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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT

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LEEANN FLYNN HALL
CLERK OF COURT

(U) IN RE ACCURACY CONCERNS REGARDING FBI
MATTERS SUBMITTED TO THE FISC.

Docket No. Misc. 19-02

**(U) RESPONSE TO THE AMICUS'S
LETTER BRIEF DATED JANUARY 15, 2020**

(U) The United States respectfully submits this response to the Amicus's Letter Brief dated January 15, 2020 pursuant to the Scheduling Order of the Foreign Intelligence Surveillance Court (FISC or the Court) entered on January 17, 2020.

I. (U) INTRODUCTION

(U) On December 17, 2019 the Court issued an Order responding to the findings of the Office of Inspector General's (OIG's) December 9, 2019, report, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation* (the OIG Report). The OIG Report found multiple omissions and misstatements regarding the applications submitted to the Court targeting Carter W. Page (Page). The Court's December 17, 2019, Order directed the Government to identify actions that have been, or will be, taken to ensure the accuracy and completeness of applications submitted by the Federal Bureau of Investigation (FBI). The Court's Order also directed the Government to explain why the FBI's applications should continue to be regarded as reliable in light of the OIG Report, pending implementation of any remaining improvements.

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(U) On January 10, 2020, the Government filed a Response to the Court's Order Dated December 17, 2020 ("the January 10, 2020 Response"). That response included a declaration from Director Christopher A. Wray of the FBI ("the FBI Declaration"), which identified actions the FBI has taken, or plans to take, in order to address the findings of the OIG Report as they relate to the accuracy and completeness of factual assertions in applications submitted to the Court by the FBI. The FBI Declaration also provided a timetable for the implementation of the 12 FISA-specific actions which the FBI will undertake.¹ As explained in the January 10, 2020 Response, (i) FBI's existing accuracy procedures, (ii) the Office of Intelligence's (OI) oversight and reporting practices when errors or omissions are identified during the application drafting process, and (iii) the corrective actions and interim measures identified in the FBI Declaration, as well as additional steps identified in the January 10, 2020 Response combine to substantiate the reliability of information contained in applications submitted by the FBI. Nonetheless, as discussed in the January 10, 2020 Response, the Department of Justice (DOJ) and the FBI have been actively considering whether additional measures are warranted in light of the findings of the OIG Report and the corrective measures identified by Director Wray. In the January 10, 2020 Response, DOJ informed the Court that it will provide further updates to the Court on any such additional measures.

(U) On January 10, 2020, the Court appointed David S. Kris, Esq. as an amicus ("the Amicus") to assist the Court in assessing the Government's January 10, 2020 Response. On

¹ (U) As noted in the Declaration, Director Wray has instructed FBI personnel to implement more than 40 corrective actions, making changes beyond those recommended by the OIG. FBI Declaration at 2. The Declaration also noted that the FBI would implement "further actions deemed appropriate," beyond those specifically outlined in the Corrective Actions. *Id.* at 4. The FBI is committed to learning from the failures in the Crossfire Hurricane Investigation and, to the extent warranted, making improvements in its processes beyond those that have already been identified.

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January 15, 2020, the Amicus filed a Letter Brief with the Court in which he discussed the Government's January 10, 2020 Response and offered additional corrective actions. On January 17, 2020, the Court issued a Scheduling Order directing the Government to submit any response it wishes to make to the Amicus's proposals by January 31, 2020.

II. (U) THE AMICUS'S LETTER BRIEF

(U) In his Letter Brief, the Amicus characterizes the Government's January 10, 2020 Response, including the 12 FISA-specific Corrective Actions discussed in the FBI's Declaration, as falling into three categories. Specifically, those categories are (a) Foreign Intelligence Surveillance Act ("FISA") standards and procedures; (b) training; and (c) audits and reviews.² In addition to discussing these three categories of information, which the Amicus notes "point in the right direction," the Amicus submits that the corrective measures must be "expanded and improved." *See* Letter Brief at 3. To this end, in his Letter Brief, the Amicus makes multiple proposals or recommendations for the Court to consider in assessing whether the Government has provided sufficient assurances regarding the accuracy and completeness of FISA applications.

(U) As the Amicus notes in his Letter Brief, "[t]he FISA process is complex, geographically dispersed, high-volume, and often time-sensitive." Letter Brief at 7. Making changes to such a complex system is a significant undertaking, and the Government must be thoughtful in its approach to ensure that the changes achieve the desired effects and avoid unintended consequences. The Government is working expeditiously to address the Court's

² (U) For ease of review and reference, the Government's Response follows these categories.

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concerns through implementation of the corrective measures discussed in the January 10, 2020 Response, including in Director Wray's Declaration.

(U) The Government respectfully submits that FBI and DOJ will need time to assess if the corrective actions are effective and to think strategically as to whether additional measures need to be put in place based on the results of those measures. These measures will also need to be deployed in a timeframe that balances the ability of the FBI and its operational personnel to thoughtfully implement these measures while also continuing to investigate critical and sensitive national security matters. The Government submits that an ongoing period of implementation supplemented by updates to the Court at appropriate intervals will allow the FBI to implement policies, procedures, and training in a manner that will avoid the need for future corrections and ensure the Court maintains full awareness of the current and future changes.

(U) This filing discusses recommendations or proposals made by the Amicus and includes updates on additional measures DOJ and the FBI will be taking to further facilitate accuracy and completeness in FISA applications, including in response to recommendations from the Amicus.

A. (U) The Amicus's Recommendations Regarding FISA Standards and Procedures

(U) The FBI Declaration sets forth eight corrective actions regarding FISA standards and procedures. Specifically, those corrective actions formalize procedures to elicit information that should be provided to the Office of Intelligence (OI) on the FISA request form, elicit information about confidential human sources (CHS) from the source handler, improve the FISA Verification form to confirm that the FBI has apprised OI of all information that may reasonably call into question the accuracy of the information in the FISA application, formalize the role of FBI supervisors in the FISA Verification process and the role of FBI attorneys in the FISA review

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process, and identify technological solutions to aid in this process. (FBI Corrective Actions 1-7 and 11).

(U) 1. CHS Checklist

(U) As noted in the Government's January 10, 2020 Response, FBI and OI are developing a checklist (also referred to as a questionnaire in the FBI Declaration) to be completed by FBI personnel during the drafting process to ensure that all relevant information regarding a human source's reliability, including the bias or motivation of the source, as well as the accuracy or basis of a source's reporting, is provided to OI. Director Wray noted in his declaration that the FBI would provide an update on this document by February 28, 2020. With regard to this checklist, which is currently in development, the Amicus suggests that the Government commit to a timeframe for completion. Letter Brief at 6. The FBI is committed to developing this checklist, which requires coordination with OI and multiple components of FBI. The FBI expects to transmit a draft of this checklist to OI by February 7, 2020. After consultation with OI and finalization of the checklist, the FBI currently intends to begin using this form on March 27, 2020, after a brief period of training.

(U) Although the checklist is not yet in place, the information the checklist is designed to capture about a human source's reliability is information that the FBI has always been required to provide OI as part of the FISA application drafting process and in response to questions from OI during the drafting process. The purpose of the checklist is to serve as a more explicit reminder to FBI personnel of what types of reliability information need to be provided to OI during the drafting process and to efficiently provide this information to OI. Until such checklist is deployed, OI will continue to work with the FBI to ensure that OI receives all relevant information regarding the reliability of human sources. In fact, the revised FISA request and

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verification forms include reminders to the agents regarding providing OI such information. Furthermore, training delivered to OI personnel during the week of January 27, 2020, emphasized the need for OI attorneys in individual cases to continue to be proactive in drafting applications through appropriate, targeted discussions with agents during the drafting process to ensure that all relevant information is being provided to the Court, including information that may tend to undermine probable cause and information regarding the reliability of human sources. OI attorneys will continue to work with case agents to review case information provided by the FBI to present factual information, including human source reliability information, accurately and to elicit and provide context for any exculpatory information or inferences that should be considered by the Court.

(U) 2. Inter-Agency Check for Sources

(U) In addition, the Amicus indicates that, “[t]o the extent it is not already required, this checklist should ensure and document a rigorous inter-agency check for sources that have relationships with other U.S. government agencies.” Letter Brief at 6. The FBI is committed to including such a question on the checklist to be completed by confidential human source handlers as part of the FBI’s revised accuracy and completeness processes. If, in a particular case, a U.S. Government agency confirms such a relationship, the FBI CHS handler will then solicit additional information from that U.S. Government agency.

(U) 3. Documenting FISA Practice of Erring on the Side of Disclosure

(U) In the January 10, 2020 Response, the Government explained that at all stages of the drafting process, OI attorneys are expected to look for errors and omissions in prior submissions to the Court. If non-material errors or omissions are found, they are to be corrected in the subsequent renewal application. Any material misstatements or omissions are to be brought

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immediately to the attention of the Court, as required by Rule 13 of the FISC Rules of Procedure. Response at 10. The OIG Report reiterated the practice of OI as set forth by supervisors interviewed in connection with that OIG investigation, which is to consider a fact or omission material if the information is capable of influencing the Court's probable cause determination and to err in favor of disclosing information that OI believes the Court would want to know. Response at 10; OIG Report at 230. The Amicus indicates that, "[t]he Court should require the Government formally to document and commit to this practice, rather than leaving it as a matter of executive branch discretion." Letter Brief at 7. The Government intends to document this practice as part its revision to its *Guidance to Ensure the Accuracy of Federal Bureau of Investigation Applications under the Foreign Intelligence Surveillance Act, Memorandum from Matthew G. Olsen & Valerie Caproni to all Office of Intelligence Attorneys, All National Security Law Branch Attorneys, and All Chief Division Counsels* (Feb. 11, 2009). (the "2009 Memorandum"), which was discussed in the January 10, 2020 Response. See Response at 13. In addition, the FBI training discussed below will instruct agents to err on the side of disclosure in its FISA practice.

(U) 4. Assessment Regarding Design and Functioning of Modified Forms

(U) The Government's January 10, 2020 Response explained that the FBI's corrective measures include revisions to the form used by FBI personnel to request initial or renewed Court authorization to conduct electronic surveillance or physical search ("the request form"), as well as revisions to the form used by case agents and supervisors to certify their compliance with the Woods Procedures during the verification of an application's accuracy ("the verification form"). See Response at 11. The revisions to the request form are designed, for example, to elicit information that may undermine probable cause and to ensure robust disclosure. The revisions

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to the verification form are intended to safeguard factual accuracy and completeness through additional certifications that must occur during the case agent's review of the application and accuracy sub-file prior to submitting a proposed application to the declarant and filing with the Court. The FBI Declaration also sets forth the FBI's timeline for training personnel regarding these modified or additional forms and the timeline for requiring that FBI personnel use the modified request and verification forms. The Amicus suggests that, "[a]s the new forms and other materials are finalized and implemented, the Court should require the government to demonstrate that they are both well-designed and functioning as designed. Thereafter, the Court should also require the government to review, reassess and report periodically on possible improvements to FISA standards and procedures in light of ongoing experience." Letter Brief at 7.

(U) The Government assesses that the revised forms are well-designed to ensure robust disclosure and safeguard factual accuracy and completeness. In addition, the Government has provided the Court and Amicus these forms, as well as FBI's training materials regarding these revised forms. The Government has also provided the Court and Amicus OI's accuracy-related training, which discusses these revised forms. As a result, the Court will be able to assess the design of the form. However, the Government is committed to ensuring that these revised forms function as designed and are effective. To this end, a review of the modified request and verification forms will be encompassed within the FBI's plan for enhanced audit, review, and compliance mechanisms to help determine whether the changes to the FISA process are effective in achieving the identified goals. The FBI is committed to working with DOJ to formulate a well-crafted, deliberate plan to ensure that the changes to the FISA process are effective. As stated in the FBI Declaration, the Government proposes to update the Court on its efforts related

UNCLASSIFIED

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to identifying and proposing audit, review, and compliance mechanisms by May 22, 2020. This provides the FBI with time to develop compliance mechanisms that take into account the new processes that are being implemented, develop methodologies for audits and reviews that utilize existing resources to the extent possible, and develop proposals for expanded compliance monitoring if necessary. In addition, the Government will update the Court on the efficacy of the newly revised forms by June 30, 2020. This additional time is needed to allow all parties to begin to get comfortable with the revised or new forms and to determine what, if any, issues are a result of learning a new form versus a flaw in the design and implementation of the form.

(U) 5. Technological Improvements

(U) The Amicus recognizes that technological improvements (as proposed in the FBI Declaration as corrective item 11) have the potential to significantly aid the FISA process. The Amicus states that “[t]he Court should carefully monitor the FBI’s progress and require regular updates on technological developments.” Letter Brief at 8. The Government will provide updates to the Court on any technological improvements that may facilitate the accuracy process.

(U) 6. Field Agents as Declarants

(U) The Amicus’s final proposal regarding FISA process and procedures, also the most significant in terms of change to the FISA process, is to consider “the possibility of using field agents, rather than headquarters agents, as declarants in FISA applications.” Letter Brief at 8. The Amicus recognizes that this would “represent a major change in practice, with potentially profound consequences.” Letter Brief at 8. In light of the findings detailed in the OIG’s Report, DOJ and the FBI recognize the need for significant change. To that end, the FBI and DOJ intend to have field agents serve as declarants on FISA applications. However, the Government still needs to resolve complex operational, legal, technical, and logistical issues. In light of this, the

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Government proposes to provide the Court with an update on its progress towards having field agents serve as declarants by March 27, 2020.

B. (U) The Amicus's Recommendations Regarding Training

(U) 1. Participation of OI in FBI Training

(U) The FBI Declaration identifies two Corrective Actions involving training. The first is a case-study training based on the OIG report findings. *See* Corrective Action 8. The second is a new training focused on FISA process rigor. *See* Corrective Action 10.³ The Amicus indicates that “[a]t the conceptual level, the two training modules are both sensible.” Letter Brief at 9. The Amicus notes that, “absent a compelling reason, the Court should generally require that OI attorneys participate along with FBI personnel in conducting all FBI training on FISA.” Letter Brief at 10. The Government notes that FBI and OI work together in the development and delivery of FISA-related training, and they have trained FBI personnel jointly for years. More recently, these joint training efforts have included the delivery of training by FBI operational personnel and FBI and OI attorneys at the six FBI field offices that sponsored the majority of FISA applications in 2018. It has also included training delivered to the three operational divisions at FBI Headquarters that request FISA applications. In addition, training has been provided to FBI attorneys who support FISA applications at FBI Headquarters and in FBI field offices. The Government’s efforts have also included the development and delivery of training to OI personnel and ongoing consultation between the FBI and OI regarding the case file reviews and, in some cases, attorney-assisted accuracy reviews currently being conducted by the FBI prior to submitting applications to the Court. These measures are producing, and will continue to

³ (U) As described in the FBI Declaration, the Director ordered the applicable FBI divisions to complete the development of the two training modules by April 30, 2020, and relevant FBI personnel are required to take the training modules by June 30, 2020. FBI Declaration at 8.

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produce, useful feedback regarding additional substantive and procedural actions to ensure the accuracy and completeness of the FBI's applications.

(U) Generally, OI has taken the lead in conducting FISA-related training during its FBI field office reviews. FBI attorneys take the lead in conducting in-house FISA-related training outside of an oversight review context. The FBI will coordinate the upcoming training modules discussed above with OI. However, from a practical perspective, there will be times when FBI will conduct FISA-related training for its personnel without OI.

(U) 2. Report on Training Participation and Results of Testing

(U) The Amicus indicates that, "the Court should require the government to report on the training, including participation rates, and the results of testing of student knowledge." Letter Brief at 10. The FBI will make FISA-related training mandatory, as discussed further below, and notes that this is intended to compel complete participation of all personnel associated with the FISA process (*e.g.*, national security case agents). The FBI will require a test for the curriculum and establish a minimum threshold to pass the test to ensure proficiency; without exception, personnel will be required to pass the test in order to participate in the FISA process. Because the curriculum is not completed at this time, the Government proposes to update the Court with additional information about the training and test during its April 30, 2020 filing.

(U) 3. Requiring Agents Who Work on FISA Applications to Complete Training

(U) Finally, the Amicus states that "[t]he Court should also (absent extraordinary circumstances and a sound explanation) forbid agents who have not successfully completed the training from serving as FISA declarants or factual verifiers." Letter Brief at 10. The Government agrees with the Amicus and notes that this suggestion reflects current practice. As a preliminary matter, FBI has, since 2009, required personnel working on FISA matters to take,

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web-based through the FBI's Virtual Academy platform or live, FISA Accuracy training from an FBI or OI attorney prior to drafting or assisting with the preparation of FISA applications.

In addition, the FBI's new FISA Request Form requires an agent to certify that he or she has completed FISA training before they are able to complete their FISA Request.

C. (U) The Amicus's Recommendations Regarding Audits and Reviews

(U) 1. The FBI's Auditing of Changes to the FISA Process

(U) The FBI Declaration sets forth one corrective action regarding audits and reviews which directs FBI's Office of Integrity and Compliance to work with FBI's Resource Planning Office to identify and propose audit, review and compliance mechanisms to ensure changes to the FISA process are effective. *See* Corrective Action 12. The Amicus notes that, "[i]t therefore appears that the FBI does not yet have a well-developed plan for enhancing auditing. The Court should inquire skeptically as to why this is the case, and take appropriate action based on what it learns." Letter Brief at 10.

(U) As noted above, in response to the OIG report, FBI is developing revised policies, has revised forms central to the FISA process, and intends to create training modules for all relevant FBI personnel, including those who draft FISA applications. In addition, the FBI is committed to developing technology that will better communicate and capture information necessary to the FISA process. As an integral part of this effort, the FBI's Office of Integrity and Compliance is working with other components in FBI, as well as DOJ, to formulate a plan to help determine whether the changes to the FISA process are effective. As stated in the FBI Declaration, the Government proposes to update the Court on this effort by May 22, 2020. This provides the FBI with time to develop compliance mechanisms that take into account the new processes that are being implemented, develop methodologies for audits and reviews that utilize

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existing resources to the extent possible, and develop proposals for expanded compliance monitoring if necessary.

(U) 2. Expansion of OI's Accuracy Reviews

(U) Additionally, in the January 10, 2020 filing, the Government detailed the procedures employed by OI's Oversight Section in its reviews of 25-30 FBI field offices annually. As part of that description, the Government noted that OI is considering how to expand at least a subset of its existing accuracy reviews at FBI's field offices to check for the completeness of factual information contained in the application being reviewed. NSD indicated that it will provide a further update to the Court on any such expansion of existing accuracy reviews. Response at 7-9. The Amicus notes that, "[t]he Court should require an update whether or not such measures are implemented, including an explanation for any decisions made." Letter Brief at 11. The Amicus further noted that, "[t]he Court should require the government to conduct more accuracy reviews, to expand those reviews, and to conduct a reasonable number of in-depth reviews on a periodic basis." Letter Brief at 12. OI has determined that it will expand its oversight to include additional reviews to determine whether, at the time an application was submitted to the FISC, there was additional information of which the Government was aware that should have been included and brought to the attention of the Court. Taking into account OI's limited personnel to conduct such reviews, OI is working to develop a process and a methodology for conducting such completeness reviews in a manner that is sufficiently thorough. OI is also working to develop a sampling methodology for conducting such reviews. The Government will provide a further update to the Court on the deployment of these expanded oversight reviews.

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D. (U) The Amicus's Recommendations Regarding Cultural Reform

(U) 1. Consistent Messaging About Compliance

(U) The Amicus advocates “for a strong FBI culture of individual ownership and responsibility for the accuracy and completeness of FISA applications.” Letter Brief at 12. The Amicus suggests that “Director Wray and other FBI leaders, as well as relevant leaders at the Department of Justice, should include discussions of compliance not only in one or two messages, but in virtually every significant communication with the workforce for the foreseeable future....He should also require his subordinates to deliver similar remarks through their own formal and informal interactions with FBI employees...” Letter Brief at 13-14. The Amicus believes that, “[t]he Court should require the FBI and DOJ to document and report on the nature and extent of this communication...” Letter Brief at 14. The Government fully agrees with the need to promote and encourage a culture of individual ownership and responsibility and supports the need for consistent messaging from all levels about compliance. In fact, the FBI has already taken steps to communicate with its workforce about the importance of accuracy and completeness. *See* Government’s January 10, 2020 Response at 10; FBI Declaration at 11. This messaging has occurred in general and in particular with regard to FISA. For example, since assuming his position in August 2017, the FBI Director has visited every field office and spoken to every headquarters component, and he has emphasized to each audience his expectation that FBI personnel be scrupulous in their adherence to rigor, accuracy, and good process. One element of his message on each of these occasions has been the critical importance of adhering to the highest standards in all of FBI’s work, so that the FBI maintains the trust of those relying on it – including, explicitly, the judges who evaluate the FBI’s warrants. These have been consistent themes and will continue to be so in the years to come.

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(U) The current FBI leadership's messaging has been uniform and unflagging. As noted in the FBI Declaration, Director Wray distributed a video to the entire FBI workforce via email on December 9, 2019, emphasizing the importance of strict compliance with accuracy procedures in the FISA process, and on January 13, 2020, he sent an FBI-wide email that underscored the importance of accuracy and completeness in FISA applications. He also reinforced this message in a secure video teleconference (SVTC) with FBI field office and Headquarter leadership on December 11, 2019. Additionally, on January 13, 2020, the FBI Deputy Director emphasized to the leadership of all FBI field and Headquarters divisions in a SVTC the need to be accurate and complete in the FISA process. More recently, on January 21, 2020, the FBI Deputy Director discussed the importance of accuracy and completeness in a video-recorded training on revised forms that will be available to all FBI personnel and required for all personnel who work on FISA applications. Then, on January 22, 2020, the FBI Director re-emphasized the importance of personnel complying with the new accuracy training and process in an FBI-wide leadership SVTC. The FBI Director again conveyed this message in a SVTC with FBI field and Headquarters leadership on January 30, 2020. In each message, FBI leadership has emphatically conveyed that rigorous adherence to the highest standards in the FISA process is expected from all FBI personnel, at every level. Rather than burdening the Court with an accounting of every instance in which the FBI conveys this message -- where it would inevitably miss instances as the messaging cascades down as intended -- the Government proposes to provide the Court with examples of the types of messaging occurring and the audience for the messaging in its April 30, 2020 filing.

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(U) 2. The FBI's Disciplinary Reviews

(U) Noting that “[i]ndividual accountability and discipline are also critical to organizational culture,” the Amicus makes two recommendations to the Court. Letter Brief at 14. The first is that the Court should require the Government to provide appropriate briefing on the FBI’s disciplinary reviews stemming from referrals by the OIG. Letter Brief at 14. The second proposal is that the Court should take whatever action is appropriate under the circumstances, including, barring agents from appearing in the Court. Letter Brief at 14. The FBI has longstanding, well-established processes for conducting disciplinary reviews, involving its Inspection Division and Office of Professional Responsibility. Taking into account the information provided by the OIG, the FBI will follow its internal processes to ensure individual accountability, where appropriate, for performance failures and/or misconduct. Upon completion of its internal review processes, the FBI is available to answer questions the Court may have related to the results.

(U) 3. Hearings

(U) Finally, the Amicus proposes that during the interim period, the Court should consider holding more hearings than it usually would. *See* Letter Brief at 14. The Government is available for any additional hearings the Court deems appropriate.

III. (U) CONCLUSION

(U) The Government shares the Amicus’s viewpoint that it needs to make changes to the FISA process in response to the OIG’s findings. As noted above, Director Wray has already instructed the FBI to implement more than 40 corrective actions, going beyond what was recommended by the OIG. The Department and the FBI are also actively considering whether additional measures are warranted. The Government appreciates the Amicus’s thoughtful

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response to the Government's January 10, 2020 filing and respectfully submits that the measures, policies, oversight, reporting practices, and additional corrective measures addressed in this filing and the Government's January 10, 2020 Response provide sufficient assurances of the accuracy and completeness of FISA applications submitted to the Court. The FBI has also reviewed this response and confirmed its accuracy.

Respectfully submitted,

Dated: 1/31/20

Melissa MacTough

Melissa MacTough
Deputy Assistant Attorney General
National Security Division
U.S. Department of Justice


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(U) VERIFICATION

(U) I declare under penalty of perjury that the foregoing response to Amicus's Letter Brief dated January 15, 2020, is true and correct with regard to the Federal Bureau of Investigation's policies and practices based upon my best information, knowledge, and belief.

(U) Executed pursuant to 28 U.S.C. § 1746 on January 31, 2020.


Dana J. Boente
General Counsel
Federal Bureau of Investigation

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