g., Pattern Crim. Jury Instr.* 11th Cir. OI O13.1 (WL 2020).

[159] *See United States v. Klein*, 247 F.2d 908, 916 (2d Cir. 1957); Practical Law Securities & White Collar Crime, *Conspiracy Charges: Overview*, w-009-8988 (WL 2022).

*9. **Campaign contributions***

52 U.S.C. § 30116(a)(1)(A) provides that "no person shall make contributions to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000." The term "person" includes "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons."[160] "Contributions" are defined as, "any gift . . . or deposit of . . . anything of value made by any person for the purpose of influencing any election for Federal office."[161] Contributions do not include, "the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee."[162] Section 30116(c) provides for adjustments for inflation, stating that limitations for contributions by persons to federal candidates are adjusted every two years.[163] The limitation for an individual donor to a candidate committee for the 2015-2016 election cycle was $2,700.[164]

Violations of section 30116 by a person qualify as a crime if, (1) the violation involved at least the amount specified in a calendar year, and (2) the violation was committed knowingly and willfully.[165]

*10. **Campaign contributions by foreign nationals***

52 U.S.C. § 30121(a)(1)(A) makes it a crime for "a foreign national, directly or indirectly . . . to make a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal . . . election." Subsection (a)(2) makes it a crime for any person to solicit, accept, or receive such a contribution or donation.

*11. **Fraud against the United States***

18 U.S.C. § 1031(a) imposes criminal liability on:

> Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent—
>
> (1) to defraud the United States; or
>
> (2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises,

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[160] 52 U.S.C. § 30101(11).

[161] *Id.* § 30101(8)(A)(i).

[162] *Id.* § 30101(8)(B)(i).

[163] *Id.* § 30116(c).

[164] Federal Election Commission, *Archive of Contribution Limits*, https:www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/archived-contribution-limits/.

[165] 52 U.S.C. § 30109(d)(1)(A).

> in any grant, contract . . . or other form of Federal assistance . . . if the value of such grant, contract . . . or other form of Federal assistance . . . is $1,000,000 or more . . . .

The government must prove three elements beyond a reasonable doubt to obtain a conviction under section 1031(a):

*First*, the defendant knowingly used or tried to use a scheme with the intent to defraud the United States or to get money or property by using materially false or fraudulent pretenses, representations, or promises;

*Second*, the scheme took place as a part of acquiring property, services, or money as a contractor with the United States or as a subcontractor or a supplier on a contract with the United States; and

*Third*, the value of the contract or subcontract was $1,000,000 or more.[166]

*12.* ***Money-laundering***

18 U.S.C. § 1956(a)(1)(A) imposes criminal liability on:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--
>
> > (i) with the intent to promote the carrying on of specified unlawful activity; or
> >
> > (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986.

To obtain a conviction under section1956(a)(1)(A), the government must prove the following three elements beyond a reasonable doubt:

*First*, the defendant conducted (or attempted to conduct) a financial transaction involving property constituting the proceeds of specified unlawful activity;

*Second*, the defendant knew that the property involved in the financial transaction was the proceeds of some form of unlawful activity; and

*Third*, the defendant acted either with the intent to promote the carrying on of specified unlawful activity or with the intent to engage in conduct violating certain provisions of the Internal Revenue Code.[167]

18 U.S.C. § 1957 imposes criminal liability on:

> Whoever . . . knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from

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[166] *See Pattern Crim. Jury Instr.* 11th Cir. OI O43 (WL 2020).

[167] *See* 3 *Modern Federal Jury Instructions-Criminal* P 50A.01 (Lexis).

specified unlawful activity [and does so either] in the United States or in the special maritime and territorial jurisdiction of the United States [or] outside the United States and such special jurisdiction, but the defendant is a United States person.

To obtain a conviction under section 1957, the government must prove the following five elements beyond a reasonable doubt:

*First*, the defendant engaged (or attempted to engage) in a monetary transaction in or affecting interstate commerce;

*Second*, the monetary transaction involved criminally derived property of a value greater than $10,000;

*Third*, the property was derived from specified unlawful activity;

*Fourth*, the defendant acted knowingly, that is, with knowledge that the transaction involved proceeds of a criminal offense; and

*Fifth*, the transaction took place in the United States, or the defendant is a U.S. person.[168]

Finally, 18 U.S.C. § 1956(h) imposes criminal liability on any person who conspires to commit any offense defined in section 1956 or 1957. To obtain a conviction under section 1956(h), the government must prove the following three elements beyond a reasonable doubt:

*First*, two or more persons reached an agreement to commit one of the specified offenses;

*Second*, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect; and

*Third*, at the time the defendant joined in the agreement or understanding, he/she knew the purpose of the agreement or understanding.[169]

*13.* ***Disclosure of national defense information***

18 U.S.C. § 793(d) imposes criminal liability on:

Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to

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[168] *See* 3 *Modern Federal Jury Instructions-Criminal* P 50A.06 (Lexis).

[169] *See Modern Federal Jury Instructions-Criminal* 6.18.1956K (8th Cir.) (Lexis 2022).

receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it.

Modern Federal Jury Instructions summarizes the elements that the government must prove beyond a reasonable doubt to obtain a conviction under section 793(d):

> *First*, that the defendant had lawful . . . possession of (or access to or control over) [describe document].
>
> *Second*, that the [document] was related to the national defense.
>
> *Third*, that the defendant had reason to believe that the document could be used to the injury of the United States or to the advantage of [name of foreign country].
>
> *Fourth*, that on [insert date], the defendant willfully communicated (or delivered or transmitted or caused to be communicated, delivered, or transmitted or attempted to communicate, deliver or transmit) the document to [name of person], who was not entitled to receive it.[170]

## IV. BACKGROUND FACTS AND PROSECUTION DECISIONS

This section begins by providing factual information about the FBI's New York Field Office ("NYFO") investigation of Carter Page in the spring of 2016 (Subsection A.1); the text messages between certain FBI officials that on their face show a predisposition to investigate Trump (Subsection A.2); and the predication, opening, and conduct of the Crossfire Hurricane investigation (Subsections A.3 through A.5). This part concludes with a comparison of some of the FBI's investigative decisions related to Clinton with some of those related to Trump (Subsection A.6). The remaining parts of this section each include a factual background and then describe the prosecutive decisions the Office made. The first addresses an investigative referral of a possible Clinton "campaign plan" (Subsection B). The next is an extensive discussion of the FISA applications targeting Page (Subsection C). The last part of this section covers conduct by private-sector actors in connection with Crossfire Hurricane and related subjects (Subsection D). In describing these matters, this section does not endeavor to repeat or restate all the information that the Office and others[171] have covered and made public. Instead, it aims to add to that body of information, include additional relevant facts, and explain the prosecutive decisions we made.

The *Appointment Order* authorized the Special Counsel "to prosecute federal crimes arising from his investigation" of the matters assigned to him.[172] What is stated in the *Mueller Report* is equally true for our investigation:

> In deciding whether to exercise this prosecutorial authority, the Office has been guided by the Principles of Federal Prosecution set forth in the Justice . . . Manual. In particular, the Office has evaluated whether the conduct of the

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[170] 1 *Modern Federal Jury Instructions-Criminal* § 29.04 (2022).

[171] These include most notably the OIG in its comprehensive reports, the *Mueller Report*, the *SSCI Russia Report*, and the *FBI Inspection Division Report*.

[172] *Appointment Order* ¶ (b).

> individuals considered for prosecution constituted a federal offense and whether admissible evidence would probably be sufficient to obtain and sustain a conviction for such an offense. Where the answer to those questions was yes, the Office further considered whether the prosecution would serve a substantial federal interest, the individuals were subject to effective prosecution in another jurisdiction, and there existed an adequate non-criminal alternative to prosecution.[173]

These considerations, as explained below, led the Office to charge three individuals with making false statements. The Office considered whether other individuals, including individuals in the government, made false statements to the FBI, the OIG, or congressional committees or whether, during the course of the Office's investigation, other individuals interviewed either omitted material information or provided false information. Again, what is stated in the *Mueller Report* is also true for our investigation:

> Applying the Principles of Federal Prosecution, the Office did not seek criminal charges against any individuals other than those listed above. In some instances, that decision was due to evidentiary hurdles to proving falsity. In others, the Office determined that the witness ultimately provided truthful information and that considerations of culpability, deterrence, and resource preservation weighed against prosecution.[174]

The Office determined that other matters it investigated either did not involve the commission of a federal crime or that our evidence was not sufficient to obtain and sustain a criminal conviction.

In addition to its prosecution and declination decisions, the Office made the following referrals to other entities:

- A referral on June 30, 2020 to the FBI's Washington Field Office ("WFO") regarding a matter related to an existing counterintelligence investigation.
- A referral in December 2020 to OI of information relevant to the accuracy of information contained in four non-Page FISA applications.
- Referrals of two matters on December 14, 2022 to the Inspector General of the Department of Defense with a copy to the General Counsel of the Defense Intelligence Agency. One matter involved the execution of a contract between DARPA and the Georgia Institute of Technology; and a separate matter involved the irregular conduct in 2016 of two former employees of the Department of Defense.
- A referral to the FBI's OGC and Inspection Division of an FBI agent for failing to document properly the known history of Igor Danchenko upon his opening as an FBI CHS.

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[173] 1 *Mueller Report* at 174 (citations omitted). For a discussion of the *Principles of Federal Prosecution, see supra* § III.A; *Justice Manual* § 9-27.220 (2018).

[174] 1 *Mueller Report* at 198-99.

- A referral to the FBI's OGC and Inspection Division of the same FBI agent for questionable instructions given to Danchenko regarding the taxability of cash payments made to him by the FBI.

In addition to the referrals described above, the Office also provided information to the FBI's Inspection Division regarding certain activities by current and former FBI employees.

## A. The Crossfire Hurricane Investigation

### *1. New York Field Office investigation of Page*

In late March 2016, Carter Page, an American energy consultant, was named a foreign policy advisor to the Donald Trump 2016 presidential campaign. Page's prior business experience was largely focused on Russian and Eurasian energy issues, and as such, he frequently interacted with various Russian nationals. Based on his previous Russian contacts, Page was known to the FBI and had been interviewed on three occasions between 2009 and 2013 by the NYFO. In 2015, Page was again interviewed by the FBI in connection with the indictment of three Russian intelligence officers in the Southern District of New York. According to the criminal complaint and subsequently returned indictment in that case, Page had been approached by the intelligence officers in an apparent failed recruitment effort.[175] In the criminal complaint, one intelligence officer referred to Page, anonymized as "Male-1," as an "idiot," and Page does not seem to have been receptive to the recruitment efforts.[176] Page was interviewed by prosecutors as a possible government witness in that case.[177] One defendant, Evgeny Buryakov, pleaded guilty before trial and was sentenced to 30 months of imprisonment.[178] The two other defendants in the case were protected by diplomatic immunity and are no longer in the United States.[179]

In April 2016, shortly after Page was named as an advisor to the Trump campaign, the NYFO opened a counterintelligence investigation of him. According to the case agent in the matter ("NYFO Case Agent-1"), in opening the investigation, the FBI was not so

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[175] *See* Sealed Complaint, *United States v. Evgeny Buryakov, "a/k/a Zhenya," et al.* (S.D.N.Y.) ¶¶ 1-4 (Jan. 3, 2015) (hereinafter "*Buryakov Complaint*") (the *Buryakov Complaint* has been unsealed.); *see* U.S. Department of Justice, Office of Public Affairs, *Attorney General Holder Announces Charges Against Russian Spy Ring in New York City* (Jan. 26, 2015); *see generally Redacted OIG Review* at 61-62 (describing Russian activities in New York and the FBI's interviews of Page).

[176] *See Buryakov Complaint* at 12-13, ¶¶ 32-34; *see also* Ellen Nakashima, Devlin Barrett & Adam Entous, *FBI Obtained FISA Warrant to Monitor Former Trump Advisor Carter Page*, Wash. Post (Apr. 11, 2017) (quoting one of the "Russian spy suspects" as saying that Page was an "idiot").

[177] OSC Report of Interview of NYFO Case Agent-1 on Sept. 5, 2019 at 2.

[178] U.S. Department of Justice, U.S. Attorney's Office Southern District of New York, Russian Banker Sentenced in Manhattan Federal Court to 30 Months in Prison for Conspiring to Work for Russian Intelligence (May 25, 2016).

[179] *Id.* at 4; Nate Raymond, *Russian banker accused by U.S. of spy role gets two-and-a-half years prison*, Reuters (May 25, 2016).

concerned about Page, but rather it was concerned about the Russians reaching out to Page.[180] Moreover, NYFO Case Agent-1 told the Office that there were no plans to seek FISA coverage on Page.[181] NYFO Case Agent-1 and her FBI supervisor informed the OIG that Page's role as a foreign policy advisor "did not influence their decision to open a case on Page."[182] It may, however, have affected the timing of the case opening and increased interest in him. Indeed, Director Comey had earlier in April "requested relevant information pertaining to any Presidential candidate."[183] In line with that directive, Comey was briefed on the Page investigation, which a week later was described as a "top priority" for the Director.[184] At that time, FBI personnel in Washington prepared a counterintelligence report on Page for the Director.[185] In July, the same personnel described the Page case, "and ones like it" as, "a top priority for Director Comey."[186] In any event, despite Page's role as a publicly named foreign policy advisor, the FBI did not open the investigation as a "Sensitive Investigative Matter" or SIM.[187]

A few months later, shortly after the FBI opened the Crossfire Hurricane investigation at FBI Headquarters and the four sub-files, including on Page, the NYFO's investigation of Page was transferred to the Crossfire Hurricane investigation at FBI Headquarters.[188]

*2. **Evidence of predisposition to investigate Trump***

The record reviewed by the Office demonstrated a rather clear predisposition on the part of at least certain FBI personnel at the center of Crossfire Hurricane to open an

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[180] OSC Report of Interview of NYFO Case Agent-1 on Sept. 5, 2019 at 2.

[181] *Id.*

[182] *Redacted OIG Review* at 63; *see also id.* at 62 (noting supervisor's view that investigation should have been opened earlier).

[183] FBI-AAA-21-0000829 (Email from Headquarters Supervisory Special Agent-1 to Auten & others dated 04/01/2016). Comey declined through counsel to be interviewed by the Office. Counsel indicated his client had previously testified in various Congressional hearings and been interviewed by various government entities on all matters relating to Crossfire Hurricane.

[184] *Id.*; FBI-AAA-21-0000798 (Email to Headquarters Supervisory Special Agent-1, Auten & others dated 04/07/2016); FBI-AAA-21-0000828 (Email from Headquarters Supervisory Special Agent-1 to Auten & others dated 07/01/2016).

[185] FBI-AAA-21-0000798 (Email to Headquarters Supervisory Special Agent-1, Auten & others dated 04/07/2016).

[186] FBI-AAA-21-0000828 (Email from Headquarters Supervisory Special Agent-1 to Auten & others dated 07/01/2016).

[187] *See* OSC Report of Interview of NYFO Case Agent-1 on Sept. 5, 2019 at 3; *Redacted OIG Review* at 62-63.

[188] *Redacted OIG Review* at 63.

investigation of Trump. For example, Peter Strzok [189] and Lisa Page[190] were directly involved in matters relating to the opening of Crossfire Hurricane. Strzok was the Agent who both wrote and approved the electronic communication opening the matter from the very start as a full investigation rather than an assessment or preliminary investigation. At the time, Page was serving as Deputy Director Andrew McCabe's Special Assistant, and, according to Strzok, it was McCabe who directed that the Crossfire Hurricane investigation be "opened immediately" after information described more fully below was received from Australian authorities in late July 2016.[191] Over a period of months prior to the opening of Crossfire Hurricane, Strzok and Page had exchanged numerous messages, which are already in the public domain and express a very clear prejudice against Trump. For example:

August 16, 2015:

Strzok: [Bernie Sanders is] an idiot like Trump.[192]

December 20, 2015 (After exchanging an article about Trump):

Page: What an utter idiot.
Strzok: No doubt.[193]

March 3, 2016:

Page: God [T]rump is a loathsome human.
Strzok: Yet he may win [the Republican nomination]. Good for Hillary.
Page: It is.
Strzok: Would he be a worse president than [C]ruz?
Page: Trump? Yes, I think so.
Strzok: I'm not sure. Omg [Trump's] an idiot.
Page: He's awful.
Strzok: America will get what the voting public deserves.
Page: That's what I'm afraid of.

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[189] Strzok was a Section Chief and later the Deputy Assistant Director in the FBI's Counterintelligence Division. (For the positions held by those involved in the Crossfire Hurricane investigation, see the chart in the *Redacted OIG Review* at 81-82.) Strzok agreed to provide information to the Office concerning matters related to the FBI's Alfa Bank investigation, but otherwise declined to be interviewed by the Office on matters related to his role in the Crossfire Hurricane investigation.

[190] Page was an attorney in FBI's OGC who was detailed as a Special Assistant to Deputy Director McCabe's Office.

[191] Strzok, *Compromised* at 115.

[192] FBI-0008217 (Office of Professional Responsibility [OPR] letter to Strzok dated 08/08/2016) at 4.

[193] *Id.*

Strzok: God, Hillary should win 100,000,000 – 0.[194]

May 3, 2016:

Page: And holy [expletive] Cruz just dropped out of the race. It's going to be a Clinton Trump race. Unbelievable.
Strzok: What?!?!??
Page: You heard that right my friend.
Strzok: I saw [T]rump won, figured it would be a bit. Now the pressure really starts to finish [the Clinton email investigation] . . .
Page: It sure does.[195]

July 18, 2016 (During the Republican National Convention):

Strzok: Oooh, TURN IT ON, TURN IT ON!!! THE DOUCHE BAGS ARE ABOUT TO COME OUT. You can tell by the excitable clapping.
Page: And wow, Donald Trump is an enormous d*uche.

July 19, 2016:

Strzok: Hi. How was Trump, other than a douche?
Page: Trump barely spoke, but the first thing out of his mouth was "we're going to win soooo big." The whole thing is like living in a bad dream.[196]

July 21, 2016:

Strzok: Trump is a disaster. I have no idea how destabilizing his Presidency would be.[197]

July 27, 2016:

Page: Have we opened on him yet? Trump & Putin. Yes, It's Really a Thing http://talkingpointsmemo.com/edblog/trumpputin-yes-it-s-really-a-thing
Strzok: Opened on Trump? If Hillary did, you know 5 field offices would . . . [198]

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[194] *Id.* at 5.

[195] *Id.*

[196] *Id.* at 6.

[197] *Id.*

[198] *Id.* at 7 (ellipses in original); *see also* Letter from Jill C. Tyson, Office of Congressional Affairs, FBI, to Senator Ron Johnson, Chairman of the Committee on Homeland Security and Governmental Affairs (Oct. 23, 2020) (attachment), https://www.grassley.senate.gov/imo/media/doc/lync_text_messages_of_peter_strzok_from_2-13-16_to_12-6-17.pdf.

(As discussed more fully below, the next day, July 28, 2016, FBI Headquarters received the Australian information that formed the basis for the opening of Crossfire Hurricane. On Sunday, July 31, 2016, Strzok, as he has written he was directed to do by McCabe, immediately opened Crossfire Hurricane. He both drafted and approved (with the authorization of Assistant Director Priestap) the Crossfire Hurricane opening communication.)[199]

August 8, 2016:

| | |
|---|---|
| Page: | [Trump's] not going to become president, right? Right?! |
| Strzok: | No. No, he's not. We'll stop it.[200] |

Similarly, and as discussed in more detail below, FBI OGC attorney Kevin Clinesmith made troubling statements demonstrating a blatant political bias against Trump. Clinesmith, who played a central role in the Page FISA process, on the day after Trump's election as President, stated to fellow FBI personnel, among other things, "viva le resistance,"[201] an obvious reference to those individuals opposed to Trump.

Although those involved in opening the Crossfire Hurricane investigation denied that bias against Trump was a factor in opening the investigation,[202] the communications quoted

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[199] *Redacted OIG Review* at 53, 58. Regarding Strzok's having direct access to McCabe, when asked if he was aware of people going around him to the 7th Floor, (meaning jumping the chain of command and going to the FBI Executive Offices on the 7th floor), Priestap replied, "oh, yeah." While Priestap stated he could not remember the specifics, Lisa Page was a concern, without question, in this respect. In addition, there were multiple times when Strzok mentioned something to Priestap and shared it with Page who, in turn, shared the information with Deputy Director McCabe. There were also instances when Strzok shared information directly with McCabe before Priestap could provide the information to McCabe himself. Priestap said these actions drove him "insane." He also told the Office that Strzok was the worst offender in this regard and that these events occurred mostly when he (Priestap) wanted to go in one direction and they (Page and Strzok) disagreed and thus went around him. *See* OSC Report of Interview of E.W. Priestap on June 2, 2021 at 3.

Priestap agreed to provide information to the Office concerning matters related to the FBI's Alfa Bank investigation, but otherwise declined to be interviewed by the Office on matters related to his role in the Crossfire Hurricane investigation.

[200] FBI-0008217 (Office of Professional Responsibility Letter to Strzok dated 08/08/2016 at 7); *see also* Letter from Jill C. Tyson, Office of Congressional Affairs, FBI, to Senator Ron Johnson, Chairman of the Committee on Homeland Security and Governmental Affairs (Oct. 23, 2020) (attachment).

[201] FBI-AAA-EC-00006440 (Lync message exchange between Clinesmith and FBI OGC Unit Chief-1 dated 11/22/2016).

[202] *See, e.g.,* Strzok, *Compromised* at 345-46; OSC Report of Interview of Supervisory Special Agent-1 on June 17, 2019 at 5; OSC Report of Interview of FBI OGC Unit Chief-1 on Aug. 29, 2019 at 10; OSC Report of Interview of Supervisory Special Agent-2 on May 5, 2021 at 8; OSC Report of Interview of Brian Auten on July 26, 2021 at 16.

above quite clearly show, at least on the part of certain personnel intimately involved in the matter, a predisposition to open an investigation into Trump.

*3. **The opening of Crossfire Hurricane***

The FBI opened Crossfire Hurricane as a full counterintelligence investigation "to determine whether individual(s) associated with the Trump campaign [were] witting of and/or coordinating activities with the Government of Russia."[203] The starting point for the Office's inquiry was to examine what information was known or available to the FBI about any such ties as of July 31, 2016, prior to opening Crossfire Hurricane. That question then divided itself into two related questions: (i) what was the information that predicated the opening of the investigation and (ii) did that information support such an investigation being opened not as an "assessment" or "preliminary" investigation, but from the start as a "full" investigation. In exploring these questions, we determined the following:

a. The information used to predicate Crossfire Hurricane

In March 2016, the Trump campaign identified George Papadopoulos as a foreign policy advisor.[204] Papadopoulos had previously worked as an energy consultant, with a particular focus on projects in the Eastern Mediterranean.[205] At the time of his appointment, Papadopoulos was employed in the United Kingdom at the London Center of International Law Practice.[206] Among Papadopoulos's acquaintances in London was a diplomat from another country ("Foreign Government-1 Diplomat-1"). Foreign Government-1 Diplomat-1 was familiar with an Australian diplomat ("Australian Diplomat-1").[207] On May 6, 2016, by prearrangement, Foreign Government-1 Diplomat-1 introduced Papadopoulos to Australian Diplomat-1.[208] On May 10, 2016, Papadopoulos and Australian Diplomat-1 met again, and this time they were joined by

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[203] FBI-0002784 (FBI EC from Counterintelligence, *Re: Crossfire Hurricane* dated July 31, 2016 at 3-4) (hereinafter "*Crossfire Hurricane Opening EC*" or "*Opening EC*").

[204] Missy Ryan & Steven Mufson, *One of Trump's Foreign Policy Advisers Is a 2009 College Grad Who Lists Model UN As a Credential*, Wash. Post (Mar. 22, 2016).

[205] FBI-AAA-02-0019485 (Crossfire Hurricane Papadopoulos Profile dated 08/05/2016); *See also SSCI Russia Report*, pt. 5, at 471.

[206] FBI-AAA-02-0019485 (Crossfire Hurricane Papadopoulos Profile dated 08/05/2016); *SSCI Russia Report*, pt. 5, at 470.

[207] OSC Report of Interview of Australian Diplomat-1 on Oct. 09, 2019 at 1-2; *SSCI Russia Report*, pt. 5, at 487.

[208] OSC Report of Interview of Australian Diplomat-1 on Oct. 09, 2019 at 2; FBI-0002775 (FBI interview of Australian diplomats dated Aug. 11, 2016 at 1-2) (hereinafter "*Australia 302*").