What DOJ Memo Means For Defense Attys Tackling Wiretaps

By **H. Gregory Baker, Rachel Maimin and Camila Garces** (April 9, 2020)

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On March 31, U.S. Department of Justice Inspector General Michael Horowitz issued a management advisory memorandum to Federal Bureau of Investigation Director Christopher Wray identifying, among other things, "apparent errors or inadequately supported facts" in 25 Foreign Intelligence Surveillance Act[1] applications submitted to the Foreign Intelligence Surveillance Court.[2]

The inspector general's review focused on the FBI's compliance with factual accuracy review procedures, known as the Woods procedures, from October 2014 to September 2019. The DOJ Office of the Inspector General evaluated a selected sample of 29 FISA applications targeting U.S. persons[3] and involving both counterintelligence and counterterrorism investigations.

The Woods procedures were implemented by the FBI in 2001 and "mandate compiling supporting documentation for each fact in the FISA application."[4] In this recent memorandum, the OIG declared that it does not "have confidence that the FBI has executed its Woods Procedures in compliance with FBI policy."[5]

For example, FBI policy:

> requires the case agent who will be requesting the FISA application to create and maintain an accuracy sub-file (known as a "Woods File") that contains: (1) supporting documentation for every factual assertion contained in a FISA application, and (2) supporting documentation and the results of required database searches and other verifications.[6]

Notwithstanding this requirement, the OIG was unable to review original Woods files for four of the 29 selected FISA applications "because the FBI has not been able to locate them and, in 3 of these instances, did not know if they ever existed."[7]

Moreover, as to the remaining 25 FISA applications with Woods Files, the OIG:

> identified facts stated in the FISA application that were: (a) not supported by any documentation in the Woods File, (b) not clearly corroborated by the supporting documentation in the Woods File, or (c) inconsistent with the supporting documentation in the Woods File.[8]

"[A]t this time," said the OIG, "we have identified an average of about 20 issues per application reviewed, with a high of approximately 65 issues in one application and less than 5 issues in another application."[9]

The OIG provided two recommendations to the FBI:

1. "[T]hat the FBI institute a requirement that it, in coordination with [the Department of

Justice's National Security Division], systematically and regularly examine the results of past and future accuracy reviews to identify patterns or trends in identified errors so that the FBI can enhance training to improve agents' performance in completing the Woods Procedures, or improve policies to help ensure the accuracy of FISA applications"; and

2. "[T]hat the FBI perform a physical inventory to ensure that Woods Files exist for every FISA application submitted to the FISC in all pending investigations."[10]

The OIG noted that it "does not speculate" regarding "whether the potential errors would have influenced the decision to file the application or the FISC's decision to approve the FISA application."[11] It is careful to state that its:

> review was limited to assessing whether the FBI's Woods Files included documentation to support the factual statements in its FISA applications as required by FBI policy; [the Office] did not review case files or other documentation to confirm FISA application accuracy or identify any relevant omissions.[12]

The OIG further acknowledges that its findings are preliminary[13] and that its audit of the FBI's execution of the Woods Procedures is ongoing.[14]

Although the memorandum only discusses the audit work to date, the interim results of the audit reveal widespread deficiencies regarding foreign intelligence surveillance. Experienced defense attorneys should be able to exploit these findings in connection with motions to suppress wiretap evidence — as well as potentially to challenge, post-trial, convictions based on such evidence — including standard Title III wiretaps that do not even involve FISA courts.

To be sure, courts do not have the ability to enforce DOJ or FBI policy, so it would be a mistake, easily quashed by prosecutors, to overreach in utilizing the report in such motions. The key point to be made is that the report calls into question overall the existence of evidence supporting factual assertions made by law enforcement to support the requisite findings of probable cause and necessity for the warrant; the credibility of law enforcement has therefore been put into question.

While it would be very difficult to challenge a warrant on this basis alone, because law enforcement affidavits supporting wiretap applications are made under penalty of perjury and there is no requirement that the factual assertions therein be proven, an experienced defense attorney making a suppression motion can certainly undermine the credibility of probable cause and necessity showings by reminding courts that there has been a finding by the FBI's own watchdog that they have not been following required procedures — even in connection with the most sensitive warrants.

There is reason, therefore, for courts to review motions to suppress wiretaps — which, presently, are rarely granted — with greater scrutiny.

In addition, reminding courts about this report may ultimately have a positive effect in connection with the ex parte application process for Title III warrants. Typically, when prosecutors apply for a wiretap, unless there are legal deficiencies in the supporting affidavits, judges do not question whether there is a sufficient evidentiary basis to back up factual assertions. This is not wholly unreasonable, given that the affidavits are made under oath and there is no statutory requirement that judges do so.

But, after this report, courts may be less likely simply to rely on the bare-bones factual

assertions that often underlie these applications and more likely to ask probing questions of the affiants to ensure that there truly is sufficient evidence to support their assertions.

Prosecutors will have to be prepared to answer these questions, even though wiretaps are obtained during the investigative phase, usually before all of the evidence has been reviewed and scrutinized in anticipation of charging.

This will hopefully have a salutary effect on the Title III process generally, making sure law enforcement is held to the proper standard before the warrant is granted.

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[1] To obtain approval for surveillance under FISA, there must be, among other things, probable cause to believe that "thetarget of the electronic surveillance is a foreign power or an agent of a foreign power" and that "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power." 50 U.S.C. § 1805(a)(2)(A)-(B).

[2] U.S. Department of Justice, Office of the Inspector General, Management Advisory Memorandum for the Director of the Federal Bureau of Investigation Regarding the Execution of Woods Procedures for Applications Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons (hereinafter "Memorandum"), Audit Division 20-047 (Mar. 2020), at 3, https://oig.justice.gov/reports/2020/a20047.pdf.

[3] See 50 U.S.C. § 1801(i) (defining "United States person" as "a citizen of the United States, an alien lawfully admitted for permanent residence . . . , an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3)").

[4] Memorandum at 2.

[5] Id.

[6] Id. at 3.

[7] Id. at 2-3.

[8] Id. at 7.

[9] Id.

[10] Id. at 9.

[11] Id. at 8.

[12] Id.

[13] Id. at 3.

[14] Id. at 9.