No. _____

In the Supreme Court of the United States

CARTER PAGE, *Petitioner,*

v.

JAMES B. COMEY; ANDREW MCCABE;
KEVIN CLINESMITH; PETER STRZOK; LISA PAGE;
JOE PIENTKA, III; STEPHEN SOMMA; BRIAN J. AUTEN;
UNITED STATES DEPARTMENT OF JUSTICE;
FEDERAL BUREAU OF INVESTIGATION;
UNITED STATES OF AMERICA;
JOHN DOE 1-10; JANE DOE 1-10

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Bureau of Investigation obtained four warrants from the Foreign Intelligence Surveillance Court to surveil Petitioner Dr. Carter Page. But its applications contained multiple errors, omissions, and misstatements that the FBI later concluded vitiated its showing of probable cause. Worse, it was later revealed that two agents leaked information about the FBI's surveillance to the press, resulting in an April 2017 article in *The Washington Post* on which the government expressly "declined to comment." The United States first acknowledged its surveillance abuses in an Office of the Inspector General report two years later. Less than a year later, Dr. Page sued the individual respondents—the FBI officials and leaders involved in the surveillance—for unlawfully surveilling him and unlawfully using or disclosing surveillance-obtained information.

The D.C. Circuit held that Dr. Page's claims accrued, not when the government acknowledged its abuses, but when Dr. Page became aware of the anonymously sourced, unverified news article. And the D.C. Circuit did so without applying—and in contravention of—this Court's "standard rule" that a claim does not accrue "until the plaintiff can file suit *and obtain relief*." *Corner Post, Inc.* v. *Board of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 810-811 (2024) (emphasis added).

The question presented is: Do claims that the government violated surveillance authorities accrue as a matter of law based merely on facts that might lead a victim to *suspect* unlawful surveillance, rather than on facts that would establish a basis for relief?

PARTIES TO THE PROCEEDING

The case caption contains the names of all parties to the proceeding.

Petitioner Carter Page was the Appellant in the D.C. Circuit and the Plaintiff in the district court.

Respondents James B. Comey,[1] Andrew McCabe, Kevin Clinesmith, Peter Strzok, Lisa Page, Joe Pientka, III, Stephen Somma, Brian J. Auten, the United States Department of Justice, the Federal Bureau of Investigation, the United States of America, John Doe 1-10, and Jane Doe 1-10 were the Appellees in the D.C. Circuit and the Defendants in the district court.

[1] When the extension application in this case docketed, No. 25A385, Mr. Comey was automatically substituted for the current director of the FBI, Kash Patel. This was error: Mr. Comey was sued in his individual capacity, not in his official capacity, and remains a respondent. See App.168a (¶26).

CORPORATE DISCLOSURE STATEMENT

Petitioner Carter Page is an individual person, and no corporate disclosure is required.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *Page* v. *Comey,* No. 23-5038 (D.C. Cir.) (opinion affirming dismissal entered May 23, 2025 (App.A); petition for rehearing *en banc* denied July 14, 2025 (App.D)); and
- *Page* v. *Comey,* No. 1:20-cv-03460-DLF (D.D.C.) (memorandum opinion dismissing claims entered September 1, 2022 (App.C); motion to alter or amend judgment denied January 18, 2023 (App.B)).

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INTRODUCTION

The D.C. Circuit held that claims brought by Petitioner Dr. Carter Page challenging unlawful and secret surveillance by the Federal Bureau of Investigation (FBI) accrued once Dr. Page read anonymously sourced news articles describing that surveillance because Dr. Page characterized the reported surveillance as "unjustified" and "politically motivated." App.19a. But the panel never addressed whether Dr. Page's claims would have survived a motion to dismiss if he had brought them based on the information in the news articles alone. Instead, the court concluded that the articles contained enough information for Dr. Page's claims to accrue, because "accrual is *not* delayed just because the plaintiff does not yet have 'access to or constructive knowledge of *all* the facts required to support [a] claim.'" App.18a-19a (first emphasis added) (quoting *Sprint Commc'ns Co.* v. *FCC*, 76 F.3d 1221, 1226 (D.C. Cir. 1996)). That rule cannot be squared with this Court's accrual precedents. Those precedents—at the very least—require knowledge of the injury such that an injured party can sue and obtain relief. But a person who merely suspects unlawful government surveillance does not know that he has been injured and *cannot* sue and obtain relief since such surveillance is secret and cannot be investigated. Under Supreme Court Rule 10(c), this Court should grant the petition and reverse.

For federal claims, accrual is a "question * * * of federal law." *Albright* v. *Oliver*, 510 U.S. 266, 280 n.6 (1994). In answering that federal question, the Court has explained that claims do not accrue until the plaintiff can sue *and obtain relief*. *Corner Post, Inc.* v.

Board of Governors of Fed. Rsrv. Sys., 603 U.S. 799, 810 (2024). Since claims grounded in speculative "the-defendant-unlawfully-harmed-me accusation[s]" will not survive a motion to dismiss, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up), a plaintiff cannot sue and obtain relief for non-speculative claims. The D.C. Circuit was thus wrong: For challenges to secret surveillance, accrual *must* be delayed until the plaintiff has "access to or constructive knowledge of *all* the facts required to support [a] claim" since the missing facts are undiscoverable and necessary to support the existence of a legal, redressable injury. App.18a-19a (cleaned up). Mere inquiry notice cannot be enough for surveillance claims to accrue since any inquiry will be fruitless: Attempts to learn about confidential government surveillance are sure to fail because any evidence will be inaccessible absent specialized legal process that could only be invoked after surviving a motion to dismiss. *E.g.*, *FBI* v. *Fazaga*, 595 U.S. 344, 351-352 (2022).

Here, by holding that Dr. Page had to bring his claims even before he had access to all the facts necessary to support his suspicion that he was being *illegally* surveilled, the D.C. Circuit guaranteed that surveillance claims will ordinarily accrue too early. This, in turn, all but guarantees the Catch-22 that such claims will either be dismissed as too speculative or as time-barred. Under the panel's reasoning, if there is any basis to show that a plaintiff *suspected* unlawful surveillance or the unlawful use or disclosure of surveillance-obtained information, no matter how speculative, the claim has accrued.

It cannot be that surveillance claims are too speculative until they are untimely. Until that exceptionally important question of federal law is properly resolved, the meaningful guardrails against surveillance that Congress enacted are nugatory. To avoid nullifying protections to victims of the surveillance state, this Court should reiterate, either summarily or on plenary review, that claims challenging secret government surveillance do not accrue until a plaintiff knows the facts necessary to bring non-speculative claims that can survive a motion to dismiss. Otherwise, the rule adopted below will lead to an influx of lawsuits based on speculation alone.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the D.C. Circuit is published at 137 F.4th 806 and reproduced in Appendix A, App.1a-74a.

The district court's opinion denying Dr. Page's motion for reconsideration is not published but is available at 2023 WL 244350 and reproduced in Appendix B, App.75a-86a.

The district court's opinion granting the various motions to dismiss is reported at 628 F. Supp. 3d 103 and reproduced in Appendix C, App.87a-155a.

The per curiam order denying Dr. Page's petition for rehearing *en banc* is not published but is available at 2025 WL 2004959 and reproduced in Appendix D, App.156a-157a.

JURISDICTION

The D.C. Circuit's opinion issued on May 23, 2025. App.1a. Dr. Page's petition for rehearing *en banc* was denied on July 14, 2025. App.156a. Chief Justice Roberts granted Dr. Page's timely request for a 60-day extension to file this petition to December 11, 2025. No. 25A385. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of Rule 12(b) is reproduced in Appendix F, App.244a. The text of the relevant sections of the Foreign Intelligence Surveillance Act of 1978 (FISA) is reproduced in Appendix G, App.245a-253a. The text of the relevant section of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act or PATRIOT Act) is reproduced in Appendix H, App.254a-257a.

STATEMENT OF THE CASE

A. Legal Background

This petition seeks the Court's review of the D.C. Circuit's holding that certain claims brought by Petitioner Carter Page under FISA, Pub. L. No. 95-511, 92 Stat. 1783, and the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, accrued with the publication of an anonymously sourced news article and were thus time-barred.

This Court recently reiterated the longstanding principle that a claim accrues only "when the plaintiff has a complete and present cause of action—*i.e.*, when

she has the right to file suit and obtain relief." *Corner Post*, 603 U.S. at 809 (cleaned up). Under that rule, any argument that limitations periods "commence[] at a time when the [injured party] could not yet file suit" is wrong. *Bay Area Laundry & Dry Cleaning Pension Tr. Fund* v. *Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 200 (1997). As the dissenting justices in *Corner Post* recognized, this means that the accrual rule is generally "context specific." *Corner Post*, 603 U.S. at 853 (Jackson, J., dissenting) (collecting cases).

Often, a claim will accrue "when an infringing act occurs." *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014). This is known as the "incident of injury" rule. *Id.* at 670 n.4. Most circuits "have adopted, as an alternative," a "'discovery rule,' which starts the limitations period when 'the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim.'" *Ibid.* (quoting William A. Graham Co. v. Haughey, 568 F.3d 425, 433 (3rd Cir. 2009)). Where such a rule applies, the Court has "been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000).

The discovery rule tends to apply only when the injury "has been concealed, or is of such character as to conceal itself[.]" *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 349-350 (1874). For such "self-concealing" injuries, the discovery rule makes sense: "[P]rivate parties may be unaware that they have been harmed," and "we do not typically spend our days looking for evidence that we were lied to," "defrauded," or—as here—*illegally* surveilled. *Gabelli* v. *SEC*, 568 U.S.

442, 450-451 (2013). In short, sometimes, whether a plaintiff "has been injured in fact may be unknown or unknowable." *United States* v. *Kubrick*, 444 U.S. 111, 122 (1979).

Whatever the justifications for a discovery rule in some circumstances, the Court has never broadly adopted it. Instead, it has acknowledged lower court decisions doing so and "repeatedly characterized" those decisions as applying "an equity-based doctrine" that "is distinct from the traditional equitable tolling doctrine." *Rotkiske* v. *Klemm*, 589 U.S. 8, 15 (2019) (collecting cases). As lower courts have recognized, the point at which an injured party discovered or reasonably could have discovered its injury is typically a question left to the jury. See, *e.g.*, *Firestone* v. *Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996); see also *American Premier Underwriters, Inc.* v. *National R.R. Passenger Corp.*, 839 F.3d 458, 464 (6th Cir. 2016). Under that rule, dismissal is "appropriate only if the complaint on its face is conclusively time-barred." *Firestone*, 76 F.3d at 1209.

B. Factual Background[2]

Dr. Page is a long-time contributor to the Nation's national-security efforts as an "operational contact" of the Central Intelligence Agency (CIA). App.180a. Despite years of service, Page was targeted by Operation Crossfire Hurricane, a flawed FBI investigation into Donald Trump's 2016 Presidential

[2] Because the petition "arises from a motion to dismiss," the facts in the Second Amended Complaint are presented, and must be accepted, as true. *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 453 (2006).

Campaign investigating suspected Russian influence. App.161a. Through deliberate lies and incomplete factual assertions, the FBI convinced the Foreign Intelligence Surveillance Court (FISC) that there was probable cause to believe that Dr. Page was an intermediary between Russia and Paul Manafort, the Trump campaign's chair. App.164a-166a, 180a, 204a-205a. This led the court to grant multiple FISA surveillance warrants to surveil Dr. Page. App.159a-160a. The FBI ultimately submitted four warrant applications—the original and three extension applications—and received four warrants. App.160a. The FBI submitted the last application in June 2017. App.168a.

Before the FBI submitted its final renewal application, however, two members of Operation Crossfire Hurricane, respondents Peter Strzok and Lisa Page, conspired to anonymously leak information from the FBI's secret surveillance of Dr. Page to the press to smear his image—and by extension the Trump campaign. App.217a. The first outlet to address the leak was *The Washington Post* in an April 2017 article called *FBI obtained FISA warrant to monitor former Trump advisor Carter Page*. App.7a. The article reported that the FBI had "convinc[ed] a Foreign Intelligence Surveillance Court judge that there was probable cause to believe Page was acting as an agent of a foreign power, in this case Russia" and that the warrant had been renewed "more than once." JA095, JA097.[3] That claim, however, was made "on

[3] JA citations are to the Joint Appendix filed in the D.C. Circuit.

the condition of anonymity" because the sources were "not authorized to discuss details of a counterintelligence probe." JA095. The article made clear that the "White House, FBI and Justice Department declined to comment." JA096. And it emphasized that respondent James Comey had only recently declined to comment "about any individuals, including Page" in congressional testimony about the FBI's "investigating efforts by the Russian government to interfere in the 2016 election." JA096. *The New York Times* mimicked aspects of the story, App.219a-220a, but—like *The Washington Post*—provided no source.

Because he knew that he was factually innocent of being a Russian agent, Dr. Page *suspected* from the news articles that he had been illegally surveilled. App.19a. And Dr. Page shared that suspicion with Congress and the public. App.56a, 57a & n.10. But foreign intelligence investigations are conducted in secret, App.108a, so Dr. Page's suspicions could not be verified regardless of the steps he took to learn more.

More than two years later, the Office of Inspector General (OIG) published its December 2019 report outlining the FBI's repeated and thorough surveillance abuses against Dr. Page. App.20a.[4] The OIG Report found that, "based upon the information

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[4] Off. of Inspector Gen., U.S. Dep't of Just., *No. 20-012, Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation* (Dec. 2019), https://tinyurl.com/2pfxvrpf [hereinafter, "OIG Rep."]. The OIG Report was addressed at length in the Complaint, *e.g.*, App.168a, 171a, and the Court can consider it, *Tellabs, Inc.* v. *Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007).

known to the FBI in October 2016, the first application contained" "seven significant inaccuracies and omissions."[5]

First, the FBI omitted information "obtained from another U.S. government agency detailing its prior relationship with Page, including that Page had been approved as an 'operational contact' for the other agency."[6] Second, the application characterized its source's reporting as having been "corroborated and used in criminal proceedings," an unauthorized overstatement of "the significance of [that] past reporting."[7] Third, the FBI failed to tell FISC that "a key * * * sub-source" was himself the subject of an FBI counterintelligence investigation, was a known "boaster" and "egoist," and was willing to "engage in some embellishment."[8] Fourth, the FBI told FISC that it had verified that its source had only leaked its research to the FBI and a third-party when the FBI knew its source had also given "his information to the State Department."[9] Fifth, the FBI omitted statements "denying that anyone associated with the Trump campaign was collaborating with Russia or with outside groups like Wikileaks."[10] Sixth, despite the FBI's claiming that Dr. Page was the intermediary between Russia and Paul Manafort, the FBI omitted statements from Dr. Page that he had never met and

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[5] OIG Rep. at viii.

[6] *Ibid.*

[7] *Id.* at viii-ix.

[8] *Id.* at ix.

[9] *Ibid.*

[10] *Ibid.*

never spoken with Paul Manafort.[11] Seventh, the FBI omitted statements from Dr. Page "that were inconsistent with its theory" that "Page was an agent of Russia."[12]

These seven inaccuracies and omissions were not brought to the attention of the National Security Division's Office of Intelligence until after "the last FISA application was filed in June 2017."[13] "Consequently, these failures were repeated in all three renewal applications."[14]

But the FBI did not stop with the seven material failures in the original application. The OIG also "identified 10 additional significant errors in the renewal applications."[15] First, the FBI omitted information "raising significant questions about the reliability of allegations included in the FISA applications."[16] Second, the FBI omitted yet another reminder from a U.S. government agency that Dr. Page was an operational contact.[17] Third, the FBI omitted information that the FBI's source lacked "self-awareness," demonstrated "poor judgment," and was unlikely to have validated his reporting.[18] Fourth, the FBI omitted information showing that the FBI's

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[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*

[14] *Ibid.*

[15] *Id.* at xi.

[16] *Ibid.*

[17] *Ibid.*

[18] *Ibid.*

source's information was shared with the Hillary Clinton campaign, that the source was paid to "discuss his reporting with the media," and that the source was "desperate that Donald Trump not get elected."[19] Fifth, the FBI omitted information that "provided greater clarity on the political origins and connections of [the source's] reporting."[20] Sixth, the FBI failed to correct its earlier assertion that the source had not provided its information to the news media.[21] Seventh, the FBI omitted an FBI finding that the source's "past contributions to the FBI's criminal program" had only "been 'minimally corroborated.'"[22] Eighth, the FBI omitted statements "denying that the Trump campaign was involved in the circumstances" of an email hack of the Democratic National Committee.[23] Ninth, the FBI omitted denials "suggesting that the campaign received an offer or suggestion of assistance from Russia."[24] And tenth, the FBI omitted information showing that Dr. Page "played no role" in changes to the Republican platform addressing "Russia's annexation of Ukraine" despite asserting his participation "in all four FISA applications."[25]

The same day that the OIG Report issued, the FBI "advised [FISC] of its assessment that," for at least the latter two applications, "if not earlier, there was

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[19] *Ibid.*

[20] *Id.* at xii.

[21] *Ibid.*

[22] *Ibid.*

[23] *Ibid.*

[24] *Ibid.*

[25] *Ibid.*

insufficient predication to establish probable cause to believe that Page was acting as an agent of a foreign power." Opinion and Order Regarding Use and Disclosure of Information at 2, *In re Carter W. Page, A U.S. Person*, Nos. 16-1182, 17-52, 17-375, 17-679 (F.I.S.C. June 25, 2020). FISC eventually found "violations of the government's duty of candor, in all four applications." *Id.* at 3.

Although Dr. Page previously suspected that, if he was surveilled as the news articles reported, any surveillance was illegal, Dr. Page did not know—and, because surveillance is confidential, could not have learned—about the illegal conduct plaguing the FBI's surveillance applications until the OIG Report issued in December 2019.

C. Procedural History

On November 27, 2020, less than a year after the OIG issued its report, Dr. Page filed his initial complaint, asserting, as relevant here, claims against members of the Operation Crossfire Hurricane team—the individual respondents—for (1) unlawfully surveilling him in violation of 50 U.S.C. § 1809(a)(1) and (2) "disclos[ing] or us[ing]" information about him "obtained through electronic surveillance" in violation of 50 U.S.C. § 1809(a)(2). App.3a, 11a. While those claims were pending, Dr. Page exhausted his administrative remedies to bring a claim against the United States under the PATRIOT Act. App.12a n.3. He amended his complaint to bring that claim in June 2021. App.12a.

1. Defendants moved to dismiss, and the district court granted those motions after holding that "Page

has brought no actionable claim against any individual defendant or against the United States." App.154a. But the court reached that conclusion on the merits and declined to dismiss Dr. Page's "FISA claims as time-barred" because the court clarified that it was "far from clear that a diligent investigation would have revealed enough evidence of illegality to avoid 'fil[ing] suit on a hunch.'" App.108a-109a (quoting *Hobson* v. *Wilson,* 737 F.2d 1, 39 (D.C. Cir. 1984), *overruled in part on other grounds by Leatherman* v. *Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163 (1993)). In so concluding, the court explained both that the complaint did "not allege that Page had access to the underlying affidavits" and that the news articles did not "describe the[ir] contents" either. App.108a. The Court added that it was "unlikely that Page would have been granted full access to them" if he tried and that it was "unclear from the complaint what investigative steps, if any, Page took or could have taken after April 2017" to avoid filing suit on a hunch. App.108a-109a.

For largely the same reasons, the district court refused to dismiss Dr. Page's PATRIOT Act claim as time-barred. App.141a. Though the district court found it "true that Page had notice of the alleged violations" two years before his administrative claims, it held that said notice was not enough: "Simply because Page knew about the FISA renewals does not mean that he knew that the applications contained FISA-obtained information" that would have supported a use-or-disclosure claim under the PATRIOT Act. App.141a.

2. On appeal, a divided panel affirmed, finding all of Dr. Page's claims untimely. App.3a. The panel purported to apply the discovery rule for claim accrual and held that Dr. Page's claims accrued not in December 2019 with the publication of the OIG Report, but in April 2017 with the publication of the two news articles. App.21a. The panel held that the surveillance claims accrued because Dr. Page decried the reported surveillance as "unjustified" and "politically motivated" in *The Washington Post* article itself. App.21a.

The panel's holding as to the accrual of the use-or-disclosure claims was more complicated. The panel explained that those claims accrued because the news articles reported that the warrants had been renewed "more than once." App.21a-22a. From that one line, the panel concluded that Dr. Page should have known that anything the FBI learned from its initial warrant would have been used or disclosed in all subsequent FISA applications since FISA requires "a summary statement of the foreign intelligence information obtained pursuant to the original order." App.21a-22a (discussing and quoting 50 U.S.C. § 1804(a)(8), (11) (emphasis omitted)).

The panel also pointed to a May 2017 letter from Dr. Page to the House Intelligence Committee where Dr. Page hyperbolically aired his suspicions that the investigation reported in the anonymously sourced April 2017 news articles—if it had occurred—was an "unjustified," "politically motivated" "potpourri of falsehoods from the Clinton/Obama regime." App.23a-24a. This letter, the panel concluded, "confirms that Page knew of the unlawfulness of the FISA warrants

and his resultant injury" and "had sufficient notice by April 2017" to bring his claims. App.24a.[26]

Having concluded that Dr. Page's claims accrued in April 2017, the panel found that his § 1809(a)(1) surveillance claim and his § 1809(a)(2) use-or-disclosure claims were time-barred under "D.C.'s three-year statute of limitations," which the panel assumed, without deciding, applied. App.18a. The panel also concluded that one theory of Dr. Page's § 1809(a)(2) claim—that respondents Lisa Page and Peter Strzok "leaked the FISA warrants' results" to the media—was "insufficiently pleaded." App.3a, 25a.[27]

As to Dr. Page's PATRIOT Act claim, the panel applied a two-year statute of limitations and concluded that this claim too was time-barred because it accrued in April 2017. App.27a-28a (citing *Schuler* v. *United States*, 628 F.2d 199, 201 (D.C. Cir. 1980)). The panel did not reach the merits of that claim. See App.30a.

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[26] The panel did not explain how the April 2017 news articles could possibly have notified Dr. Page about any claims related to the final warrant application, which was not submitted until months later, in June 2017. Nor did the panel analyze whether Dr. Page could have obtained *relief* based solely on what he learned from the April 2017 news articles.

[27] Petitioner acknowledges that the panel's conclusion as to that theory is not worthy of this Court's review. But the panel did *not* reach the merits of the remaining § 1809(a)(2) claim that the FBI unlawfully used or disclosed FISA-obtained information in its applications seeking extensions of the original FISA-warrant. See App.3a (only finding the § 1809(a)(2) claim "in part[] insufficiently pleaded").

Partially dissenting, Judge Henderson agreed that Dr. Page's § 1809(a)(1) surveillance claim was untimely "for the reasons explained by the majority," App.48a, but dissented as to the § 1809(a)(2) claims, App.3a, 59a-60a. She explained that it was wrong to "dispose[] of" a "critical factual dispute with a lone sentence from the *Post* article, which quotes an anonymous Government official speaking off the record and alleging that the FISA warrant was renewed." App.65a. She explained that, for the majority to conclude that *The Washington Post* article gave Dr. Page knowledge of his use-or-disclose injury, the panel had to:

> infer that Page (i) read the one line in the entire article that discussed renewal applications, (ii) read the FISA statute, (iii) found the precise portion of the statute addressing applications to the FISC and (iv) ascertained from the text's oblique language that the Government used FISA-derived information in its warrant reauthorization requests.

App.63a.

Judge Henderson found this to be "one inferential leap too many." App.63a. She explained that—even on appeal—Dr. Page still could "only speculate about the contents of the FISA renewal applications" because the secrecy required by FISA and the PATRIOT Act creates an "evidentiary vacuum." App.63a-64a.

Judge Henderson continued that the evidentiary vacuum could not have been filled by the "lone sentence from the *Post* article" on which the majority relied to dispose of Dr. Page's claims under 50 U.S.C.

§ 1809(a)(2). App.65a. This was particularly true because "the Government's official organs—the White House, the FBI and the Justice Department—all 'declined to comment.'" App.65a. Judge Henderson further focused on *The Washington Post* article's calling its claims "unsubstantiated" and including a quote from the former Director of National Intelligence expressly *denying* "any FISA orders to monitor the communications of Trump * * * or his campaign." App.65a-66a. Judge Henderson thus explained that she "cannot join the majority holding" because "[a] jury—the traditional factfinders" should "be given the opportunity to adjudicate these contested facts" to determine whether they gave Dr. Page knowledge of his inquiry. App.66a-67a.

For similar reasons, Judge Henderson found Dr. Page's PATRIOT Act claim timely. App.57a. But, unlike the panel, Judge Henderson concluded (1) that Dr. Page forfeited the arguments supporting the claim and (2) even if he had preserved those arguments, the claim "would fail on the merits." App.57a-58a.

Dr. Page unsuccessfully sought *en banc* review. App.156a.

REASONS FOR GRANTING THE PETITION

The panel held that Dr. Page's claims accrued at the time of the 2017 press reports, without determining whether Dr. Page's claims would have survived a motion to dismiss if they relied on only the information contained in the April 2017 news articles. That approach is inconsistent with this Court's precedents, which hold that claims do not accrue until a person can file suit *and* obtain relief. If applied broadly, the rule adopted below would require potential victims of unlawful government surveillance to file suit once they suspect illegal surveillance to avoid limitations defenses. But such speculative claims are likely to be dismissed. To ensure that victims of unlawful surveillance are not stuck between having to file speculative claims or facing statute-of-limitations issues, the Court should grant the petition and reverse.

I. The Rule Adopted Below Is Inconsistent with This Court's Claim-Accrual Precedents.

The decision below applied a rule that is inconsistent with this Court's precedents on an important question of federal law: when a federal claim accrues.

1. The Court has explained that the general rule is "that the limitations period commences when the plaintiff has a complete and present cause of action." *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409, 418 (2005) (cleaned up). It has further explained that, "[u]nless Congress has told us otherwise in the legislation at

issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area Laundry*, 522 U.S. at 201. The federal rule is thus simple enough to state: "Absent other indication, a statute of limitations begins to run at the time the plaintiff has the right to apply to the court for relief." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring in judgment) (cleaned up).

This is no new principal. For more than a century, "the uniform result of the cases decided on the statute of limitations" was "that [a statute of limitations] does not deprive a party of his remedy, unless he has been guilty of the laches or default contemplated therein." H.G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* 11 (Boston, Soule & Bugbee 1883). Not much later, commentator John Kelly explained that a "cause of action accrues at the time the party is entitled to sue, demand relief, or make the entry." John Kelly, *A Treatise on the Code Limitations of Actions Under All State Codes* 91 (1903). That a cause accrues only when a party has been hurt was the only "logical" rule, he explained, because "there are cases where the breach or the wrong did not cause the 'hurt.'" *Ibid.*

2. This rule also implicates a related set of precedents which make clear that a person cannot apply to the Court for relief based only on speculation. While "the pleading standard * * * does not require detailed factual allegations, * * * it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). The prohibition on such

accusations means that "a formulaic recitation of the elements of a cause of action" and "naked assertions devoid of further factual enhancement" "will not do." *Ibid.* (cleaned up). In other words, as this Court clarified just last term, when allegations in a complaint are "all speculation," "it is not enough" to survive "a motion to dismiss." *Smith & Wesson Brands, Inc.* v. *Estados Unidos Mexicanos*, 605 U.S. 280, 296 (2025); *accord Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level.").

Applying this standard in the context of this Court's accrual precedents confirms that claims based only on speculation that would not survive a motion to dismiss have not accrued because a plaintiff *cannot* "file suit and obtain relief." *Bay Area Laundry*, 522 U.S. at 201.

3. Here, the panel below applied a different rule. Its rule, established before this Court decided *Bay Area Laundry*, provides that "a cause of action accrues and the limitations period begins to run only when 'the plaintiff discovers, or with due diligence should have discovered, the injury that is the basis of the action.'" App.18a (quoting *Sprint Commc'ns Co.* v. *FCC*, 76 F.3d 1221, 1226 (D.C. Cir. 1996)). Under that rule, "accrual is not delayed just because the plaintiff does not yet have 'access to or constructive knowledge of *all* the facts required to support [a] claim.'" App.18a-19a (quoting *Sprint Commc'ns*, 76 F.3d at 1228). And because Dr. Page did not need to even have constructive knowledge to all the facts under that rule, the panel concluded that it was *not* requiring him to

file speculative claims because he had "both read the *Post* and *Times* articles and knew he was the subject of alleged illegal government surveillance." App.24a. Rather, because Dr. Page decried the surveillance described in those articles as "unjustified" and "politically motivated," App.19a, the panel concluded that Dr. Page's "lack of access to the affidavits" did not matter; "Page knew all the essential facts on which he relies in support of his FISA claims[.]" App.20a.

This was wrong. As this Court has plainly acknowledged, "individuals affected by FISA surveillance are very often unaware of the surveillance *unless it is revealed by the Government*." *Fazaga*, 595 U.S. at 356 (emphasis added). And here, surveillance alone is not even an injury under FISA or the PATRIOT Act. Indeed, Dr. Page's knowledge that he was not a Russian agent—and thus that any investigation into him was "unjustified"—said nothing about whether the FBI had probable cause to believe he was a Russian agent—the relevant standard under FISA and the critical question for determining whether Dr. Page had even been injured. 50 U.S.C. § 1809; see also *id.* §§ 1804(a), 1805(a). Thus if "discovery of the injury" is the relevant question for accrual, *Rotella*, 528 U.S. at 555, Dr. Page would have had to know *from the news articles* that respondents lacked probable cause to surveil him and thus "injured" him by doing so anyway.

But the news articles don't say as much. See JA095-JA100. Nor could they have. This Court has explained that "innocent explanations—even uncontradicted ones—do not have any automatic, probable-cause-vitiating effect." *District of Columbia*

v. *Wesby*, 583 U.S. 48, 68 (2018). That means Dr. Page's knowledge of his own innocence would have been a *non sequitur* had he tried to establish that the FBI surveilled him without probable cause before the OIG Report.

For similar reasons, Dr. Page would not have been able to allege that the FBI lacked probable cause in its warrant applications by pointing to his being an operational contact for the CIA. Dr. Page did not know—and could not have known before the OIG Report—(1) that the FBI knew that Dr. Page was an operational contact at the time of the first FISA application, and (2) that the FBI had excluded that information from its applications. That information came out for the first time in the OIG Report.[28]

Nor, before the OIG Report, could Dr. Page have claimed that the CIA had likely shared information with the FBI about Dr. Page's status as an operational contact. As this Court has recognized, "[a]gencies often have hundreds of employees, dozens of offices, and several levels of leadership." *Gabelli*, 568 U.S. at 452. For Dr. Page to have asserted any non-speculative allegation about his relationship with the CIA, he would have had to know who at the FBI knew what—and when. Worse, even when "[d]ifferent agencies often have overlapping responsibilities," it is an open question whether "the knowledge of one [is] attributed to all[.]" *Ibid.* Dr. Page would thus have had to allege—without anything to support that allegation—that the FBI knew about his relationship with the CIA before he could even allege that the relationship vitiated

[28] See OIG Rep. at viii.

probable cause. None of these allegations would rise to a level necessary to survive a motion to dismiss.

The panel was also wrong to point to Dr. Page's April 2017 belief that the investigation into him was "politically motivated." App.21a. Just as "probable cause should generally defeat a retaliatory arrest claim," *Nieves* v. *Bartlett*, 587 U.S. 391, 406 (2019), retaliatory—or, to use Dr. Page's language, "politically motivated" *investigations* can still be supported by probable cause. *Cf. Henry* v. *United States*, 361 U.S. 98, 102 (1959) ("If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent."). Dr. Page's suspicion that any surveillance was politically motivated was therefore irrelevant to Dr. Page's eventual claims too.

In short, Dr. Page's belief that the surveillance reported in the news articles was "unjustified" and "politically motivated" was just that—a belief. It did not show that he had discovered the relevant injuries: (1) surveillance without probable cause and (2) the illegal use of any surveillance-obtained information. The panel was wrong to hold that his claims accrued.

4. Had the panel applied the proper rule that a claim accrues only when a plaintiff knows enough to file a claim sufficient to obtain relief, it would have found Dr. Page's claims timely because he brought those claims as soon as he knew enough about his injury to survive a motion to dismiss.

This conclusion flows from the fact that Dr. Page did not even know and could not have learned that he had been injured before the OIG Report. Unlike traditional judicial activities, FISC typically acts "on

an *in camera, ex parte* basis": "Disclosure and an adversary hearing are the exception, occurring *only* when necessary." *United States* v. *Belfield*, 692 F.2d 141, 147, 149 (D.C. Cir. 1982). As Justice Gorsuch recently recognized, "FISC holds its proceedings in secret and does not customarily publish its decisions." *ACLU* v. *United States*, 142 S. Ct. 22, 23 (2021) (Gorsuch, J., dissenting from the denial of certiorari). Its decisions are publicized only after "the Director of National Intelligence, in consultation with the Attorney General" conducts a declassification review. 50 U.S.C. § 1872(a).

FISA information is so secret, moreover, that even now, years after Dr. Page allegedly had sufficient notice to challenge respondents' surveillance and their subsequent use and disclosure of the information obtained from that surveillance, the government itself is still required to turn to the Foreign Intelligence Surveillance Court to use it. Just a month after the D.C. Circuit held that Dr. Page's claims were "conclusively time-barred," App.3a, FISC granted a government motion seeking the "internal sharing of Page FISA information with FBI and DOJ personnel who previously did not have access."[29] If a court order is necessary before "OIG, FBI and other DOJ personnel" can even *review* the "Page FISA information,"[30] even after the OIG Report, there is no way Dr. Page had enough information about the

[29] Order at 4-6, *In re Carter W. Page, A U.S. Person*, Nos. 16-1182, 17-52, 17-375, 17-679 (F.I.S.C. June 17, 2025), https://perma.cc/69PV-LCYM.

[30] *Id.* at 6.

surveillance and the use or disclosure of that information to survive a motion to dismiss in April 2017, years before the OIG had even begun its investigation.

Nor could Dr. Page have learned about the surveillance and use or disclosure of his information by other means. True, he could have asked the government directly if the information in *The Washington Post* article was correct. But the government had already declined to comment to the press. App.65a. And (here again) the government could not have disclosed anything about the investigation to Dr. Page given the secrecy of FISC proceedings.

Dr. Page also could not have learned information through a Freedom of Information Act request. Other attempts to obtain "records about the unmasking of members of President Trump's campaign and transition team" were met not only with denials, but with refusals to search for or acknowledge "even the existence or nonexistence of such records." *Schaerr* v. *United States Dep't of Just.*, 69 F.4th 924, 926 (D.C. Cir. 2023). Any attempt by Dr. Page to obtain records of his being surveilled would surely have met the same legal barriers.

Efforts to obtain discovery to support his claims would also have likely been fruitless if he challenged the surveillance in federal court based solely on the information in the April 2017 news articles as the panel held he needed to do. See App.3a. Had Dr. Page sued before the government acknowledged the surveillance for the first time in the OIG report,

respondents would likely have done what they have done in other cases asserting FISA claims: Assert "the state secrets privilege" and move to dismiss before giving Dr. Page *any* information to support his facially speculative claims. See *Fazaga*, 595 U.S. at 351-352.

In short, contrary to the panel's conclusion that Dr. Page had more than a hunch, App.24a, the news articles at most made Dr. Page suspicious that (1) he was surveilled; (2) the surveillance was illegal; and (3) the government then illegally used or disclosed information obtained in that surveillance. Dr. Page's claims thus could not accrue based on the news articles. They did not give him enough information about his legal injury to turn to the district court, survive a motion to dismiss, and obtain relief, and he could not obtain that required information through any other means.

The panel thus departed from this Court's precedents on what is required before a claim accrues: the ability to bring a suit and obtain relief. This Court's review is necessary to ensure that the panel's departure does not block claims of other victims of unlawful surveillance who might suspect—but cannot know even through diligent efforts—that they have been injured.

II. The Question Presented Is Exceptionally Important.

For victims of unlawful government surveillance, the stakes of getting the accrual question wrong are enormous. All agree that Congress enacted 50 U.S.C. § 1810 to impose "civil liability for individuals who violate Section 1809 by engaging in unauthorized

surveillance and/or disclosing/using the information so obtained," App.17a, and 18 U.S.C. § 2712 to allow actions brought against the United States for the unlawful use or disclosure of FISA-derived information, App.55a (Henderson, J., partially dissenting) (discussing 18 U.S.C. § 2712). Everyone involved needs clear rules. For a plaintiff to vindicate these statutory rights, they need to know when to file suit. Government officials who conduct such surveillance need to be put on notice that their actions may lead to liability within a certain time. And, of course, courts must have a clear rule for determining the timeliness of claims challenging secret government surveillance.

The question presented is thus of great practical importance. If this Court allows the decision below to stand, targets of unlawful surveillance will often be forced to challenge that surveillance and any resulting misuse of information obtained through it on the barest of mere suspicions, knowing that speculation is not enough to survive a motion to dismiss. See *Smith & Wesson*, 605 U.S. at 296. Many victims of such surveillance—and certainly their attorneys—will be unwilling to do so, fearing that filing a civil suit will result in an inevitable motion to dismiss or (worse) sanctions.

The D.C. Circuit's rule will also engender both significant uncertainty and protracted litigation. As Justice Scalia wrote, "any period of limitation is utterly meaningless without specification of the event that starts it running." *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 199 (1997) (Scalia, J., concurring in part and concurring in the judgment). Under the rule adopted

below, when the statute of limitations begins to run for surveillance-related claims is an open question because there is no need to even consider the point at which a person could finally "file suit and obtain relief." *Bay Area Laundry*, 522 U.S. at 201. As discussed above, general suspicions about an injury are unlikely to give a victim of surveillance enough information to survive a motion to dismiss, but the decision below nonetheless requires the filing of a speculative complaint.

In short, this Court's guidance is necessary for surveillance victims, government officials, and courts alike to resolve when claims challenging government surveillance accrue.

III. This Case Cleanly Presents the Question Presented.

Granting the petition would also give this Court a clean vehicle to resolve the exceptionally important question about when a cause of action challenging secret surveillance accrues.

The procedural posture is ideal. As this Court has recognized, in cases like this one that "come[] to [it] at the motion-to-dismiss stage, the Court assumes the truth of 'well-pleaded factual allegations' and 'reasonable inference[s]' therefrom." *National Rifle Ass'n of Am.* v. *Vullo*, 602 U.S. 175, 181 (2024) (quoting *Iqbal*, 556 U.S. at 678-679). The Court can thus answer the legal question presented by the petition with no factual disputes: What the complaint alleges is, for now, what happened.

Nor is there any question that the panel's resolution of the question presented was outcome

determinative as to the § 1809(a)(1) surveillance claims, the § 1809(a)(2) use/disclosure claims, and the PATRIOT Act claim.

Moreover, although the D.C. Circuit spent some time considering the appropriate statute of limitations for each claim, *e.g.*, App.17a-18a, 28a-29a, the answer to *those* questions has no bearing on whether Dr. Page's claim accrued based on the April 2017 news articles and Dr. Page's resulting suspicion that he was being unlawfully surveilled. Whatever the correct statute of limitations for FISA and PATRIOT Act claims, if Dr. Page's claims did not accrue until the OIG Report gave Dr. Page enough information to survive a motion to dismiss, all Dr. Page's claims are timely.

Finally, the Court will not need to decide whether a discovery rule applies to claims under FISA and the PATRIOT Act. As Judge Henderson recognized, "no party * * * challenged the applicability of the discovery rule," and the panel applied it. App.48a (Henderson, J., concurring in part and dissenting in part).[31]

This case thus cleanly presents a controlling legal issue: If the discovery rule applies, when do claims challenging surveillance accrue? If this Court were to grant review and conclude that claims challenging unlawful government surveillance and the unlawful use or disclosure of the fruits of that surveillance do not accrue based on mere suspicion when inquiry into

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[31] The PATRIOT Act's text, however, does support a discovery rule because it provides that accrual occurs "on the date upon which the claimant first has a reasonable opportunity to discover the violation." 18 U.S.C. § 2712(b)(2) (App.255a).

those suspicions would not return the information needed to bring a claim and obtain relief, then that conclusion will revive the case. The D.C. Circuit, on remand, will then be able to resolve on the merits any questions about the adequacy of Dr. Page's allegations.[32]

CONCLUSION

Dr. Page's suspicions that he was the target of a secret investigation were not enough to trigger the statute of limitations for his claims. In holding that those suspicions were sufficient, and sufficient as a matter of law, the D.C. Circuit denied him a judicial forum and set a rule that all but guarantees that a person surveilled by the government faces the expiration of the relevant limitations period before he has enough information to survive a motion to dismiss. That decision was wrong, and this Court should grant the petition to clarify—either on plenary review or through summary reversal—that federal claims alleging illegal surveillance do not accrue based only on a plaintiff's uninvestigable suspicions of wrongdoing.

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[32] Resolving the question presented in Dr. Page's favor, of course, would not revive Dr. Page's § 1809(a)(2) use-or-disclosure claim as it relates to the media-leak allegation against respondents Page and Strzok, which the panel already concluded was insufficiently pleaded. See App.24a-26a.

Respectfully submitted,

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December 11, 2025

APPENDIX

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Appendix A

USCA Case #23-5038 Document #2117198
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 6, 2024 Decided May 23, 2025

No. 23-5038

CARTER PAGE,
APPELLANT

v.

JAMES B. COMEY, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:20-cv-03460)

Gene C. Schaerr argued the cause for appellant. With him on the briefs were *Erik S. Jaffe* and *Brian J. Field*.

David N. Kelley argued the cause for individual appellees. With him on the brief were *Meaghan VerGow*, *Andrew R. Hellman*, *Meredith N. Garagiola*, *Daniel Brovman*, *Brigida Benitez*, *Patrick F. Linehan*, *Brian M. Heberlig*, *Robert J. Katerberg*, *Kaitlin Konkel*, *Christopher C. Muha*, *Aitan D. Goelman*,

Ivano M. Ventresca, *Joseph R. Palmore*, *James M. Koukios*, and *Alexandra M. Avvocato*.

Benjamin M. Shultz, Attorney, U.S. Department of Justice, argued the cause for government appellees. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, at the time the brief was filed, and *Sharon Swingle*, Attorney.

Before: HENDERSON, PILLARD, and CHILDS, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* CHILDS.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* HENDERSON.

CHILDS, *Circuit Judge*: Carter W. Page appeals the district court's dismissal of his second amended complaint for failure to state a claim. *Page v. Comey*, 628 F. Supp. 3d 103 (D.D.C. 2022). Page filed an action against the United States, the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), as well as current and former known and unknown FBI officials (individual defendants[1]) (collectively Appellees), alleging that the FBI unlawfully obtained four warrants to electronically surveil him pursuant to the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801–1885c, and that Appellees leaked to the press information obtained pursuant to those warrants, giving rise to liability under FISA and the Patriot Act. Page alleged

[1] In the second amended complaint, Page identified as individual defendants James Comey, Andrew McCabe, Kevin Clinesmith, Peter Strzok, Lisa Page, Joe Pientka III, Stephen Somma, Brian J. Auten, John Does 1–10, and Jane Does 1–10.

that as the result of the public revelation of this unlawful surveillance he suffered reputational harm, pain and suffering, and lost lucrative business opportunities. Ultimately, the district court dismissed Page's claims, finding them either time-barred or insufficiently pleaded.

For the reasons below, we are unanimous in affirming dismissal of Page's claims of unlawful surveillance under FISA (*see* 50 U.S.C. § 1809(a)(1)) on the ground that they are conclusively time-barred. We also unanimously affirm the dismissal of the Patriot Act claim against the United States, with the majority concluding that claim, too, is time-barred and the partial dissent resting instead on Page's failure to preserve the claim and its legal insufficiency in any event. Finally, the majority concludes that Page's claim of unlawful disclosure or use of the results of unlawful surveillance under FISA (*see* 50 U.S.C. § 1809(a)(2)) is also time-barred and, in part, insufficiently pleaded.

Judge Henderson dissents only insofar as she would have allowed Page's section 1809(a)(2) disclosure-or-use claim to proceed. She parses that claim into distinct strands. She would hold, first, that the claim that certain defendants used FISA-derived information to apply for ensuing warrant applications should not be dismissed as time-barred without first allowing discovery into whether, once Page knew he was subject to FISA warrants, he knew or reasonably should have inquired into FISA's warrant-renewal requirements. On its merits, she explained, that claim was plausibly pleaded. Second, Judge Henderson analyzes Page's media-leak theory as two distinct claims. The first, that media leaks by defendants Lisa Page and Peter Strzok led to publication of the fact that Carter Page was under FISA surveillance, she would dismiss for failure to state an unlawful-

disclosure claim because Page's identity and the fact of surveillance were not themselves information "obtained by" FISA surveillance. As to the second, Judge Henderson reads the complaint to support a reasonable inference that those two leakers also disclosed FISA-acquired information that the newspapers decided not to mention. She therefore discerns an unlawful-disclosure claim against the pair that she would deem timely.

I.

A.

In this appeal from an order granting a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the relevant facts are those "alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the court] may take judicial notice." *Hurd v. District of Columbia, Gov't*, 864 F.3d 671, 678 (D.C. Cir. 2017) (quoting *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997)). Unless otherwise noted, the following background is derived from Page's second amended complaint.

"During the 2016 U.S. Presidential election," Page volunteered as a "member of an informal foreign policy advisory committee to then-candidate Donald J. Trump's election campaign." 2d Am. Compl. ¶ 21 (JA027). Page alleged that on July 31, 2016, he became the target of an FBI surveillance program called Operation Crossfire Hurricane. The purpose of Crossfire Hurricane was "to determine whether 'individual(s) associated with the Trump campaign [we]re witting of and/or coordinating activities with the Government of Russia.'" *Id.* ¶ 5 (JA022).

In August 2016, the Central Intelligence Agency (CIA) informed members of the Crossfire Hurricane team that Page had been a CIA "operational contact" from 2008 to 2013, assisting in countering Russian and other foreign intelligence activity. *Id.* ¶ 11 (JA023). Several weeks later, the CIA sent an investigative referral to FBI Director James Comey (Comey) and Deputy Assistant Director of Counterintelligence Peter Strzok (Strzok) conveying that presidential candidate "Hillary Clinton had approved a plan concerning U.S. Presidential candidate Donald Trump and Russian hackers hampering U.S. elections as a means of distracting the public from her use of a private mail server." *Id.* ¶¶ 12, 167 (JA024, JA054–JA055). A few weeks later, on September 19, 2016, the FBI received information from Christopher Steele, a Confidential Human Source, that "falsely alleged unlawful communications and activities involving . . . Page and two Russians with close ties to Russian President Vladimir Putin." *Id.* ¶¶ 9, 14 (JA023–JA024). However, the CIA had identified this information from Steele as possibly containing false allegations. In addition, the FBI became aware of several other facts that raised questions regarding Steele's credibility, including: (1) that the Democratic Party and/or the Clinton campaign supposedly paid Steele to perform "political opposition research," and (2) that the CIA had reportedly warned the FBI of a "potential political scheme" involving a disinformation effort to report a connection between the Trump campaign and Russia. *Id.* ¶¶ 9, 15, (JA023, JA025). Steele eventually provided similar information to public news media regarding the investigation.

On September 23, 2016, Michael Isikoff published an article in *Yahoo! News* titled "U.S. intel officials probe ties between Trump adviser and Kremlin." Michael Isikoff, *U.S. intel officials probe ties between Trump adviser and Kremlin*, *Yahoo! News* (Sept. 23, 2016), https://perma.cc/T2GE-M22D. The article stated that in July 2016, Page "[spoke] at a commencement address for the New Economic School, an institution funded in part by major Russian oligarchs close to Putin." *Id.* Additionally, the article stated that "U.S. intelligence agencies ha[d] also received reports that Page met with another top Putin aide while in Moscow—Igor Diveykin." *Id.* "In response to [this] article, on September 25, 2016, . . . Page sent a letter to . . . Comey in which he categorically denied that he had any such communications with the Russian individuals and documented his previous cooperation with the CIA and the FBI to combat Russian spying." 2d Am. Compl. ¶¶ 15, 81 (JA025, JA039). Upon the receipt and sharing of Page's letter with the Crossfire Hurricane team the following day, Strzok wrote to FBI lawyer Lisa Page that "[a]t a minimum, the letter provides [the team] a pretext to interview" Page. *Id.* ¶ 147 (JA051).

On October 21, 2016, the FBI submitted its first FISA warrant application to the Foreign Intelligence Surveillance Court (FISC), relying on the *Yahoo! News* article and other allegedly false and misleading information. Under 50 U.S.C. § 1805(a)(2)(A), the FISC has authority to issue orders for electronic surveillance when presented with evidence that there

is probable cause to believe that a target is an "agent of a foreign power."

After a second FISA warrant application had been submitted on January 12, 2017, two FBI agents—one of whom was individual defendant Stephen Somma—conducted an "ambush interview" of Page, followed by four additional interviews in March 2017. 2d Am. Compl. ¶¶ 122, 210 (JA047, JA063). In total, the five interviews lasted roughly ten hours. Page opines that he "was candid and cooperative with the agents, and his answers undermined any contention that he was acting as an agent of a foreign power." *Id.* ¶¶ 122, 210 (JA047, JA063). On April 7, 2017, the FBI submitted a third FISA warrant application to continue its surveillance of Page.

A few days later, on April 10, 2017, Strzok purportedly texted Lisa Page to devise a plan to leak information about the Crossfire Hurricane investigation to the news media. The following day, the *Washington Post* published a story entitled, "FBI obtained FISA warrant to monitor former Trump adviser Carter Page." JA095–JA100; *see also* 2d Am. Compl. ¶ 221 (JA068). The article, which reported on information provided by "law enforcement and other U.S. officials" who "were not authorized to discuss details of a counterintelligence probe," stated that "[t]he FBI and the Justice Department obtained [a] warrant targeting Carter Page's communications after convincing a Foreign Intelligence Surveillance Court judge that there was probable cause to believe Page was acting as an agent of a foreign power, in this case Russia." JA095; 2d Am. Compl. ¶ 221(a) (JA068).

The *Washington Post* story quoted Page as saying that "[t]his confirms all of my suspicions about unjustified, politically motivated government surveillance" and that "[he] ha[s] nothing to hide." JA096. According to the *Post*, Page "compared surveillance of him to the eavesdropping that the FBI and Justice Department conducted against civil rights leader Martin Luther King Jr." *Id.* Page "dismissed what he called 'the dodgy [Steele] dossier' of false allegations" and maintained that he wanted to testify before Congress to clear his name, JA98, because any information he provided to the Russians was "innocuous," *i.e.*, "basic immaterial information and publicly available research documents." JA100. Page also stated in his defense that he had assisted the government in an earlier espionage case against a Russian national.

Ten days later, on April 22, 2017, the *New York Times* published an article entitled "Comey Tried to Shield the F.B.I. From Politics. Then He Shaped an Election." Matt Apuzzo, Michael S. Schmidt, Adam Goldman, and Eric Lichtblau, *Comey Tried to Shield the F.B.I. From Politics. Then He Shaped an Election*, N.Y. TIMES (Apr. 22, 2017), https://perma.cc/YC6A-UGBY. The *New York Times* article focused on the investigation of Hillary Clinton's emails. The article mentioned Page, stating that he "gave a speech in Moscow criticizing American foreign policy" and that he "had previously been under F.B.I. scrutiny years earlier, as he was believed to have been marked for recruitment by Russian spies." 2d Am. Compl. ¶ 224(a) (JA069). This was the *Times* article's only explicit reference to Page.

On April 27, 2017, Page was interviewed by former CNN news anchor Chris Cuomo, wherein Page acknowledged having read both the *Washington Post* and the *New York Times* articles. *Page v. Comey*, Case No. 1:20-cv-03460, ECF No. 88-10, at 9 (D.D.C. Sept. 17, 2021). In response to questioning regarding whether the FBI had probable cause to surveil him, Page expressed his eagerness to obtain full disclosure about the warrant applications because "there [had] been terrific reporting in various news outlets, including '[the] Washington Post', [and] '[the] New York Times' based on various leaks and some of them have exactly pointed back to that dodgy dossier." *Id.*

Approximately a month later, on May 22, 2017, Page again acknowledged and explicitly cited to the *Washington Post* article in a letter to Congressmen K. Michael Conaway and Adam Schiff, responding to a request to voluntarily appear before the United States House of Representatives Permanent Select Committee on Intelligence (House Intelligence Committee).[2] In the letter, Page stated that the Clinton campaign had engaged in illegal activities and leaks, and he could "help set the record straight . . . following the false evidence, other illegal activities as well as additional extensive lies distributed by the Clinton campaign and their transnational associates." JA101. Page referenced the "unfortunate front-page *Washington Post* article about the civil rights abuses committed against me which you might have seen: 'Applications for FISA warrants' . . . filled with a

[2] The Joint Appendix only contains three pages from Carter's twenty-three-page submission.

potpourri of falsehoods from the Clinton/Obama regime which fabricated this travesty from the outset." JA102.

Page's letter welcomed the invitation to testify before the House Intelligence Committee on the "civil rights injustices" against him. He informed the Committee that public access to the FISA warrants in advance of his testimony would be "essential" to dispel "the continued delusional charade regarding Russia's connections with the new Administration." JA102–JA103. Page contrasted the "proper legal procedures of disclosure currently underway" with the "recent misleading illegal leaks," plainly referring to the government leaks reported in the *Washington Post* article. JA 101. Thereafter, on June 29, 2017, the FBI submitted the fourth and final FISA warrant application.

On November 2, 2017, Page testified before the House Intelligence Committee. Page stated that he was a victim of two felonies: the leaking of both his identity and classified information in relation to the FISA warrant documented in the *Washington Post* article. *Testimony of Carter Page: Hearing Before the Permanent Select Comm. on Intelligence*, 115th Cong. (2017) (*Page Testimony*), https://perma.cc/74C9-RWZ9 at 16–17, 21–22. During his testimony, Page referenced the surveillance activities taken against him by the FBI. In his opening statement, Page stated that "the alleged U.S. cyber operations of wiretap against myself . . . marked a new low with this baseless domestic interference in our democracy prior to the 2016 election." *Id.* at 35. Page further observed that although neither he nor the Committee "kn[e]w

the details about how [he] was illegally hacked and wiretapped," they should "soon" learn the information because of his and the Committee's requests for information. *Id.* During questioning by Congressman Gowdy, Page again referenced the *Washington Post* article, stating that someone leaked his interviews with the FBI to the *Post*. *Id.* at 59. Page's congressional testimony also incorporated his May 22, 2017 letter in which he observed that "[b]ased on revelations in the press thus far, [he] was the primary known person allegedly put under the most intensive surveillance by the Obama Administration as part of their 2016 domestic political intelligence operation." *Id.* at 15.

In March 2018, the DOJ's Office of Inspector General (OIG) initiated a review of the FBI's surveillance of Page. The OIG published a report on December 9, 2019, in which it observed that the FBI's factual misstatements and omissions regarding Page "taken together resulted in FISA applications that made it appear that the information supporting probable cause was stronger than was actually the case." OIG, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation* (Dec. 2019), https://perma.cc/8TGE-VGTK at xiii.

B.

On November 27, 2020, Page filed a complaint in the United States District Court for the District of Columbia, alleging eight causes of action, including four claims of FISA violations against the individual defendants; one claim against individual defendants

seeking damages under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); one claim against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671–2680; one claim against the DOJ for violating the Privacy Act, 5 U.S.C. § 552a; and one claim against both the FBI and DOJ for violating the Privacy Act. Page amended his complaint on April 15, 2021, but did not make any substantive changes to his allegations. After attempting to comply with mandatory prerequisites,[3] Page filed a second amended complaint on June 8, 2021, adding a claim against the United States for a violation of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), 18 U.S.C. § 2712.

On September 17, 2021, each of the individual defendants separately moved to dismiss Page's FISA and *Bivens* claims. That same day, the United States, the FBI, and the DOJ moved to dismiss the FTCA, Privacy Act, and Patriot Act claims.

C.

In the district court, Appellees sought to dismiss Page's second amended complaint on the grounds that his claims were time-barred by the statute of limitations and that he failed to state a claim upon which relief may be granted. *Page*, 628 F. Supp. 3d at 115. The United States also moved to dismiss Page's

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[3] Seeking to exhaust his administrative remedies under the Patriot Act pursuant to 18 U.S.C. § 2712(b)(1), Page presented an administrative claim to the DOJ on September 30, 2020, which it denied on April 22, 2021.

FTCA claim and one of his Privacy Act claims on the basis that the district court lacked jurisdiction over them. *Id.* In addressing whether Page's FISA claims were time-barred, the district court found that a three-year general statute of limitations under D.C. law was applicable due to FISA's silence on the issue. *Id.* at 116–17. Notwithstanding its finding that "by April 11, 2017, Page knew that he was subject to surveillance by the FBI and DOJ," *id.* at 118, the district court held that in the context of the discovery rule, "it is far from clear that a diligent investigation would have revealed enough evidence of illegality to avoid filing suit on a hunch." *Id.* at 119 (internal quotation marks and brackets omitted).

For the same reasons, the district court declined to dismiss Page's *Bivens* and Patriot Act claims on statute of limitations grounds. *Id.* at 129, 134. Instead, the district court disposed of Page's FISA and Patriot Act claims on the basis that Page failed to plead sufficient facts to state a plausible claim for relief. *Id.* at 129, 134. The district court dismissed Page's *Bivens* claim holding that "an extension of the *Bivens* remedy to this new context is unwarranted." *Id.* at 129 (internal quotation marks omitted). As to Page's Privacy Act claims, the district court found that Page "has neither exhausted his administrative remedies nor filed a timely claim." *Id.* at 140. The district court dismissed Page's remaining Patriot Act and abuse of process claims on the grounds that he failed to state a claim under the Patriot Act and that his abuse of process claim "is not cognizable under D.C. law." *Id.*

Page timely appealed dismissal of his FISA claims and his Patriot Act claim.

II.

We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. "We review the district court's dismissal *de novo* and may affirm its judgment on any basis supported by the record." *Elec. Priv. Info. Ctr. v. IRS*, 910 F.3d 1232, 1236 (D.C. Cir. 2018) (citation omitted). On *de novo* review, we generally take as true all plausibly pleaded factual allegations and draw all reasonable inferences in the plaintiff's favor. *See, e.g.*, *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012).

III.

Appellees contend that Page did not timely file his claims in accordance with the applicable statutes of limitation. Upon its review, the district court determined that "the complaint does not conclusively show that Page was sufficiently on notice of his claims before November 27, 2017." *Page*, 628 F. Supp. 3d at 119. On *de novo* review, we hold that Page's second amended complaint on its face is conclusively time-barred.

A.

"Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 352 (1983). Accordingly, statutes of limitations "afford[] plaintiffs what the legislature deems a reasonable time to present their claims [while simultaneously] protect[ing] defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, . . . fading

memories, disappearance of documents, or otherwise." *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citations omitted).

At the motion to dismiss stage under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "dismissal is appropriate on statute of limitations grounds 'only if the complaint on its face is conclusively time-barred.'" *Commonwealth Land Title Ins. Co. v. KCI Techs., Inc.*, 922 F.3d 459, 464 (D.C. Cir. 2019) (citation omitted). This face-of-the-complaint principle, although rarely explained, limits a court's consideration to materials properly before it. In this Circuit, a "court may consider the facts alleged in the complaint, [and] documents attached thereto or incorporated therein, ..." *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006). The incorporation-by-reference doctrine "permits courts to consider documents not attached to a complaint if they are 'referred to in the complaint and integral to the plaintiff's claim.'" *Real World Media LLC v. Daily Caller, Inc.*, No. CV 23-1654, 2024 WL 3835351, at *3 (D.D.C. Aug. 14, 2024) (*quoting Banneker Ventures, LLC v. Graham,* 798 F.3d 1119, 1133 (D.C. Cir. 2015) (cleaned up)). Additionally, a court may consider those portions of "documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss." *Terveer v. Billington*, 34 F. Supp. 3d 100, 110 (D.D.C. 2014) (*quoting Ward v. D.C. Dep't of Youth Rehab. Servs.,* 768 F. Supp. 2d 117 (D.D.C. 2011)).

A court may also consider "matters of which it may take judicial notice," *Stewart*, 471 F.3d at 173, because that information "is not subject to reasonable

dispute," Fed. R. Evid. 201(b). Courts have acknowledged the appropriateness of taking judicial notice of the public availability of newspaper articles and the existence of specified congressional testimony. *E.g.*, *Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) ("This court may take judicial notice of the existence of newspaper articles in the Washington, D.C., area . . . ."); *Muller-Paisner v. TIAA*, 289 F. App'x 461, 466 n.5 (2d Cir. 2008) ("[C]ongressional testimony is an appropriate subject for judicial notice as a public record for the fact that the statements were made.").

Therefore, for purposes of our *de novo* review of the district court's decision dismissing Page's FISA and Patriot Act claims, we consider not only the allegations of the second amended complaint, but also the publication of the April 11, 2017 *Washington Post* article, the April 22, 2017 *New York Times* article, and his November 2, 2017 testimony before the House Intelligence Committee, which transcript included Page's May 22, 2017 letter to Congressmen Conaway and Schiff. To determine if Page's claims are time-barred, we must assess, first, the applicable limitations period, and second, the time at which his claims accrued.

B.

Page's FISA claims center on four warrant applications submitted to the FISC, which he alleges the FBI knowingly supported with insufficient evidence. "FISA is concerned with foreign intelligence surveillance." *United States v. Belfield*, 692 F.2d 141, 148 (D.C. Cir. 1982). "The statute is meant to 'reconcile

national intelligence and counterintelligence needs with constitutional principles in a way that is consistent with both national security and individual rights.'" *Id.* (quoting S. Rep. No. 95–701, 95th Cong., 2d Sess. 16 (1978)). FISA ensures individual privacy "'through its provisions for in-depth oversight . . . by all three branches of government and . . . an expanded conception of minimization that differs from that which governs law-enforcement surveillance.'" *Id.* (quoting Allan S. Schwartz, *Oversight of Minimization Compliance Under the Foreign Intelligence Surveillance Act: How the Watchdogs Are Doing Their Job*, 12 Rutgers L.J. 405, 408 (1981)). Section 110 of FISA (50 U.S.C. § 1810) creates civil liability for individuals who violate Section 1809 by engaging in unauthorized surveillance and/or disclosing/using the information so obtained. 50 U.S.C. § 1809(a).

The district court correctly noted that "FISA's civil cause of action does not contain a statute of limitations." *Page*, 628 F. Supp. 3d at 116. Generally, "[w]hen a federal action contains no statute of limitations, courts will ordinarily look to analogous provisions in state law as a source of a federal limitations period." *Loumiet v. United States*, 828 F.3d 935, 947 (D.C. Cir. 2016) (quoting *Doe v. DOJ*, 753 F.2d 1092, 1114–15 (D.C. Cir. 1985)); *see also Richards v. Mileski*, 662 F.2d 65, 68 (D.C. Cir. 1981) ("In this instance, as no specific statute of limitations has ever been enacted by Congress for such claims, the appropriate local statute of limitations is borrowed."). The individual defendants contend that the appropriate limitations period is found either in D.C.'s one-year statute of limitations for libel and invasion

of privacy, or in the two-year statute of limitations set forth in the Wiretap Act and the Stored Communications Act—two federal laws that, like FISA, regulate surveillance. *See* D.C. Code § 12-301(4); 18 U.S.C. §§ 2707(f) [Stored Communications Act], 2520(e) [Wiretap Act]. Page maintains that the analogous limitations period is instead found in D.C.'s three-year statute of limitations for "actions . . . *for which a limitation is not otherwise specifically prescribed*." D.C. Code § 12-301(a)(8) (emphasis added). Though recognizing the contrary inclination of our partially dissenting colleague, Partial Dissent at 13–14, we assume without deciding that the longer period applies because Page's FISA claims accrued before November 27, 2017—more than three years before he filed his November 27, 2020 complaint—and are therefore barred under even the most generous of the potentially applicable limitations periods.

"State law dictates the statute of limitations, but the timing of the accrual of . . . claims is a question of federal law." *Loumiet*, 828 F.3d at 947. "In federal courts 'the general rule of accrual' in cases in which the injury is 'not of the sort that can readily be discovered when it occurs' is that a cause of action accrues and the limitations period begins to run only when 'the plaintiff discovers, or with due diligence should have discovered, the injury that is the basis of the action.'" *Sprint Commc'ns Co. v. FCC*, 76 F.3d 1221, 1226 (D.C. Cir. 1996) (quoting *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 341–42 (D.C. Cir. 1991)). Importantly, accrual is not delayed just because the plaintiff does not yet have "access to or

constructive knowledge of *all* the facts required to support [a] claim." *Id.* at 1228 (emphasis added).

In *Hobson v. Wilson* we held that, when a claim is fraudulently concealed, its limitation period begins to run at the time the claimants have reason to know of both their injury and the unlawfulness of the defendant's conduct. 737 F.2d 1, 33–41 (D.C. Cir. 1984). There, we observed that plaintiffs were put on sufficient notice more than three years before they sued when they read an article describing an unlawful FBI investigation of which they knew or had reason to know they were targets. *Id.* at 38–39. We explained that if plaintiffs *either* simply read the article about an unlawful FBI scheme *or* simply knew of an FBI investigation targeting them without any reason to think it was unlawful, the information would not suffice to provide notice of their claims. *Id.* at 38–39. However, we emphasized that in reading the article describing the FBI investigation as unlawful and knowing they were the subjects of that investigation, the *Hobson* plaintiffs had enough "timely information to claim that *they* were victims of unconstitutional FBI activities." *Id.*

Page does not contest that, by April 11, 2017—the publication date of the *Washington Post* article describing the FBI's surveillance of Page and quoting Page's description of the surveillance as "unjustified" and "politically motivated"—he "knew that he was subject to surveillance by the FBI and DOJ, and he suspected that the allegations, and the ensuing warrants, were baseless." *Page*, 628 F. Supp. 3d at 118. Nonetheless, Page contends that his claims did

not accrue until he received confirmation from the OIG report that the warrants contained significant errors.

Our precedent does not require a plaintiff to have access to a warrant's supporting affidavit before claim accrual starts. In *Richards v. Mileski*, we held that it was "irrelevant" to consider when the government agency would have made relevant documents available to the plaintiff; instead, we concluded that "[t]he test of due diligence measures the plaintiff's efforts to uncover his cause of action against what a reasonable person would have done in his situation *given the same information*." 662 F.2d at 71 (emphasis added). In *Sprint Communications Company v. FCC*, we explained that once a prospective plaintiff is put on notice that they may have an actionable claim, they are "required to make a diligent inquiry into the facts and circumstances that would support th[e] claim." 76 F.3d at 1228. Finally, in *Sparshott v. Feld Entertainment, Inc.*, we held that "there is no need that someone actually 'discover' or be aware of the violation." 311 F.3d 425, 429 (D.C. Cir. 2002) (emphasis in original). "Rather, the question is whether the person had a *reasonable opportunity* to discover [it]." *Id.* (emphasis in original).

Page's argument erroneously focuses on his lack of access to the affidavits, rather than whether he took reasonable measures to uncover his cause of action once he learned of the defendants' alleged wrongful conduct. We disagree that Page did not have "notice of the basis for his claims until the [OIG] Report was issued in December 2019." Reply Br. 3. Rather, by spring of 2017, Page knew all the essential facts on which he relies in support of his FISA claims that

defendants surveilled him in violation of 50 U.S.C. § 1809(a)(1) and "disclosed or used" results of that surveillance in violation of § 1809(a)(2).

Relying on the discovery rule and our precedent, we hold that Page had actual or inquiry notice of his FISA claims for unauthorized surveillance and disclosure by April 2017. (Judge Henderson would assume without deciding that the discovery rule applies to Page's FISA claims, Partial Dissent at 16, but because we read our precedent to embrace that rule, we apply it here.) In his second amended complaint, Page alleged that the individual defendants surveilled him knowing that there was no probable cause to do so, and then unlawfully used or disclosed the information gathered from that surveillance. 2d Am. Compl. ¶ 142 (JA 50).

As previously noted, the April 11, 2017 *Washington Post* article quoted Page himself describing the surveillance as "unjustified" and "politically motivated." JA096. Those statements show that he had concluded by April of 2017 that the FBI was unlawfully subjecting him to surveillance without probable cause.

The *Post* article also reported that the FBI had renewed the initial warrant "more than once," JA097, thereby informing readers, including Page, that the FBI had submitted multiple warrant renewal applications. FISA requires warrant renewal applications to describe information gathered from previous surveillance. That requirement is readily available public information—especially to a person like Carter Page with multiple advanced degrees and

prior interest in CIA operations.[4] The statute declares that:

> Each application for an order approving electronic surveillance . . . shall include . . . a statement of the *facts concerning all previous applications* that have been made to any judge.
> . . .

50 U.S.C. § 1804(a)(8) (emphasis added). And it specifies that "an application for an extension of an order under this subchapter for a surveillance targeted against a United States person," such as the surveillance of Page, must include:

> *a summary statement of the foreign intelligence information obtained* pursuant to the original order (and any preceding extension thereof) as of the date of the application for extension, *or a reasonable explanation of the failure to obtain such information*.

Id. § 1804(a)(11) (emphasis added). Page himself highlights this requirement to support his FISA claims. *See* 2d Am. Compl. ¶¶ 229, 230 (JA 70). The statute's command plus the *Post* report of repeated renewals sufficed to put Page on notice that the FBI

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[4] Page alleges that he earned a Master's degree in National Security from Georgetown, an MBA from New York University, and a PhD from the School of Oriental and African Studies University of London, in addition to serving in the Navy in "intelligence-related billets" and serving as an International Affairs Fellow at the Council on Foreign Relations. 2d Am. Compl. ¶ 21 (JA026–JA027).

"used or disclosed" information gathered under the initial warrant in its ensuing applications in contravention of 50 U.S.C. § 1809(a)(2).

Given the direct quotations from Page in the *Post* article together with FISA's express terms, nothing more is needed to show the claim is time-barred. But Page's May 22, 2017 letter to the House Intelligence Committee provides helpful confirmation that, when he spoke to the *Post* the previous month about the "unjustified" and "politically motivated" surveillance, he thought the government had intentionally misrepresented his connection to Russia and surveilled him in reliance on that pretense.[5] Page's letter described the warrants as "filled with a potpourri of falsehoods from the Clinton/Obama

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[5] Our dissenting colleague posits that we cannot rely on Page's May 22, 2017, letter to the House Intelligence Committee because the letter is a matter outside of the pleadings, Partial Dissent at 22–23, and Appellees forfeited and/or waived reference to it, Partial Dissent at 28 n.11. However, matters judicially noticed are not considered matters outside the pleadings. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."). Moreover, D.C. Circuit precedent does not foreclose our discretion to consider "forfeited" issues. *Molock v. Whole Foods mkt. Grp., Inc.*, 952 F.3d 293, 298–99 (D.C. Cir. 2020) (quoting *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993)). Forfeiture binds parties, not the court. *Miguel-Pena v. Garland*, 94 F.4th 1145, 1158 (10th Cir. 2024) (citation omitted). Accordingly, in our evaluation of whether Page had notice of his FISA claims, we are not required to ignore Page's Congressional testimony or his May letter, which occurred more than three years before he filed his complaint.

regime which fabricated this travesty from the outset." JA102. The letter also confirms that he believed the *Post* article was based on "illegal" leaks from within the government. Therefore, Page's May 22, 2017 letter reiterating his awareness reflected in the April 11, 2017 article confirms that Page knew of the unlawfulness of the FISA warrants and his resultant injury more than three years before he filed his FISA claims on November 27, 2020.[6] These facts are materially indistinguishable from those supporting the time bar in *Hobson*, 737 F.2d at 39. Far from requiring him to file suit "on a hunch," the stated concern of the *Hobson* court, Page– who had both read the *Post* and *Times* articles and knew he was the subject of alleged illegal government surveillance–had sufficient notice by April 2017 to bring FISA claims. *See id.*

Our partially dissenting colleague discerns in Page's complaint a distinct claim of which he was not aware in early 2017, and so is not time-barred: that Peter Strzok and Lisa Page's media leaks included FISA-obtained information. Partial Dissent at 30, 35–37. We do not read the complaint to state any such claim. The dissent's sole citation (*id.* at 35–36) is to snippets of a sentence in the complaint that lumps together distinct "use or disclose" theories and four different defendants:

> On information and belief, Defendants, known and unknown to Dr. Page, but including but not limited to, Comey,

[6] Page did not argue judicial deception or any other basis to toll the statute of limitations.

> McCabe, Strzok, and Page, leaked information and records concerning Dr. Page, including but not limited to the existence of the FISA Warrants, the contents of the warrant applications, and the results of the Warrants, that were protected from disclosure under the FISA and the Privacy Act to media outlets, including the New York Times, the Washington Post, and possibly others.

2d. Am. Compl. ¶ 226 (JA 69–70). But the complaint elsewhere attributes distinct actions to those individual defendants. It describes Comey and McCabe as applying for further FISA warrants—necessarily using information obtained from earlier surveillance and disclosing it to the FISA court in "obtaining each subsequent renewal warrant." 2d. Am. Compl. ¶ 229 (JA 70); *see id.* ¶¶ 152–154, 162–63 (JA 52–53, 54). And, according to the complaint, Lisa Page and Peter Strzok were the media leakers. *See* 2d. Am. Compl. ¶¶ 196, 220-225 (JA 60, 67–69). Page alleges that they leaked to the *Washington Post* and the *New York Times* the existence of and putative bases for FISA warrants to surveil him—allegations later confirmed by the OIG Report. But the complaint includes no plausible factual allegations supporting any inference that Page or Strzok leaked the FISA warrants' results. In other words, "Page's bare allegation that the defendants disclosed the results of this surveillance to the media, without any further detail, does not raise his 'right to relief above the speculative level.' *Twombly*, 550 U.S. at 555." *Page*, 628 F. Supp. 3d at 129.

To the extent such a theory is thought to be pleaded in the summary sentence quoted above, it hangs on a naked assumption: Despite a lack of factual allegations, Strzok and Lisa Page leaked not just the warrants' existence, putative basis, and Page's identity, as the *Post* reported, but FISA-obtained information, too. In sum, as to the distinct theory our colleague discerns and concludes is timely, the reality that the complaint adds no more factual support to the assumed broader leak than Page either knew or had reason to know in 2017 only confirms that no such timely claim exists.

C.

Page's Patriot Act claim arises under 18 U.S.C. § 2712, which permits actions against the United States to recover money damages for violations of specified sections of FISA. *Id.* § 2712(a). The Patriot Act expanded the investigatory tools federal law enforcement agents can employ to allow for easier exchange of information and cooperation between units. *See* Patriot Act, H.R. 3162, 107th Congress (2001–2002). The Patriot Act contains its own statute of limitations, providing:

> Any action against the United States under this section shall be forever barred unless it is presented in writing to the appropriate Federal agency within 2 years after such claim accrues or unless action is begun within 6 months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

18 U.S.C. § 2712(b)(2). Although the D.C. Circuit has not passed on this particular provision, we have interpreted an identically worded provision in the FTCA, 28 U.S.C. § 2401(b).[7] We held the FTCA provision "requires the claimant both to file the claim with the agency within two years after accrual of the claim and then to file a complaint in the District Court within six months after the agency denies the claim." *Schuler v. United States,* 628 F.2d 199, 201 (D.C. Cir. 1980). "Were we to read the 'or' in the section as really intending the disjunctive, a claimant who filed a claim with the agency within two years would then be able to bring it to a District Court at any remote future time after the agency denied him relief." *Id. See Sanchez v. United States*, 740 F.3d 47, 50 n.6 (1st Cir. 2014) ("We read this disjunctive language as setting out two deadlines, both (not just either) of which must be satisfied. Otherwise, there would effectively be no deadline at all.").

The Patriot Act not only employs limitations language identical to the FTCA but adopted it decades after *Schuler* had interpreted it as we do today. *See Smith v. City of Jackson, Miss.*, 544 U.S. 228, 260

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[7] Section 2401(b) states:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b).

(2005) (O'Connor, J., concurring) (emphasizing that like language appearing in separate statutes is a "strong indication" that they should be interpreted alike, particularly where judicial interpretation of one statute precedes Congress' adoption of the second) (citing *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 626 (1992) ("Congress' use of the same language . . . indicates a likely adoption of our prior interpretation of that language.")); *Shirk v. U.S. ex. rel. Dep't of Interior*, 773 F.3d 999, 1004 (9th Cir. 2014) ("A basic principle of interpretation is that courts ought to interpret similar language in the same way, unless context indicates that they should do otherwise."). Accordingly, we hold that, for statute of limitations purposes, Page was required to present his Patriot Act claim to the FBI within two years after the claim accrued and file the resulting lawsuit within six months after notice of the FBI's denial of the claim. Our partially dissenting colleague disagrees with our use of *Schuler* and the other cases that rely on it. Partial Dissent at 18–21. However, *Schuler* is precedent of this Circuit and stare decisis requires us to follow it unless "the court [e]n banc has overruled it," which it has not. *Brewster v. Comm'r of Internal Revenue*, 607 F.2d 1369, 1373–74 (D.C. Cir. 1979).

Page successfully met the six-month filing requirement. As alleged in the second amended complaint, the FBI issued the final denial of Page's administrative claim on April 22, 2021. Page filed his second amended complaint—the first complaint to include his Patriot Act claim—on June 8, 2021, well within the six-month deadline provided in 18 U.S.C.

§ 2712(b)(2). But Page failed to file his administrative claim with the FBI within two years of its accrual.

Under the Patriot Act, accrual occurs "on the date upon which the claimant first has a reasonable opportunity to discover the violation." 18 U.S.C. § 2712(b)(2). Page asserts that he presented his Patriot Claim to the FBI in a letter dated September 30, 2020. Therefore, if Page had notice of facts and circumstances supporting the discoverability of a Patriot Act claim before September 30, 2018, Page's claim is barred by the statute of limitations.

Page's allegations and their documentary support show that, as of April 2017, Page had ample bases to discover the FISA violation supporting his Patriot Act claim. In his second amended complaint, Page alleged that the FBI and DOJ violated the Patriot Act by using the surveillance information gathered on him for unlawful purposes, including to obtain further surveillance without probable cause. 2d. Am. Compl. ¶¶ 229, 230 (JA 70). As explained above, by April 2017, Page was on notice of that claim. The April 11, 2017, *Washington Post* article confirmed the existence of two warrant applications:

> The government's application for the surveillance order targeting Page included a lengthy declaration that laid out investigators' basis for believing that Page was an agent of the Russian government and knowingly engaged in clandestine intelligence activities on behalf of Moscow . . . [and s]ince the 90-day warrant was

> first issued, it has been renewed more than once by the FISA court.

JA097.

And, as explained above, *see supra* Section III.B., in addition to knowing that the FBI and DOJ had secured at least one renewal warrant, Page knew or could have known from the FISA statute itself that any warrant renewal application had to disclose the information gathered on him from previous surveillance. *See* 50 U.S.C. § 1804(a)(8). As such, Page had sufficient information by April 2017 to advance his theory that the FBI and DOJ violated the Patriot Act by using surveillance information gathered on him to obtain subsequent warrant renewals. Page later acknowledged as much by asserting in his May 22, 2017, letter to the House Intelligence Committee that U.S. government operatives leaked his identity and revealed classified information regarding "the completely unjustified FISA warrant against [Page]" documented in the *Washington Post* article. *Page Testimony*, https://perma.cc/74C9-RWZ9 at 16–17, 21–22. These events confirm that Page discovered the basis for his Patriot Act claim by April 2017, significantly more than two years before he submitted it to the FBI. As a result, the statute of limitations bars Page's claim under the Patriot Act.

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For the foregoing reasons, we affirm the district court's dismissal of Carter Page's FISA and Patriot Act claims pursuant to Federal Rule of Civil Procedure 12(b)(6) as time-barred.

So ordered.

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring in part and dissenting in part: In my view, this case involves the Government running roughshod over institutional guardrails designed to safeguard our civil liberties. The several defendants now evade liability, not because they are guiltless, but because the Court finds Carter Page's claims time barred. Although I agree in part with that conclusion, I cannot join the majority in full because I am convinced that one of Page's claims is timely and, accordingly, he is entitled to his day in court.

I. BACKGROUND

A. FISA's History

I begin by summarizing the history of the Foreign Intelligence Surveillance Act (FISA)—history that is particularly pertinent to this case. With the advent of electronic surveillance, the Government struggled to strike a balance between two ancient and competing interests: the need for a "vigorous executive" capable of "secrecy[] and dispatch" in the national security realm, The Federalist No. 70 (A. Hamilton) (Clinton Rossitier ed., 1961), versus the risk that the President's "Minions" would use "dangerous or oppressive Measures" and "shelter themselves" from "Inquiry into their own misconduct in Office." George Mason, *Objections to the Constitution of Government Formed by the Convention* (1787). In the early twentieth century, the United States Supreme Court held that domestic wiretapping and surveillance fell outside the ambit of the Fourth Amendment absent a physical trespass into a constitutionally protected area. *Olmstead v. United States*, 277 U.S. 438, 464–66

(1928). Under this framework, "the Fourth Amendment was inapplicable to non-trespassory electronic surveillance . . . [and] . . . warrants were not required." *Zweibon v. Mitchell*, 516 F.2d 594, 617 (D.C. Cir. 1975) (*en banc*). And so, the Executive expanded the scope of warrantless electronic surveillance, which "was generally accomplished without a physical trespass." *Id.* at 617–18.

That regime was upended in *Katz v. United States*, the decision that replaced the Fourth Amendment's trespass model with the now prevailing reasonable-expectation-of-privacy test and held that the Government must obtain a warrant before employing electronic surveillance during a criminal investigation. 389 U.S. 347, 353, 356–57 (1967). But the *Katz* Court reserved judgment on whether its holding applied "in a situation involving the national security"—that is, when the Government's reason for surveillance was not traditional criminal enforcement but intelligence gathering. *Id.* at 358 n.23. The Congress responded to *Katz* by passing the Omnibus Crime Control and Safe Streets Act of 1968 (OCCSSA). Title III of OCCSSA, known as the Wiretap Act, established procedures for judicial authorization of electronic surveillance by law enforcement but disclaimed regulation of the President's ability to intercept "[t]he contents of any wire or oral communication" if the purpose was "to obtain foreign intelligence information . . . or to protect national security information against foreign intelligence activities." Pub. L. No. 90-351, Title III, § 802, 82 Stat. 197, 212, 214 (1968) (then-codified at 18 U.S.C. § 2511(3)).

Five years later, in *United States v. U.S. District Court* (the "*Keith*" case) the Supreme Court narrowed the national security carve-out recognized in *Katz*. 407 U.S. 297 (1972). It first interpreted § 2511(3) of the Wiretap Act as agnostic on "the President's electronic surveillance power," neither endorsing nor denying its existence. *Id.* at 303. It then held that the Fourth Amendment applies to "domestic security surveillance" if the target has no "significant connection with a foreign power, its agents or agencies." *Id.* at 309 n.8, 320–22. The *Keith* Court, like its predecessor, declined to pass on the "scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." *Id.* at 308.

In the mid-1970s, courts continued to grapple with the existence and scope of a national-security exception to the Fourth Amendment. After *Keith*, three federal circuits held that the President's foreign affairs powers allowed the Government to conduct warrantless electronic surveillance to monitor domestically an agent of a foreign power. *See United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973); *United States v. Butenko*, 494 F.2d 593, 608 (3d Cir. 1974); *United States v. Buck*, 548 F.2d 871, 875–76 (9th Cir. 1977). Our Court bucked the trend and—in a fractured plurality opinion—implied that "wiretapping in the area of foreign affairs should [not] be exempt from prior judicial scrutiny." *Zweibon*, 516 F.2d at 651.[1]

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[1] The eight judges of the *en banc* Court filed five separate opinions. A four-judge plurality "suggest[ed]" that domestic

Around the same time, the Congress and the media brought to light a cascade of abuses committed by the intelligence community. Presidents from Franklin Roosevelt onward had authorized ever-expanding warrantless electronic surveillance rooted in claims of inherent executive power. S. Rep. No. 95-604, at 7–9 (1977). Because of the need for secrecy, this surveillance was conducted without legislative or judicial oversight. S. Rep. No. 95-217, at 1 (1977). Although the surveillance began as a tool for matters "involving the defense of the nation," it drifted into domestic affairs. *Keith*, 407 U.S. at 310 n.10.

In 1975, the Congress formed a select committee chaired by Maryland Senator Frank Church to investigate the Executive's alleged misuse of its vast surveillance apparatus. The Church Committee uncovered abuses that "infringed upon" the "rights of United States citizens." S. Rep. No. 94-755, at 12 (1976). The revelations spurred the Congress to create the first Senate Select Committee on Intelligence, which concluded that responsibility for surveillance "must be shared by the three branches of Government." S. Rep. No. 95-217, at 1.

The legal and political tumult of the 1970s led to a protracted legislative struggle to rein in the President. The Foreign Intelligence Surveillance Act resulted from those efforts. FISA aimed to resolve the legal haze of *Keith* and the public's eroded confidence

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surveillance of an agent of a foreign power required a warrant but did "not rest [their] decision" thereon. *Id.* Two judges declined to speak to the issue and the remaining two believed that the plurality's dicta was wrong. *Id.* at 681, 686, 688–89, 705–06.

in the intelligence community with one "basic premise"—"that a court order for foreign intelligence electronic surveillances can be devised that is consistent with . . . the fourth amendment." S. Rep. No. 95-701, at 9 (1978). FISA "was a surprisingly simple statute" that "banned the Government from conducting 'electronic surveillance' without a FISA warrant," absent one of a narrow list of exceptions. Orin S. Kerr, *Updating the Foreign Intelligence Surveillance Act*, 75 U. Chi. L. Rev. 225, 230 (2008). The warrant was to be issued by the newly created Foreign Intelligence Surveillance Court (FISC), the Congress's mechanism for balancing secrecy and accountability. The FISC lies at the heart of FISA's grand bargain: the Executive Branch agreed to legal oversight and restraint in exchange for procedural safeguards implemented behind a veil of secrecy. "Unlike most other courts, [the] FISC holds its proceedings in secret and does not customarily publish its decisions." *ACLU v. United States*, 142 S. Ct. 22, 23 (2021) (Gorsuch, J., dissenting from the denial of certiorari). The Congress would police the FISA process through two newly formed intelligence committees that themselves conduct a significant share of their business behind closed doors.

FISA thus resolved the lingering *Keith* exception and remedied the intelligence community's rudderless surveillance through a series of internal and external checks. *See* 50 U.S.C. §§ 1804(a) (executive oversight procedures), 1805(a) (judicial oversight), 1808 (congressional oversight) (1978). Foreign intelligence surveillance now requires a warrant and that warrant

is subject to Executive Branch attestation, judicial approval and post-hoc congressional oversight.

Sadly, the closed nature of the process allowed a mix of complacency and duplicity to unspool FISA's tightly wound safeguards. One early pressure point arising in the FISA process was the Government's purpose for surveilling: foreign intelligence surveillance is the domain of FISA but traditional law enforcement is subject to Title III procedures. *Compare* 50 U.S.C. § 1804(a) *with* 18 U.S.C. §§ 2516–18; *see also U.S. Telecom Ass'n v. FCC*, 227 F.3d 450, 453 (D.C. Cir. 2000). Whereas a Title III warrant requires a probable cause of criminal activity determination, FISA requires only probable cause that a target is acting as a foreign power's agent. Before procuring a warrant, then, FISA required the Executive Branch to certify "that the purpose of the surveillance is to obtain foreign intelligence information." Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 104(a)(7)(B), 92 Stat 1783, 1789. To police the FISA/Title III line, in the mid-1990s the Attorney General constructed a "wall" between the intelligence community and the Department of Justice (DOJ). Under DOJ's 1995 policy, federal prosecutors avoided giving even the "appearance" that they were "directing or controlling" an investigation if FISA applied or was even being contemplated. *See* Memorandum from the Att'y Gen. on Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations (July 19, 1995), https://perma.cc/X42F-QESR.

In 2001, the FISC presiding judge unearthed a series of FBI affidavits that claimed adherence to the wall when in fact information had leaked from the FBI to federal prosecutors. The issue was not the merits of the wall; indeed, the Congress would later amend FISA to remove the wall. *See* USA Patriot Act of 2001, Pub. L. No. 107–56, § 218, 115 Stat. 272, 291 (amending 50 U.S.C. § 1804(a) from "the purpose" to "a significant purpose" to allow for greater information sharing across the Executive); *In re Sealed Case*, 310 F.3d 717, 736–46 (FISC Rev. 2002) (upholding the amended language). Rather, the concern was the Executive's disregard for its own procedural buffers and its sometimes-doubtful representations to the court. It initially "confess[ed] error in some 75 FISA applications . . . related to misstatements and omissions of material facts," a number that only grew with time. *In re All Matters Submitted to Foreign Intel. Surveillance Ct.*, 218 F. Supp. 2d 611, 620–21 (FISC 2002), *abrogated on other grounds by In re Sealed Case*, 310 F.3d 717. In response, the FISC presiding judge convened the full FISC and issued an order banning one FISA affiant from ever again appearing before the court. Bernard Horowitz, *FISA, the "Wall," and Crossfire Hurricane: a Contextualized Legal History*, 7 Nat. Sec. L. J. 1, 64–65 (2020) (recounting this history).

In response to the lapses recounted above, the FBI implemented what became known as the "Woods procedures," a series of internal checks requiring the FBI agent responsible for a FISA warrant application to maintain a "Woods File"—supporting documentation for every factual assertion contained in

the FISA warrant application. *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, No. 19-02, 2020 WL 1975053, at *1 (FISC Apr. 3, 2020).

B. Carter Page Warrants

As the majority describes it, the FBI made some "factual misstatements and omissions regarding Page." Maj. Op. 10. Assuming the facts as alleged to be true, as we must at this litigation stage, *see Mills v. Anadolu Agency NA, Inc.*, 105 F.4th 388, 395 (D.C. Cir. 2024), I find the record far more troubling. According to Page, the FBI engaged in serious Woods File breaches: it failed to scrutinize the conflicting motives of its primary source, Christopher Steele; it concealed information from the FISC that cast doubt on Steele's credibility; and it omitted Page's past work for the Central Intelligence Agency (CIA) in its FISA application.[2] It is solely because of these breaches that the FISC authorized the Government's surveillance of Page. Ordinarily, these facts would be allegations we would simply assume to be true. But we need not rely on assumptions. In 2019, the Justice Department's Office of the Inspector General (OIG) issued a report cataloging the delicts. *See* OIG, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire*

[2] In addition to his work for the CIA, Page served in the United States Navy, led a distinguished career at a leading financial institution and taught courses on energy and politics at New York University. After graduating from the United States Naval Academy, Page obtained a Master's degree from Georgetown, an MBA from NYU and a PhD from the School of Oriental and African Studies University of London.

Hurricane Investigation (Dec. 2019), https://perma.cc/8TGE-VGTK (OIG Report).

The OIG found that the FBI *ex industria* concealed exculpatory information regarding Page from the FISC while embellishing more negative information. The FBI suspected Page of involvement in Russia's infamous 2016 election interference based on a report prepared by Steele. *Id.* at vii. Yet the "FBI did not have information corroborating the specific allegations against Carter Page in Steele's reporting when it relied upon his reports in the first FISA application or subsequent renewal applications." *Id.* at viii. Indeed, the FBI "obtained [] information raising significant questions about the reliability of" Steele yet said nary a word to the FISC. *Id.* at vi. On the contrary, it "overstated" Steele's reliability. *Id.* at viii.

The OIG identified several "instances in which factual assertions relied upon in the [] FISA application[s] were inaccurate, incomplete, or unsupported." *Id.* In one of the most glaring acts of defiance, an FBI lawyer, Kevin Clinesmith, altered emails to indicate that Page was "not a source" for the CIA when he had in fact acted as a source in the past. *Id.* at 7– 8; *see also United States v. Clinesmith*, No. 20-cr-165, ECF Nos. 8–9, (D.D.C. Aug. 19, 2020). All in all, the OIG identified *seventeen* significant errors in the Page FISA applications. *See* OIG Report at viii–xii. As the Government itself now belatedly concedes, but for those errors it could not have sustained its surveillance of Page. *See* Gov't Br. 6 (acknowledging that "in light of th[e]se errors, in the last two renewal applications, if not earlier, there was insufficient predication to establish probable cause to believe that

Page was acting as an agent of a foreign power") (quotations omitted).

It would be egregious enough if this conduct were the work of a few wayward defalcators. But the OIG found that similar shortcomings infected the entire FISA process. On the heels of the Page fiasco, the OIG conducted a random audit of 29 other FISA applications to ascertain their compliance with the Woods File procedures. Every reviewed application contained Woods violations. Twenty-five files contained inadequately supported claims or errors and four applications had *no* Woods File. OIG, *Audit of the Federal Bureau of Investigation's Execution of its Woods Procedures for Applications Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons* ii (Sept. 2021), https://perma.cc/3LKS-72CP. The Justice Department informed the FISC that these 29 applications contained 209 errors and the OIG identified an additional 209 instances in which the Woods Files did not support claims made in the warrant applications. *Id.* at ii, 7–8. A broader audit of every FISA application made between January 2015 to March 2020 produced yet another 179 instances "where the required Woods File was missing, destroyed, or incomplete." *Id.* In other words, the manifest failures in the Page FISA process were not an aberration but par for the course for the FBI.

C. The Page Leaks

But the FBI did not stop at misleading the FISC. Page was not only unlawfully surveilled—the surveillance then became public fodder due to a steady drip of leaks to the media that painted Page as a

foreign agent; in particular, a Russian agent. First, the FBI's informant, Christopher Steele, disclosed selected portions of his subsequently discredited investigation to the media, including that Page had met with sanctioned Russian individuals. Second, two FBI employees, Lisa Page and Peter Strzok, executed a scheme to leak to the media that Page was the subject of a FISA warrant. In a series of crass text messages sent via their government devices, Strzok and Lisa Page shared their mutual enmity for Page and crowed about their "media leak strategy" to tarnish his reputation.[3] The Deputy Attorney General later released these text messages because he believed that they "were so inappropriate and intertwined with their FBI work that they raised concerns about political bias influencing official duties." Declaration of Rod J. Rosenstein, *Strzok v. Barr*, No. 1:19-cv-2367, ECF No. 38-1, (D.D.C. Jan. 17, 2020). The leaks had their predictable effect. For years Page has been branded with the false label of "agent of a hostile foreign power."

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[3] Deputy FBI Director Andrew McCabe allegedly put his imprimatur on the Page media leak operation. Indeed, McCabe was later fired from the FBI after personally authorizing a leak of other "sensitive information" to, as the OIG found, "enhanc[e] [his] reputation." OIG, *A Report of Investigation of Certain Allegations Relating to Former FBI Deputy Director Andrew McCabe* 1–2, 33–34 (Feb. 2018), https://perma.cc/8TZK-9GZM. When questioned about the leaks, McCabe "lacked candor" with the FBI Director and—under oath—again "lacked candor" with the FBI's Inspection Division and OIG. *Id.* More colloquially, McCabe leaked, then lied.

II. ANALYSIS

Despite our Government's appalling conduct, I agree with my colleagues' conclusion that Page cannot prevail on all but one of his claims. His FISA claims cannot be brought against the Government defendants—the Department of Justice, the FBI and the United States—and his Patriot Act claim—which can lie against governmental agencies—is, I believe, forfeited and, in any event, is without merit as discussed *infra*.[4] As for Page's first FISA claim against the individual defendants, I reach the same result that my colleagues do but on slightly different analyses. And, most importantly, I do not agree that Page's second FISA claim is time-barred; I believe that Page states a timely and plausible claim for relief and would therefore reverse the district court's dismissal of that claim.

A. FISA Section 1809(a)(1)

I begin where the majority does: with Page's § 1809(a)(1) claim. My colleagues conclude that Page's first FISA claim is time-barred but "assume without deciding" which of the parties' three proffered limitations periods governs. Maj. Op. 16. And they decide that the federal discovery rule controls in determining when a FISA claim first accrues. *Id.* I would resolve the question they assume and assume the question they decide.

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[4] *See* discussion II.B.

1. Limitations Period/Accrual Rule

FISA contains no statute of limitations, "a void which is commonplace in federal statutory law." *Bd. of Regents v. Tomanio*, 446 U.S. 478, 483 (1980). In the absence of congressional preemption, the applicable state limitations statute applies of its own force; that is, the court "'borrow[s]' the most closely analogous state limitations period." *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 414 (2005). The parties advance a slew of options for the governing limitations period. In my view, only one—D.C. Code § 12-301(8)—has merit.

The individual defendants argue that we should use the two-year limitations period found in both the Wiretap Act and the Stored Communications Act because those laws "work in tandem with FISA and share its objective[s]," and because a resort to state law would result in "forum shopping and inconsistent judgments." Red Br. 52–53 (internal quotations omitted).[5] The Wiretap Act, Pub L. No. 90-351, Title III, § 802, 82 Stat. 197, 212, 18 U.S.C. § 2510 *et seq.*, governs prospective surveillance of the contents of oral, wire or electronic communications. Its counterpart, the Stored Communications Act, Pub. L. No. 99-508, Title II, § 201, 100 Stat. 1848, 1860, 18 U.S.C. § 2701 *et seq.*, governs acquisition of the contents or metadata of those communications. In other words, the Wiretap Act applies when the Government actively intercepts communications and the Stored Communications Act applies when the

[5] For clarity, I refer to the individual defendants' brief as the Red Brief and to the Government's brief as the Gov't Brief.

Government seeks to retrieve stored communications. It can be the difference between listening in on a live telephone call and retrieving a one-month log of a cellphone's intercepted text messages.

The three statutes are *in pari materia*—they relate "to the same subject matter," employ contiguous statutory terms and form discrete pieces of a uniform whole: the means by which the Government may lawfully conduct electronic surveillance of its citizens. 2B Singer & Singer, *Sutherland Statutes & Statutory Construction* (7th ed. Nov. 2024 update) § 51:1–3. For this reason, the individual defendants argue that the Court should apply the two-year limitations period prescribed for the Wiretap Act and for the Stored Communications Act to FISA. With respect, I disagree.

I do agree that state statutes of limitations apply of their own force unless legitimately displaced by an act of the Congress. Perhaps because this doctrine became the inaptly named "borrowing doctrine," courts thought it equally proper to "borrow" statutes of limitations from other *federal* laws. *See, e.g.*, *Haggerty v. USAir, Inc.*, 952 F.2d 781, 786–88 (3d Cir. 1992); *Smith v. Int'l Org. of Masters, Mates & Pilots*, 296 F.3d 380, 382 (5th Cir. 2002). But properly understood, "the borrowing doctrine involves no borrowing at all." *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 163 (1987) (Scalia, J., concurring in the judgment). Instead, "state statutes of limitations . . . apply as a matter of state law" to "federal statutory causes of action" if the Congress has not otherwise prescribed. *Id.* at 161. A court that applies a state statute of limitations is engaged in a quintessentially judicial role: the application of law to

facts. But a court treads on legislative terrain when it "borrows" what it views as a sufficiently analogous federal limitations period from one statute and applies it to another. To do so "is not a construction of a statute, but, in effect, an enlargement of it by the court." *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019). Accordingly, the Supreme Court has termed it "the rare case" in which it is appropriate to "borrow [an] analogous federal limitations period in the absence of an expressly applicable one." *Graham Cnty.*, 545 U.S. at 415; *see N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34–35 (1995) (describing it as "a closely circumscribed and narrow exception to the general rule" that state law applies) (alterations omitted). And here, FISA's close relationship to the Wiretap and Stored Communications Acts and its express omission of a statute of limitations does not support "borrowing" either of the latter limitations periods; instead, the negative inference is just as justified, if not more so. If a statute "omits words used in a prior statute on a similar subject," that omission is considered deliberate and indicative of a "different intent." 2B *Sutherland* § 51:2.

In the alternative, the individual defendants ask that we apply D.C.'s one-year statute of limitation for claims alleging "libel, slander" or "other invasion of privacy claims." D.C. Code § 12-301(4); *see Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1062 (D.C. 2014) (extending § 12-301(4) to privacy torts). Section 12-301(4) claims apply to private tortfeasors; FISA governs only those who engage in conduct "under color of law." 50 U.S.C. § 1809(a)(1), (2); *see Payne v. District of Columbia*, 559 F.2d 809, 817 n.32 (D.C. Cir. 1977)

(explaining that "injuries inflicted by officers acting under color of law are significantly different in kind from those resulting from acts of private persons"). We have also held that D.C.'s catchall three-year limitations period applies to analogous Fourth Amendment *Bivens* actions. *See Banks v. Chesapeake & Potomac Tel. Co.*, 802 F.2d 1416, 1429 (D.C. Cir. 1986); D.C. Code § 12-301(8) (setting a three-year limitation for any claim "not otherwise specifically prescribed"). Accordingly, I agree with my colleagues that § 12-301(8)'s three-year limitation applies—not because I assume it but because the law commands it.

Although I believe the limitations period is straightforward, the accrual rule presents a closer question that I would not resolve today. Section 12-301(8)'s three-year limitation runs from "the time the right to maintain the action accrues." As the majority explains, the accrual rule for a federal claim—even when applying a state limitations period— is a question of federal law. *See Albright v. Oliver*, 510 U.S. 266, 280 n.6 (1994).

A claim accrues "when the plaintiff has a complete and present cause of action—*i.e.*, when she has the right to file suit and obtain relief." *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 809 (2024) (internal quotations omitted). A claim for retrospective relief becomes complete, and thus accrues, at the moment of injury. This is called the "incident of injury rule," *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 & n.4 (2014), and constitutes the "standard rule" for accrual. *Rotkiske*, 589 U.S. at 13; *Graham County*, 545 U.S. at 418 (same). Sometimes, however, courts employ a

"discovery rule," under which the limitations period begins "when the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim." *Petrella*, 572 U.S. at 670 n.4. The discovery rule "arose in 18th-century fraud cases as an 'exception' to the standard rule," *Gabelli v. SEC*, 568 U.S. 442, 449 (2013), and has since been expanded by the Supreme Court to only "two contexts, latent disease and medical malpractice." *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001).

The majority posits that the discovery rule is "the general rule" in federal courts, at least "in cases in which the injury is 'not of the sort that can readily be discovered when it occurs.'" Maj. Op. 16 (quoting *Sprint Commc'ns Co. v. FCC*, 76 F.3d 1221, 1226 (D.C. Cir. 1996)). I respectfully disagree. The majority relies on our decision in *Sprint Communications*, which in turn relies on *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 341–42 (D.C. Cir. 1991). In *Connors*, then-Judge Ruth Bader Ginsburg concluded that courts of appeals had coalesced around the view that "the discovery rule is to be applied in all federal question cases in the absence of a contrary directive from Congress." 935 F.2d at 342 (quotation omitted). I believe that consensus may no longer be good law.

The Supreme Court has "observed that lower federal courts 'generally apply a discovery accrual rule when a statute is silent on the issue'" but it has conspicuously "not adopted that position as [its] own." *TRW Inc.*, 534 U.S. at 27 (quoting *Rotella v. Wood*, 528

U.S. 549, 555 (2000)).[6] On the contrary, the Court has cautioned against an "expansive approach to the discovery rule" and termed its broad use a "bad wine of recent vintage." *Rotkiske*, 589 U.S. at 14 (quoting *TRW Inc.*, 534 U.S. at 37 (Scalia, J., concurring in the judgment)). *Rotkiske* "expressly rejected" the "default presumption that all federal limitations periods run from the date of discovery." *Id.* at 12. Granted, the clandestine nature of FISA surveillance may often preclude FISA's civil cause of action absent a discovery accrual rule. But no party here challenged the applicability of the discovery rule and so we lack the benefit of adversarial briefing on the matter. I would accordingly assume without deciding that the discovery accrual rule applies here.

With these reservations noted, I agree that Page's § 1809(a)(1) claim alleging that the individual defendants engaged in unlawful surveillance is untimely for the reasons explained by the majority.

B. The Patriot Act

1. The Plain Text

The Patriot Act provides that:

> Any action against the United States under this section shall be forever barred unless it is presented in writing to the appropriate Federal agency within 2 years after such claim accrues ***or*** unless action is begun

[6] Notably, *TRW Inc.* was authored by Justice Ginsburg. Justice Ginsburg cited to her *Connors* decision but drew a contrast between the default rule as developed in the circuit courts and the default rule applied by the Supreme Court. *Id.* at 27–28.

> within 6 months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented. The claim shall accrue on the date upon which the claimant first has a reasonable opportunity to discover the violation.

18 U.S.C. § 2712(b)(2) (emphasis added). Section 2712(b)(2) is plainly disjunctive: a plaintiff must *either* present his claim to the agency within two years *or* bring an action within six months of final agency denial.

The Patriot Act's statute of limitation echoes the Federal Tort Claims Act (FTCA), which provides that:

> (a) [E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.
>
> (b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401. Both the Patriot Act and the FTCA impose two distinct procedural requirements: administrative exhaustion and timely filing. No action can be filed against the United States "unless the claimant shall have first presented the claim to the

appropriate Federal agency and his claim shall have been finally denied by the agency." 28 U.S.C. § 2675(a). The agency then has six months to resolve an administrative claim, after which the agency's silence may "be deemed a final denial of the claim." *Id.* All claims are then subject to the general limitations rule that they are "barred unless the complaint is filed within six years after the right of action first accrues." *Id.* § 2401(a).[7] For FTCA and Patriot Act claims only, the action is also "barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after . . . final denial of the claim by the agency." *Id.* § 2401(b); *accord* 18 U.S.C. § 2712(b)(2).

Properly construed, any claim against the United States must, in effect, first be presented to the Government no later than five years and six months from accrual; that is, six months before the six-year limitations deadline in 28 U.S.C. § 2401(a). For tort and Patriot Act claims, a plaintiff is subject to a stricter rule requiring timelier administrative presentment. If the plaintiff presents his claim to the agency within two years, he is treated like other claimants and benefits from the full six-year statute of limitations. But if the plaintiff presents his claim to the agency after two years, the limitations period for civil suit is shortened to six months after agency denial. The statute effectively imposes a penalty on a

[7] These FTCA procedures apply with equal force to the Patriot Act. *See* 18 U.S.C. § 2712(b)(1) (requiring "[a]ny action . . . under this section" to follow the agency presentment "procedures of the Federal Tort Claims Act").

plaintiff who sits on his claim before presenting it to an agency.

Despite the plain text, in *Schuler v. United States* this court applied comments in the FTCA's legislative history to rewrite its deadline. 628 F.2d 199 (D.C. Cir. 1980). It worried that "[w]ere we to read the 'or' in the section as really intending the disjunctive, a claimant who filed a claim with the agency within two years would then be able to bring it to a District Court at any remote future time after the agency denied him relief." *Id.* at 201. But that result does not follow. A claimant would still be subject to § 2401(a), which bars *any* claim not brought within six years of accrual. The *Schuler* court thought that "relying on [§ 2401(a)] makes little sense" because it is a "general" limitation "superseded" by the "specific language of Section 2401(b)." *Id.* And notwithstanding § 2401(a) and (b) can operate jointly, the Court determined that "the legislative history of Section 2401(b) clearly shows that Congress intended a claimant to surmount both [§ 2401(b)] barriers." *Id.* at 202.

Schuler divined this congressional intent not from the statute but from a pair of committee reports. The committee reports describe § 2401(b) as requiring "a claimant [to] file a claim in writing to the appropriate Federal agency within 2 years after the claim accrues, ***and*** to further require the filing of a court action within 6 months . . . of a final decision . . . by the agency." H.R. Rep. No. 89-1532, at 5 (1966) (emphasis added); *accord* S. Rep. No. 89-1327, at 8 (1966) (similarly using an "and"). *Schuler* engrafted the committee report's "and" onto the statutory "or," relying on its "common sense and the legislative

history" and its belief that the FTCA was "not happily drafted." 628 F.2d at 201.

Three years later, the Second Circuit adopted our statutory misconstruction. It did so despite conceding that "[i]t is beyond dispute that 'or' generally is a disjunctive." *Willis v. United States*, 719 F.2d 608, 610 (2d Cir. 1983). Surveying the legislative history, the court declared it "beyond our ken" "[w]hy the draftsman chose to use 'or' in the bill, as distinguished from the crystal clear 'and' of the committee reports." *Id.* at 612. Relying on *Schuler*, *Willis* rewrote § 2401(b) to fit the statute to its legislative history. *Willis* acknowledged that it did not provide "a strictly literal reading" and that it could therefore "lead to an intercircuit conflict." *Id.* at 610, 613 n.3.

Later precedent of both the Supreme Court and this Court makes clear that the statute's plain language cannot be disregarded. In interpreting statutes, we begin with the "plain language" because it is "[t]he most reliable guide to congressional intent," *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006), and "avoid[s] the pitfalls that plague too quick a turn to the more controversial realm of legislative history." *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004). "[L]egislative history is not the law" and insofar as it is ever a proper source for revealing congressional intent, it is only to *resolve* an ambiguity, not to *create* one by "muddy[ing] clear statutory language." *Azar v. Allina Health Servs.*, 587 U.S. 566, 579 (2019). This is particularly true "with respect to filing deadlines [when] a literal reading of Congress' words is generally the only proper reading of those words." *United States v. Locke*, 471 U.S. 84, 93 (1985).

There is no ambiguity in the meaning of "or." *Schuler* simply—and erroneously—thought that the Congress did not intend what it wrote. And as predicted, its disregard of the text eventually engendered a circuit split. *Compare Schuler*, 628 F.2d at 201 ("Were we to read the 'or' in the section as really intending the disjunctive, a claimant who filed a claim with the agency within two years would then be able to bring it to a District Court at any remote future time after the agency denied him relief") *with Ellison v. United States*, 531 F.3d 359, 363 (6th Cir. 2008) ("Had Congress used 'and' in writing this statute (or had we adopted 'and' in construing it), that would mean that a claim would be barred only if the plaintiff filed the action late in the agency *and* filed the action late in court.").[8]

Schuler's misinterpretation violates basic principles of statutory construction and fair notice. Under *Schuler*'s approach, the meaning of § 2401(b) is the precise opposite of its text. Indeed, *Willis* acknowledged that its interpretation "may cause hardship to litigants" who rely on the law as written. 719 F.2d at 613 n.3. *But see Feliciano v. Dep't of*

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[8] *Ellison* created its own interpretative anomalies by inverting the logic of the statute. In an effort to reconcile *Schuler*'s (mistaken) belief that a plain text read would eliminate any judicial deadline with the disjunctive "or," the court read "forever barred . . . unless" (a) "or" (b) as "forever barred . . . if not" (a) "or" (b). *Id.* at 363. That is, the court interpreted § 2401(b) to forever bar claims if a plaintiff does not present the claim to an agency within two years or does not sue within six months of agency denial. That is not what the statute says. But *Ellison* at least recognized that it could not simply "transform[] 'or' into 'and'" to better align with purported legislative purpose. *Id.* at 363.

Transp., 145 S.Ct. 1284, 1291 (2025) ("[T]hose whose lives are governed by law are entitled to rely on its ordinary meaning, not left to speculate about hidden messages."). That should not be the case, especially in the context of the FTCA, where claimants are often *pro se*.

Of course, *Schuler* remains binding on this panel until the Supreme Court or the *en banc* Court corrects it. But its *stare decisis* effect applies only to the FTCA. We have never interpreted the Patriot Act's statute of limitations and are therefore not bound to compound its error. Although "*stare decisis* concerns may counsel against overruling" our erroneous FTCA precedent, there is "no reason whatsoever" to let that error spill over to a separate statute. *Rose v. Rose*, 481 U.S. 619, 636 (1987) (O'Connor, J., concurring in part and concurring in the judgment). "To be sure, where two statutes use similar language," courts "generally take this as a strong indication that they should be interpreted *pari passu*." *Smith v. City of Jackson*, 544 U.S. 228, 260 (2005) (O'Connor, J., concurring in the judgment) (cleaned up); *see* Maj. Op. 24–25 (relying on this rationale). But nothing in *Schuler* "provides any reason to extend its holding to the" Patriot Act as "the decision in [*Schuler*] was not based on any analysis of [the FTCA's] actual language. Rather, the *ratio decidendi* was the statute's [legislative history]." *Smith*, 544 U.S. at 261–62.

As should be plain, the legislative history of statute A has no bearing on the meaning of statute B. The committee reports that *Schuler* thought key are doubly irrelevant: once because they are unenacted legislative history and, again, because they are the

legislative history of a different statute. "[L]egislative history can not justify reading a statute to mean the opposite of what it says" or "turn[ing] a clear text on its head." *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 985 (7th Cir. 2008). And it certainly cannot do so if it tells the legislative history of another statute.

There is no dispute that Page filed his Patriot Act claim within six months of agency denial and within six years of claim accrual. *See* Maj. Op. 25. That should be the end of the matter.

2. Page's Timeliness

Even under what I believe is the majority's mistaken statutory construction, Page's Patriot Act claim is timely. The Patriot Act authorizes a suit against the United States for a willful violation of certain FISA provisions. Section 106(a) of FISA—the only provision Page relies on—in turn provides that "[n]o information acquired from an electronic surveillance pursuant to [FISA] may be used or disclosed by Federal officers or employees except for lawful purposes." 50 U.S.C. § 1806(a). My colleagues believe that Page knew or should have known of the Government's use or disclosure of FISA-derived information as of the April 2017 *Washington Post* article, a theory I address more fully *infra*.[9] For now, I note my belief that nothing in the *Post* article would give Page the requisite notice of his injury to establish that his claim accrued more than two years before it was administratively presented.

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[9] *See* discussion II.C.

The majority also points to Page's statements in a May 22, 2017 letter to the House Permanent Select Committee on Intelligence. Maj. Op. 27. Unlike the *Washington Post* report, the May 2017 letter is not incorporated into Page's complaint. The Government requested that the district court take judicial notice of the letter under Fed. R. Evid. 201(b), a request the majority now apparently grants. The Government skates on thin ice when it asks the Court to resolve an affirmative defense on a motion to dismiss based on facts outside the record. As we have repeatedly stated, affirmative defenses may be resolved on a Rule 12(b)(6) motion based only on "the face of the complaint." *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 578 (D.C. Cir. 1998). Should the Government urge the court to "consider matters outside the pleadings," the Court must "convert[] the motion into one for summary judgment and afford[] all parties 'reasonable opportunity to present all material made pertinent to such a motion by Rule 56.'" *Gordon v. Nat'l Youth Work All.*, 675 F.2d 356, 360 (D.C. Cir. 1982) (quoting Fed. R. Civ. P. 12(b)).

The majority concludes that the May 2017 letter reflects Page's belief that the Government "leaked his identity and revealed classified information regarding [the FISA warrants] . . . documented in the *Washington Post* article." Maj. Op. 27. The first claim goes to Page's belief that the Government revealed his previously anonymized identity as a result of *United States v. Buryakov*, No. 15-cr-73, 2016 WL 4417889 (S.D.N.Y. May 19, 2016). In that case, the FBI filed documents indicating that the defendant, a Russian intelligence agent, discussed the attempted recruiting

of "Male-1" as an intelligence asset. Two news outlets later reported that "Male-1" was Carter Page. *Testimony of Carter Page Before the H. Permanent Select Comm. on Intel.*, 115th Cong. 16 nn. 31–32 (2017), https://perma.cc/74C9-RWZ9. The second claim goes to Page's belief that the Government leaked the existence of the FISA surveillance to the Washington Post.[10] Neither pertains to Page's Patriot Act claim, which instead focuses on the Government's use of FISA-obtained information in the application renewal process. Even considering the May 2017 letter—which I do not believe we should—it helps the Government not at all, as nothing in the letter indicates Page's awareness of his Patriot Act claim more than two years before his administrative filing.

3. The Merits

Although I believe that Page's Patriot Act claim is timely, I also believe he has forfeited it. Recall, FISA § 1806(a) provides that "[n]o information acquired from an electronic surveillance pursuant to [FISA] may be used or disclosed by Federal officers or employees except for lawful purposes." 50 U.S.C.

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[10] The Government, for its part, draws a different inference. It relies on the May 2017 letter and other evidence extrinsic to the complaint as indicia that Page suspected numerous "errors and omissions in the FISA applications," including "about the so-called Steele dossier." Gov't Br. 16–17. In other words, the Government's evidentiary support goes to Page's *knowledge about the lawfulness* of the surveillance. But as the Government itself argues elsewhere, Page's claim focuses on the use or disclosure of FISA information for an unlawful purpose. Nothing in the Washington Post's reporting, the May 2017 letter or the Government's other evidence supports a claim that the Government *misused* the information it acquired.

§ 1806(a). In district court, Page argued that the Government "violated the PATRIOT Act because [it] knowingly used the unlawfully obtained" FISA information in its renewal applications. *Page v. Comey*, 628 F. Supp. 3d 103, 134 (D.D.C. 2022). As the district court correctly explained, Page mistakenly conflated §§ 1806(a) and 1809(a); that is, Page alleged that the Government disclosed information that was "*acquired* through unauthorized surveillance" when his Patriot Act claim requires that "FISA information [be] used or disclosed . . . *for an unlawful purpose*." *Id.* at 134–35. On appeal, Page now alleges that the "FISA-acquired information was" put to the "unlawful end of misleading the FISC." Blue Br. 81 (internal alterations omitted). His theory works like this. The Justice Department lacked probable cause when it obtained at least the third and fourth FISA warrants. These warrants nevertheless issued because of the Government's duplicity during the application process. And because FISA-derived information was used to support the flawed probable cause finding, that information was put to an unlawful purpose. *Id.* at 81–82. The argument is both forfeited and meritless. An appellant "forfeits an argument by failing to press it in district court." *Government of Manitoba v. Bernhardt*, 923 F.3d 173, 179 (D.C. Cir. 2019). Page's complaint does not assert the legal theory that he now advances on appeal. His district court briefs do not touch on the argument. And the district court did not pass on its merits.

Were the argument preserved, Page's Patriot Act claim would fail on the merits. As Page himself asserts, FISA-acquired information was put to a

quintessentially lawful purpose: disclosure to the FISC. Page argues that because the totality of the evidence did not support probable cause, the Government's use of FISA evidence to obtain a warrant was itself an unlawful purpose. But the Government's duty under FISA is to disclose its evidence to the FISC judges. Granted, the Government cannot "mislead [the FISC] by including [false] information . . . or . . . omit[ting] material information." Blue Br. 82. But the FISA information submitted to the FISC did neither. Page's challenge is not to the Government's lawful use of FISA information but to its unlawful omission of non-FISA information. He does not allege that the Government (as opposed to the individual defendants) used FISA-derived information outside the warrant renewal process. He does not allege that using FISA-derived information to apply for a warrant constitutes an unlawful purpose. He does not allege that the Government manipulated, altered or in any way obfuscated the contents of the FISA-derived information. What he alleges is that the Government should have included additional information alongside the FISA-derived information, which would have led the FISC to deny the Government's warrant renewal applications. In other words, his grievance is not with the Government's "*use* of the collected information" but with its "collection of the information itself." *Al-Haramain Islamic Found., Inc. v. Obama*, 705 F.3d 845, 853 (9th Cir. 2012) (explaining that such claims must be brought against individual defendants under FISA rather than against the Government through the Patriot Act). I therefore agree with the majority that

Page's Patriot Act claim fails but not based on untimeliness.

C. FISA Section 1809(a)(2)

Finally, I do not join the majority's holding that Page's § 1809(a)(2) claim is untimely. I also believe that Page has stated a plausible § 1809(a)(2) claim and would therefore reverse the district court's dismissal of this claim.

1. The Statute of Limitations

Page's two FISA claims allege two legally distinct injuries that can accrue at different times. Recall, Page pleaded two claims under FISA. First, he alleged that the individual defendants "intentionally engage[d] in [unauthorized] electronic surveillance under color of law." 50 U.S.C. § 1809(a)(1). The injury that gives rise to this claim is the act of surveillance. Second, he alleged that the individual defendants "disclose[d] or use[d] information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through [unauthorized] electronic surveillance." *Id.* § 1809(a)(2). The injury that gives rise to this claim is not the act of surveillance but the disclosure or use of information obtained through surveillance.

The majority devotes only minimal attention to explaining why Page's § 1809(a)(2) claim is time-barred. In its view:

> The [*Washington Post*] article [] reported that the FBI had renewed the initial warrant "more than once," JA097, thereby informing readers, including Page, that the

> FBI had submitted multiple warrant renewal applications. FISA requires warrant renewal applications to describe information gathered from previous surveillance . . . . The statute's command plus the *Post* report of repeated renewals sufficed to put Page on notice[.]

Maj. Op. 19–20. With respect, I believe that recitation misreads the statute, the record and the procedural posture. The majority ascribes to Page a comprehensive knowledge of FISA's provisions. But nothing in the Washington Post's reporting would alert Page—or any reasonable reader—to the Government's use or disclosure of FISA-derived information. My colleagues' rejection of Page's § 1809(a)(2) claim is particularly glaring at the motion to dismiss stage, when our duty is to "assume the truth of [Page's] factual allegations and draw all reasonable inferences in h[is] favor." *Mills*, 105 F.4th at 395.

The *Washington Post* article quotes unnamed Government officials as asserting that the FISA applications to surveil Page were "renewed more than once by the FISA court." JA97. Page's § 1809(a)(2) claim turns, in part, on his assertion that the Government used or disclosed FISA-derived information in its three surveillance renewal applications. Page does not know this for certain—nor do we, as the partially declassified renewal applications retain vast redactions—but he suggests that it is likely because FISA requires renewal applications to contain "a statement of the facts concerning all previous applications that have been made . . . and the action taken on each previous

application." 50 U.S.C. § 1804(a)(8). My colleagues thus conclude that once Page read the *Post* article and learned that the surveillance warrants had been renewed, he was aware of his § 1809(a)(2) injury per his own theory.[11] Again, with respect, I believe that conclusion does not follow.

Under the discovery rule, a plaintiff's claim accrues "when the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim." *Petrella*, 572 U.S. at 670 n.4 (internal quotations omitted). In other words, accrual

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[11] The majority also relies on Page's statements in a May 22, 2017 letter to the House Permanent Select Committee on Intelligence. Maj. Op. 20. In addition to my concerns noted *supra* II.B.2., this evidence is patently forfeited and likely waived. The Government—but not the individual defendants—raised the letter before us. *Compare* Gov't Br. 16–18 *with* Red Br. 54–55. Because it is the defendants' burden to prove their affirmative defense and because a statute of limitations defense is subject to ordinary rules of forfeiture and waiver, *see John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008), Page's congressional testimony cannot support the individual defendants' limitations defense. The majority offers no justification for its use of the letter other than noting that a court may take judicial notice of matters not subject to reasonable dispute. Maj. Op. 20–21 n.5. But judicial notice does not allow us to venture outside the four corners of the complaint on a motion to dismiss to rely on evidence the defendants themselves forfeited. And this evidence is more than forfeited. At oral argument, counsel for the individual defendants was asked why he had not raised Page's public statements made between April and November 2017; counsel disclaimed any reliance on these statements. *See* Oral Arg. Tr. 52:15–53:11. Counsel's "intentional relinquishment" of any reliance on the May 2017 letter constitutes a waiver. *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004).

may occur through actual or constructive knowledge. Both bases should fail at this stage.

Section 1804(a) requires the Government to disclose "all previous [FISA] applications" and, in the case of surveillance extensions, "a summary statement of the foreign intelligence information obtained . . . or a reasonable explanation of *the failure to obtain such information*." 50 U.S.C. § 1804(a)(8), (11) (emphasis added). In other words, the statute plainly contemplates that a renewal application may not disclose FISA-derived information. For example, if the Government tries but fails to install a bugging device on a target's phone within the statutorily prescribed deadline, *see id.* § 1805(d), it could renew its application without disclosing or using "information obtained under color of law by electronic surveillance." *Id.* § 1809(a)(2).

To conclude that Page had actual knowledge of his injury at the time of the *Washington Post* article, we must infer that Page (i) read the one line in the entire article that discussed renewal applications, (ii) read the FISA statute, (iii) found the precise portion of the statute addressing applications to the FISC and (iv) ascertained from the text's oblique language that the Government used FISA-derived information in its warrant reauthorization requests. That is one inferential leap too many, especially at the dismissal stage. Page is a layman—not a lawyer—and the entire FISA process occurs behind closed doors.[12] Even now,

[12] My colleagues gesture at Page's "multiple advanced degrees" as somehow justifying their stringent treatment of his claim. Maj. Op. 19. They do not explain how Page's resume provides any insight into the ins and outs of FISA. But even taking their point

Page can only speculate about the contents of the FISA renewal applications because they have been only partially declassified. The evidentiary vacuum existing even now should not allow us to hold, as a matter of law, that Page possessed actual knowledge of his injury from a single newspaper article necessarily bereft of detail. And, again, what Page "knew and when []he knew it, in the context of a statute of limitations defense, are questions of fact for the jury." *Goldman v. Bequai*, 19 F.3d 666, 672 (D.C. Cir. 1994) (internal alterations omitted) (quoting *Riddell v. Riddell Wash. Corp.*, 866 F.2d 1480, 1484 (D.C. Cir. 1989)).

If the majority instead means to suggest that Page had inquiry notice of his § 1809(a)(2) injury, I believe that conclusion is also premature at the dismissal stage. Whether a plaintiff exercising "reasonable diligence should have known of a cause of action is a question of fact for the jury." *Klein v. Cornelius*, 786 F.3d 1310, 1321 (10th Cir. 2015). Indeed, the district court thought it so *unlikely* that the individual defendants used FISA-acquired information in their renewal applications that the court dismissed Page's § 1809(a)(2) claim on the merits. *See Page*, 628 F. Supp. 3d at 129.

Finally, even if I were to credit that the *Post* article gave Page actual or constructive knowledge of

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on its own terms, no expert could discern from the "public information" available as of April 2017 that a viable § 1809(a)(2) lay against the individual defendants. *Id.* As explained, a FISA warrant can be renewed without using or disclosing any FISA-derived information.

his § 1809(a)(2) claim as it relates to the individual defendants' use of FISA-acquired information in renewal applications, that knowledge would apply only to the first of Page's two § 1809(a)(2) claims. As further described *infra*,[13] Page separately alleges that FBI employees Peter Strzok and Lisa Page leaked FISA-acquired information to the Washington Post and to the New York Times. The majority gives no reason that the disclosure/use claim is untimely. I believe there is none.

* * *

The individual defendants assert—and the majority erroneously credits—that Page's § 1809(a)(2) claim accrued when the first word of the FBI's surveillance surfaced: April 11, 2017, the date the Washington Post disclosed that the Government had obtained a FISA warrant to surveil Page. Page's second amended complaint alleges that he did not apprehend his injury until December 9, 2019—almost 32 months later—with the publication of the OIG's Report.

The majority disposes of this critical factual dispute with a lone sentence from the *Post* article, which quotes an anonymous Government official speaking off the record and alleging that the FISA warrant was renewed. Never mind that the Government's official organs—the White House, the FBI and the Justice Department—all "declined to comment" to the Post. JA96. Never mind that the *Post* article catalogs "unsubstantiated claims about U.S. Surveillance" and quotes the former Director of

[13] *See* discussion II.C.3.

National Intelligence as saying, "U.S. law enforcement agencies did not have any FISA orders to monitor the communications of Trump . . . or his campaign." JA99. And never mind that the *Post* report initially contained erroneous information that was later corrected. *See* JA100 (updating the report to correct two factual errors in the initial publication). The majority sweeps all this aside and concludes that no factfinder could conclude that Page possessed anything less than encyclopedic knowledge of the FISA renewal process—and oracular insight into the FBI's bases for seeking renewal—all from the lone *Post* article. A jury—the traditional factfinders—will never be given the opportunity to adjudicate these contested facts because my colleagues conclude that Page's complaint does not even *plausibly* assert that he was unaware that the Government used and or disclosed FISA-derived information about him.

As we have repeatedly held, "courts should hesitate to dismiss a complaint on statute of limitations grounds based solely on the face of the complaint because statute of limitations issues often depend on contested questions of fact." *Momenian v. Davidson*, 878 F.3d 381, 387 (D.C. Cir. 2017) (quotation omitted); *see also Jones v. Rogers Mem'l Hosp.*, 442 F.2d 773, 775 (D.C. Cir. 1971) ("[T]he complaint cannot be dismissed" under a 12(b)(6) statute of limitations defense "unless it appears *beyond doubt* that the plaintiff can prove *no* state of facts in support of his claim that would entitle him to relief.") (emphasis added). This record is riddled with doubts. Because the individual defendants have not come close to satisfying the "strict standard" at the

motion-to-dismiss stage of demonstrating that Page's "claims are conclusively time-barred on the face of the complaint," I cannot join the majority holding. *Capitol Servs. Mgmt., Inc. v. Vesta Corp.*, 933 F.3d 784, 787 (D.C. Cir. 2019).

2. The FISA Warrant Renewal Allegations

Turning to the merits, I believe that Page has stated a plausible violation of § 1809(a)(2) and would therefore reverse the district court's dismissal of this claim. Page's complaint alleges that the individual defendants "unlawfully . . . disclosed[] and used . . . the results of the surveillance on him," including through "leaks to the media, obtaining each subsequent renewal warrant, [and] obtaining additional surveillance and investigative information." JA70. The complaint adds that the defendants "used the information obtained from the issued FISA warrants to obtain each of the subsequent warrants as well as to . . . obtain or justify additional investigative measures against Dr. Page . . . [and] to request investigative assistance from other law enforcement and intelligence agencies." JA70–71 (emphasis removed). Elsewhere, the complaint describes each of the individual defendants' roles in the Government's investigation, including their roles in obtaining FISA warrant renewals from the FISC. At the same time, Page fails to bridge the gap between these two allegations; that is, he does not explain how an individual defendant used the fruits of FISA surveillance in investigating or approving applications to the FISC. The district court treated this gap as a chasm into which all of Page's claims incurably fell. In

my view, that unduly cabined view of the complaint was inappropriate at the pleading stage.

Instead, the district court was required to accept the validity of Page's factual allegations and "draw all reasonable inferences" from the complaint in Page's favor. *Mills*, 105 F.4th at 395. Those allegations and reasonable inferences tip Page's complaint over the plausibility line. For example, Page alleges that FBI Director James Comey personally signed the second and third FISA warrant applications and Deputy Director Andrew McCabe personally signed the fourth application. And Page alleges that information gathered from earlier FISA surveillance was included in each subsequent reauthorization application. In isolation, neither action links an individual defendant to a disclosure or use. But the Court must read "the allegations of the complaint as a whole." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 47 (2011). That reading makes plain that the Director and the Deputy Director used or disclosed FISA-derived information when they separately sought warrant reauthorization from the FISC.

The district court rejected this reauthorization theory because, in its view, Page's complaint was a web of contradictions: the complaint alleged that surveillance "produced 'no evidence at all'" that Page was a Russian agent, which "undercut[] his claim that its results were used to procure the renewal warrants." *Page*, 628 F. Supp. 3d at 129. I see no contradiction. Accepting the complaint's facts as true, the FBI captured some of Page's communications and informed the FISC of the contents of those communications, notwithstanding that the

communications did not squarely peg Page as a Russian asset. FISA's *ex parte* procedures hold the Government to "a heightened duty of candor," *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, 411 F. Supp. 3d 333, 336 (FISC 2019), which means it must include all evidence—incriminating and mitigating—in its FISC applications. There is no basis to conclude, as the district court may have done, that the FISC would treat the absence of evidence as evidence of absence in reauthorizing surveillance of Page. And in any event, it was not the district court's role to assess the likelihood (assuming plausibility) of Page's underlying factual allegations. At the motion to dismiss stage, the plaintiff's job is to plead, not to prove.

This is particularly true in the context of FISA litigation, where "the necessary information lies within defendants' control" and so a plaintiff must resort to "pleadings on information and belief." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1279 n.3 (D.C. Cir. 1994). "Specific facts are not necessary" to clear the low bar of Rule 8(a)(2)—nor could such facts be proffered pre-discover in all but the most extraordinary of FISA civil suits. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). At this stage in the litigation, it suffices that Page alleged that (i) FISA-derived information was used and disclosed in applying for FISA warrants, (ii) at least some of the individual defendants personally engaged in that use or disclosure through their involvement in the application process and (iii) at least some of these defendants knew or should have known that each earlier FISA application included material omissions

or falsehoods and, thus, the compiled information was tainted by an improper process. Granting Page "the benefit of all inferences that can be derived from" his allegations, *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012), they are more than sufficient to "nudge[] [Page's] claims across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

3. The Media Leak Allegations

Page's separate use-and-disclosure theory expressly directed at defendants Peter Strzok and Lisa Page survives for a similar reason. In their FBI employment, they allegedly conspired to produce a public narrative that Page was an agent of Russia through selective leaks of FISA information to the media. Their scheme led to the *Washington Post* story and, ultimately, to the cascade of events that have so despotically damaged Page's reputation. Page pursues his claims against these defendants down two paths. The first lacks merit but the second alleges a viable § 1809(a)(2) claim.

Page first argues that "Strzok and Lisa Page gave [his] identity to the [Washington Post]," and that this identification alone constitutes a § 1809(a)(2) violation. Blue Br. 78–79. As the individual defendants note, however, Page does not "argue that defendants obtained his identity *by* electronic surveillance." Red Br. 49–50; *see* 50 U.S.C. § 1809(a)(2) (encompassing only intentional disclosure or use of "information obtained . . . by electronic surveillance"). They are correct; Page's complaint extensively documents the defendants' investigation

into and targeting of him before any electronic surveillance commenced. Page therefore cannot prevail on his first argument.

Page separately alleges that Strzok and Lisa Page "leaked . . . the results of the" FISA surveillance "to media outlets, including the New York Times [and] the Washington Post." JA69–70. This theory has traction. If proven, it would constitute a naked "intentional[] disclos[ure] or use[]." 50 U.S.C. § 1809(a)(2). If proven, it would mean that those two jumped-up civil servants—"neither servants nor civil," as Churchill once described their antecedents—plotted to pervert the law.

The district court discounted Page's allegations because "[n]either the Times nor the Post article cited in the complaint contains any mention of the fruits of Page's surveillance." *Page*, 628 F. Supp. 3d at 129. That may be a strong argument on summary judgment. But not at this stage when the district court must accept Page's allegations as true and ask whether they state a plausible claim for relief under the law. They do.

My colleagues commit the same error as the district court. They conclude that Page plausibly alleges that Strzok and Lisa Page "leaked to the *Washington Post* and the *New York Times* the existence of and putative bases for FISA warrants to surveil him" but not "that [Lisa] Page or Strzok leaked the FISA warrants' results." Maj. Op. 22. This is so because the former was "confirmed by the OIG Report" yet the latter rests on a purportedly "naked assumption." *Id.* at 22–23. With respect, our role at

this stage is not to dissect the record in search of rigorous proof. If Page's allegations support a reasonable inference that the defendants leaked the FISA warrants, that ends the matter. In my view, the allegations support such an inference. Two leading papers of record spread across their front pages details of the Government's surveillance of Page. I do not see how the majority can find it implausible that Strzok and Lisa Page leaked information obtained from that surveillance to the media—especially when my colleagues acknowledge that these leakers *did* unlawfully disclose the existence of and bases for the surveillance. Nor do I see how any plaintiff could ever jump the majority's pleading hurdle absent some form of pre-suit discovery. But for the fortuity of the OIG Report, Page's entire complaint would necessarily have been pleaded exclusively on information and belief—or, to use my colleagues' words, on "naked assumption[s]."

It is irrelevant that neither media article describes the fruits of the surveillance. Both articles name Carter Page. They reveal that he was the target of FISA surveillance. And on Page's telling, the surveillance had yet to uncover any information whatsoever to link him to Russia as its agent. It is at least plausible to conclude that the reporters were leaked some portion of Page's communications and chose to focus their coverage on the existence of the surveillance rather than on the substance of what the surveillance produced. As alleged, Strzok and Lisa Page were the sources of these leaks. And as alleged, Strzok and Lisa Page knew or had reason to know that the information was obtained through improperly

authorized surveillance. At summary judgment, the absence of evidence of leaked surveillance contents—as opposed to the fact of surveillance itself—could prove dispositive. For now, however, the Court must accept the complaint's allegations as true and, on that basis, the district court erred in dismissing Page's § 1809(a)(2) claim.

III. CONCLUSION

FISA's grand bargain was struck after the public learned of an array of intelligence scandals involving the Executive's rampant and lawless spying on American citizens. The enacting Congress aimed to subject the President's unbridled surveillance authority to the oversight of the other two branches and, in exchange, surveillance was allowed to take place away from the public eye. At the core of this bargain were FISA's warrant procedures. Yet, as this case makes shockingly clear, those procedures have proven inadequate.

From start to finish, the FISA process was marred by governmental omissions and commissions that led a pliant court to authorize surveillance on an American citizen. FISA's requirements may sometimes prove difficult to satisfy but disregarding them is the gateway to naked violations of our civil liberties. I take some solace in the knowledge that the Government's egregious conduct roused the Congress to action. In response to this very case, it amended FISA to increase oversight and impose new penalties on individuals who crash FISA's guardrails. *See* Reforming Intelligence and Securing America Act, Pub. L. No. 118-49, 138 Stat. 862 (2024). Alas, this is

cold comfort to Page. Nevertheless, I believe that Page's first FISA claim is untimely and his Patriot Act claim is both forfeited and fails on the merits. I therefore join my colleagues in affirming the dismissal of those claims but I would give Page his day in court on his claim brought pursuant to 50 U.S.C. § 1809(a)(2). With regard to that claim, I respectfully dissent.

Appendix B

Case 1:20-cv-03460-DLF Document 127
Filed: 01/18/23

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CARTER PAGE, *Plaintiff,* v. JAMES B. COMEY *et al.*, *Defendants.*	No. 20-cv-3460 (DLF)

MEMORANDUM OPINION

Following the Court's order granting the defendants' motions to dismiss and closing this case, Carter Page filed a motion to alter or amend the judgment under Rule 59(e) and for relief from the judgment under Rule 60(b) of the Federal Rules of Civil Procedure. Pl.'s Mot. for Recons., Dkt. 119. For the reasons that follow, the Court will deny the motion.

I. BACKGROUND[1]

As explained at length in the Court's initial opinion, *see* Mem. Op. at 1–9, Dkt. 115, this case arises out of various FBI agents' alleged actions to obtain four successive Foreign Intelligence Surveillance Act (FISA) warrants to electronically surveil Page during the Trump 2016 campaign, despite there being no probable cause to do so. *Id.* at 2. Among other things, Page alleged that the FBI used reports by Christopher Steele, who "was paid by the Democratic National Committee and/or the Clinton campaign to perform political opposition research," as a basis to obtain the FISA warrants "without adequately investigating [Steele's] reliability and motives." *Id.* at 2–3.

And as relevant here, the complaint alleged that Igor Danchenko, "one of Steele's key sub-sources," provided information to the FBI that "contradicted key claims in Steele's reports" but "was not reported" in the FISA applications. *Id.* at 31.

Page's Second Amended Complaint brought claims under the FISA and *Bivens* against individual defendants James Comey, Andrew McCabe, Kevin Clinesmith, Peter Strzok, Lisa Page, Joe Pientka, Stephen Somma, and Brian Auten, all individuals who worked at the FBI. Second Am. Compl. (SAC) ¶¶ 256–274, 283–289, Dkt. 73. The complaint also listed John Does 1–10 as individual defendants "whose identities or specific involvement in the conduct alleged in this Complaint may not yet be known to the Plaintiff." *Id.*

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[1] The Court assumes familiarity with the extensive discussion of the facts set forth in its initial opinion. *See* Mem. Op. at 1–10, Dkt. 115.

¶¶ 34–35. Finally, Page sued the United States under the Federal Tort Claims Act (FTCA) and PATRIOT Act, *id.* ¶¶ 275–282, 303–311, and DOJ and the FBI under the Privacy Act, *id.* ¶¶ 290–302.

Each of the named individual defendants and the institutional defendants moved to dismiss. Dkts. 80–88. The Court granted the motions. *See* Order, Dkt. 114. It dismissed the FISA, *Bivens*, FTCA, and PATRIOT Act counts for failure to state a claim under Rule 12(b)(6). Mem. Op. at 34–35, 38–39, 43–44. It further dismissed one Privacy Act count for failure to exhaust administrative remedies, *id.* at 49, and the other as time-barred, *id.* at 50. Although the Court dismissed all claims without prejudice except for the *Bivens* claim, the Court directed that the case be closed.[2] Order at 1. On September 29, 2022, Page moved to alter or amend the judgment under Rule 59(e) and for relief from the judgment under Rule 60(b) based on newly discovered evidence about the FBI's relationship with Danchenko. Pl's Mem. of Law in Supp. of Mot. for Recons. at 2–3, Dkt. 119-1.

II. LEGAL STANDARDS

Rule 59(e) permits a party to file a "motion to alter or amend a judgment . . . no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). "A

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[2] The Order constituted "[t]he dismissal without prejudice of [the] *action* (or 'case')," which "is final and appealable." *Ciralsky v. CIA*, 355 F.3d 661, 666 (D.C. Cir. 2004) ("That the dismissal was without prejudice to filing another suit does not make the cause unappealable, for denial of relief and dismissal of the case ended this suit as far as the District Court was concerned." (quoting *United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794–95 n.1 (1949)).

Rule 59(e) motion is discretionary and need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (per curiam) (quotation marks omitted). A movant cannot use a Rule 59(e) motion to raise new issues, theories, or arguments that could have been presented in the course of the litigation. *Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020); *Fox v. Am. Airlines, Inc.*, 389 F.3d 1291, 1296 (D.C. Cir. 2004). Instead, such a motion "must address new evidence or errors of law or fact and cannot merely reargue previous factual and legal assertions," and it will be granted "[o]nly if the moving party presents new facts or a clear error of law which compel a change in the court's ruling." *New York v. United States*, 880 F. Supp. 37, 38 (D.D.C. 1995) (quotation marks omitted).

Similarly, under Rule 60(b), "the court may relieve a party . . . from a final judgment" on grounds including "mistake, inadvertence, surprise, or excusable neglect"; "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)"; "fraud . . . , misrepresentation, or misconduct by an opposing party"; or "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(1), (2), (3), (6). "[A] district court enjoys significant discretion in deciding whether to grant or deny a Rule 60(b) motion . . . ." *Computer Pros. for Soc. Resp. v. U.S. Secret Serv.*, 72 F.3d 897, 903 (D.C. Cir. 1996). Like Rule 59(e), "Rule 60(b) is not a vehicle for presenting theories or

arguments that could have been raised previously." *Walsh v. Hagee*, 10 F. Supp. 3d 15, 19 (D.D.C. 2013) (quotation marks omitted).

III. ANALYSIS

In his motion for reconsideration, Page asks the Court to reopen the case to "correct mistakes of fact and law" and grant him "leave to amend his SAC" based on newly discovered evidence. Pl.'s Mem. at 13–14. He also requests authorization to conduct "targeted discovery." *Id.* at 13. The Court will address each in turn.

A. Reopening the case based on newly discovered evidence

Page alleges that, after the Court's opinion and order issued, new evidence came to light that Danchenko was a paid source for the FBI from March 2017 to October 2020 and thus had "been paid to assist each of the Defendants' perpetration of their illegal activities," which the defendants "conceal[ed] . . . from this Court throughout the course of the current litigation." *Id.* at 2, 5. Page understands this new information to imply that the individual defendants "deliberately put one of the fabricators of the Steele Dossier on FBI payroll in order to keep him quiet and further cover up the individual FBI Defendants' misdeeds." *Id.* at 17 (emphasis omitted); *see also id.* at 16–19. Based on this new evidence, Page "moves the Court to alter and/or amend the final order" dismissing his Second Amended Complaint and closing the case. *Id.* at 13.

Such relief is not warranted. Troubling as the Danchenko allegation may be, it does not "compel the

court to change its prior position" on any count. *Nat'l Ctr. for Mfg. Scis. v. Dep't of Def.*, 199 F.3d 507, 511 (D.C. Cir. 2000). Rather, the alleged new evidence would not affect the analyses dismissing the claims against either the individual or institutional defendants.

As to the individual defendants, the new facts have no bearing on the Court's rationale for dismissing the FISA claims.[3] The Court reasoned that Page's FISA claims "fail[ed] for two reasons": (1) FISA "does not allow for aiding and abetting liability," Mem. Op. at 19–20; and (2) it applies only to those "who participate[] in *collecting* the target's communications using certain devices," which Page's complaint did not allege for any individual defendant, *id.* at 26, 28–29. Even assuming the new allegations about a coverup involving Danchenko are true, those two legal conclusions remain unaffected. While Page suggests that the Danchenko evidence supports a "civil conspiracy" theory of liability, *see* Pl.'s Reply at 4–5, Dkt. 124, that argument fails for the same reason his aiding-and-abetting theory failed. Mem. Op. at 20 ("[S]tatutory silence on the subject of secondary liability means there is none." (quotation marks omitted)); *see also Broidy Cap. Mgmt. LLC v. Muzin*, No. 19-cv-0150, 2020 WL 1536350, at *11 (D.D.C. Mar. 31, 2020), *aff'd*, 12 F.4th 789 (D.C. Cir. 2021) ("The same principle applies to bar recovery from coconspirators . . . .").

[3] Page does not challenge the dismissal of the *Bivens* claims against the individual defendants.

Moreover, Page's assertion that Danchenko himself was a "device" by which the defendants collected communications, Pl.'s Reply at 17, is likewise unconvincing. Page defines "device" to include "[a] scheme to trick or deceive." *Id.* (quoting Black's Law Dictionary (11th ed. 2019)). But his definition is plainly at odds with the statutory language, which speaks of "the installation of . . . an *electronic*, *mechanical*, or other surveillance device," 50 U.S.C. § 1801(f)(1), (4) (emphasis added), and the Court's explanation of that term, which emphasizes that using a device "is distinct from the process of getting a warrant," Mem. Op. at 22–23. Therefore, even if a coverup helped secure the warrants, it cannot be considered a "device" for purposes of FISA.

As to the institutional defendants, the new evidence does not impact the statute of limitations analysis for dismissing Page's Privacy Act claim.[4] *See id.* at 50–52. The Court reasoned that Page knew about alleged leaks to media outlets "when [the relevant articles] were published in April 2017," even if "he did not then know the identities of the leakers" or details of the leaks. *Id.* at 51. Thus, the Court concluded, Page's "Privacy Act disclosure claims expired two years after publication," *id.*, and his suit (brought more than three-and-a-half years later) was time-barred. *Id.* at 52. Again, the Danchenko allegations are irrelevant. Even if the new evidence did show that the defendants engaged in "material and willfull [*sic*] misrepresentations," Pl.'s Reply at 23,

[4] Page does not challenge the dismissal of his other Privacy Act claim due to failure to exhaust.

those misrepresentations would not negate Page's inquiry notice of any Privacy Act violations when the articles containing alleged leaks were published. *See* Mem. Op. at 51. Page's arguments to the contrary reference the portion of the Court's opinion discussing—and rejecting— whether the *FISA claims* were time barred, *see* Pl.'s Mem. at 25–26 (citing Mem. Op. at 16), and are inapposite for the Privacy Act conclusion.[5]

To the extent Page challenges the dismissal of the remaining claims against the institutional defendants, *see* Pl.'s Reply at 12–13 (FTCA claim); *id.* at 18–22 (PATRIOT Act claim), he did not raise those arguments in his motion and the Court will not consider "issues raised for the first time in a reply brief." *Rollins Env't Servs. (NJ) Inc. v. EPA*, 937 F.2d 649, 653 n.2 (D.C. Cir. 1991). And even if the Court did consider them, the arguments would fail for the same reason: whether or not Danchenko was a paid FBI informant does not impact the analyses as to either claim. *See* Mem. Op. at 40 (dismissing FTCA claim because Page did not allege that "the defendants *used* the warrants wrongfully"); *id.* at 41–45 (dismissing PATRIOT Act claim due to sovereign immunity, failure to exhaust, and failure to plausibly allege that the government improperly "used or disclosed FISA information").

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[5] Page's remaining arguments about FISA's legislative history and statutory interpretation, *see* Pl.'s Mem. at 20–23; Pl.'s Reply at 18–19, and the Privacy Act's statute of limitations, *see* Pl.'s Mem. at 26–27, are legal theories that "could have [been] raised before the decision issued" and the Court will not address them now. *Banister*, 140 S. Ct. at 1703.

Because the newly discovered information about Danchenko would not "compel a change in the court's ruling" on any claim, it does not support altering, amending, or granting relief from the Court's order dismissing Page's complaint and closing the case. *New York*, 880 F. Supp. at 38 (quotation marks omitted). As a result, Page's motion for leave to amend necessarily fails. *See* Pl.'s Mem. at 17, 19–20. "[O]nce a final judgment has been entered, a court cannot permit an amendment unless the plaintiff 'first satisfies Rule 59(e)'s more stringent standard' for setting aside that judgment." *Ciralsky*, 355 F.3d at 673 (quoting *Firestone*, 76 F.3d at 1208 (alteration omitted)). "Since the court decline[s] to set aside the judgment under Rule 59(e)," Page's "motion to amend under Rule 15(a) [is] moot." *Id.*[6]

B. Conducting targeted discovery

Page also asks for discovery to enable him "to learn sufficient details to plead the relevant causes of action." Pl.'s Mem. at 13. Specifically, he seeks to uncover "[w]hat exactly the [d]efendants . . . disclosed to journalists," "[w]hat . . . the [d]efendants kn[ew] about the partisan, political motivations of the

[6] To the extent Page wishes to bring new causes of action, *see, e.g.*, Pl.'s Reply at 14–15 (quoting 42 U.S.C. § 1985(3)), the Court notes that his Second Amended Complaint was dismissed without prejudice to refiling a new suit. *See* Order at 1. Page has provided no argument or reason to believe that that dismissal unfairly prejudiced him due to, for example, a statute of limitations concern. *See Ciralsky*, 355 F.3d at 674 (remanding for the district court to consider "the [statute of limitations] consequences of denial" of a Rule 59(e) decision, but ultimately "leav[ing] the choice entirely in the hands of the district court" (quotation marks omitted)).

surveillance of Page," and the identities of John Does 1–10, "the individuals who 'engaged in' the mechanics of the FISA surveillance." *Id.* at 24–25. The Court will deny these requests.

First, Page has not provided grounds for this relief under Rule 59(e) or Rule 60(b). These discovery requests are not related to the newly discovered evidence, nor has Page identified any "intervening change of controlling law . . . or the need to correct a clear error or prevent manifest injustice." *Firestone*, 76 F.3d at 1208 (quotation marks omitted). Rules 59(e) and 60(b) are thus not the proper vehicle for these requests, which could have been presented earlier. *Id.*; *Walsh*, 10 F. Supp. 3d at 19.

In any event, Page's discovery requests fail for a second reason. "A plaintiff may not 'use discovery to obtain the facts necessary to establish a claim that is plausible on its face pursuant to [the] *Twombly* and *Iqbal* [pleading standards]—even when those facts are only within the head or hands of the defendant.'" *Ambellu v. Re'ese Adbarat Debre Selam Kidist Mariam*, 406 F. Supp. 3d 72, 83 (D.D.C. 2019), *aff'd*, No. 19-7124, 2020 WL 873574 (D.C. Cir. Feb. 14, 2020) (quoting *Felder v. WMATA*, 105 F. Supp. 3d 52, 59 (D.D.C. 2015)). Page is not entitled to conduct "a fishing expedition" to discover new potential claims he may bring against the defendants. *Id.* at 82 (quoting *Bastin v. Fed. Nat'l Mortgage Ass'n*, 104 F.3d 1392, 1396 (D.C. Cir. 1997)); *see also Mama Cares Found. v. Nutriset Societe Par Actions Cimplifiee*, 825 F. Supp. 2d 178, 184 (D.D.C. 2011) ("[T]he discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable *without discovery*, not

to find out if it has any basis for a claim." (quotation marks omitted)).

Page's request for discovery to learn the identities of the John Does fares no better. Courts do sometimes allow cases to proceed against "'John Doe' defendants, but only in situations where the otherwise unavailable identity of the defendant will eventually be made known through discovery." *Newdow v. Roberts*, 603 F.3d 1002, 1010 (D.C. Cir. 2010). That exception is not applicable here. Page's complaint does not detail any alleged wrongdoing by the John Does. *See* SAC ¶¶ 34–35 (stating that Does' "specific involvement in the conduct alleged in this Complaint [was] not yet [] known to the Plaintiff"). The complaint later states that unknown individuals engaged in surveillance of Page pursuant to the FISA warrants, *id.* ¶¶ 140–141, but makes no attempt to link that action to any cause of action.[7] Thus, this is a very different case from *Malibu Media, LLC v. Doe*, 64 F. Supp. 3d 47, 48–50 (D.D.C. 2014), which permitted jurisdictional discovery "to learn the identity of putative defendants." *See* Pl.'s Mem. at 23. There, the complaint plausibly alleged that John Doe violated the Copyright Act, and discovery was permitted to uncover his identity and ensure personal jurisdiction. *Malibu Media*, 64 F. Supp. 3d at 48–50. By contrast, Page has not alleged any claim against John Does 1–10. Thus, discovery would, once again, "amount to nothing more than a fishing expedition" to uncover wrongdoing that

[7] Notably, FISA exempts from liability those who engage in electronic surveillance that "was authorized by and conducted pursuant to a search warrant or court order of a court of competent jurisdiction." 50 U.S.C. §§ 1809(b), 1810.

he has not already plausibly alleged. *Bastin*, 104 F.3d at 1396. Page's "[m]ere conjecture or speculation" of wrongdoing by John Does 1–10 "is not enough to justify jurisdictional discovery." *Malibu Media*, 64 F. Supp. 3d at 48 (quotation marks omitted); *see also Landwehr v. FDIC*, 282 F.R.D. 1, 4–5 (D.D.C. 2010) (explaining that plaintiffs could not "maintain their claims against the 'Doe' defendants" given "the complete absence of any specific allegations against" them).

CONCLUSION

For the foregoing reasons, the plaintiff's motion to alter or amend the judgment and for relief from the judgment is denied. A separate order consistent with this decision accompanies this memorandum opinion.

/s/ Dabney L. Friedrich
DABNEY L. FRIEDRICH
United States District Judge

January 18, 2023

Appendix C

Case 1:20-cv-03460-DLF Document 115
Filed: 09/01/22

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CARTER PAGE, *Plaintiff,* v. JAMES B. COMEY *et al.*, *Defendants.*	No. 20-cv-3460 (DLF)

MEMORANDUM OPINION

As part of its investigation into the alleged connection between the Trump 2016 presidential campaign and the Russian government, the Federal Bureau of Investigation obtained warrants under the Foreign Intelligence Surveillance Act (FISA) to electronically surveil Carter Page, an informal advisor to the campaign. Page alleges that the surveillance was unlawful because the warrant applications were false and misleading. He brings statutory and constitutional claims against the United States, the Department of Justice, the FBI, and individuals who worked at the FBI. Before the Court are the individual defendants' Motions to Dismiss, Dkts. 80–87, and the government defendants' Motion to Dismiss, Dkt. 88. For the reasons that follow, the Court will grant each motion.

I. BACKGROUND

A. Facts

1. *Operation Crossfire Hurricane*

On July 31, 2016, the FBI opened a counterintelligence investigation named "Operation Crossfire Hurricane" to determine whether individuals associated with the Trump presidential campaign were involved in coordinated activities with the Russian government. Second Am. Compl. (SAC) ¶ 5, Dkt. 73.[1] Plaintiff Carter Page, a "volunteer member of an informal foreign policy advisory committee" to the Trump campaign, alleges that he was targeted in this investigation. *Id.* ¶¶ 5, 21. According to Page, the FBI obtained four successive FISA warrants to electronically surveil him, despite there being no probable cause to suspect that he was a Russian agent. *Id.* ¶ 3; 50 U.S.C. §§ 1804(a)(3)(A), 1805(a)(2)(A).

Allegedly, defendant Stephen Somma, then an FBI counterintelligence investigator, was the first to propose the surveillance of Page. SAC ¶ 202. After asking about the possibility of seeking FISA warrants, the FBI Office of General Counsel told Somma on August 15, 2016, that he needed more evidence to establish probable cause. *Id.* ¶ 203. Meanwhile, on August 17, the CIA told the Crossfire Hurricane team that Page had been a CIA "operational contact" from 2008 to 2013 and had helped the agency combat

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[1] In deciding these motions to dismiss, the Court accepts as true all material factual allegations in the complaint. *See Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011).

Russian and other foreign countries' intelligence-related activities. *Id.* ¶ 11. And on September 7, the CIA allegedly told defendants James Comey, then-director of the FBI, and Peter Strzok, then-Deputy Assistant Director of Counterintelligence, that 2016 presidential candidate Hillary Clinton had approved a plan to connect Trump and Russian hackers in order to distract the public from her use of a private email server. *Id.* ¶ 12.

Page further alleges that soon after, on September 19, the FBI received information about a connection between the Trump campaign and Russia. *Id.* ¶ 14. Christopher Steele, a confidential source for the FBI, provided two reports alleging that Page engaged in "improper or unlawful communications or activities" with "two sanctioned Russians with close ties to Russian President Vladimir Putin." *Id.* ¶¶ 14, 74. Steele was paid by the Democratic National Committee and/or the Clinton campaign to perform political opposition research. *Id.* ¶ 9. The FBI used his reports as a basis to obtain a FISA warrant to surveil Page. *Id.* ¶ 14.

According to Page, Steele's reports were "essentially the exclusive source of information supporting probable cause for the FISA warrant applications." *Id.* ¶ 15. FBI officials allegedly chose to proceed with and rely on Steele's information without adequately investigating his reliability and motives. *See, e.g.*, *id.* ¶¶ 15, 91, 157, 170. And they falsely elevated Steele's credibility in the warrant applications and omitted facts that cast doubt on his claims. *See, e.g.*, *id.* ¶¶ 17, 111. At the same time, they never disclosed Page's previous work as an operational

contact for the CIA in any of the four warrant applications. *Id.* ¶¶ 17–18.

The DOJ Office of Inspector General (OIG) later investigated and revealed the FBI's "material failures" during this process. *Id.* ¶ 42. The Foreign Intelligence Surveillance Court (FISC) has indicated that Page's surveillance was "unlawful." *Id.* ¶ 50. Indeed, the government has conceded that it lacked probable cause to surveil Page under the last two warrants and also agreed to sequester information obtained from all four of the warrants. *Id.* ¶ 48. Below, the Court will describe Page's allegations about each warrant application, *see infra* Part I.A.2–5, and about each individual defendant's actions, *see infra* Part III.A.1.ii.c.

2. *First FISA Warrant*

On September 23, 2016, soon after the FBI received Steele's reports, a Yahoo! News article repeated the allegations that Page met with two sanctioned Russians, according to a "well-placed Western Intelligence source." SAC ¶ 76. Although Steele's confidential source agreement with the FBI prohibited him from talking to the media about the information he provided to the FBI, allegedly he was the source for the article. *Id.* A draft application for the first FISA warrant acknowledged that he was the source for the article, though the draft was later changed to say that Steele's business associate or client gave the information. *Id.* ¶ 80. The final version of the warrant application cited the Yahoo article as corroboration for Steele's allegations, even though he was the source for both. *Id.* ¶¶ 78, 80.

Two days after publication of the Yahoo article, Page sent a letter to Comey denying that he had contact with the sanctioned Russians and explaining his long history of interactions with the CIA and the FBI. *Id.* ¶ 81. Comey gave the letter to the Crossfire Hurricane team and its supervisor, Strzok. *Id.* Around the same time, Page told Stefan Halper, another FBI confidential source, that he was never involved with Russia on behalf of the Trump campaign. *Id.* ¶ 86. This was consistent with statements that other witnesses made during FBI interviews. *Id.* ¶¶ 85, 87. Allegedly, Page's denials were never disclosed by the FBI to DOJ attorneys. *Id.* ¶ 86. Meanwhile, even though a DOJ attorney asked Somma whether Page was ever a source for the CIA, Somma did not mention Page's years as a CIA operational contact. *Id.* ¶¶ 11, 72, 84, 205.

Page alleges that in early October, a DOJ attorney learned that Steele was performing political opposition research and thus grew concerned about his credibility. *Id.* ¶ 89. Strzok briefed Comey and defendant Andrew McCabe, then-Deputy Director of the FBI, about these concerns, but they "brushed [them] aside" and urged DOJ to move forward with the warrant application. *Id.* ¶ 91. Defendant Lisa Page, an FBI lawyer, told the DOJ attorney that Comey and McCabe had approved the decision to apply for the warrant; she also told McCabe that a "high-level push" might be necessary to get it approved. *Id.* After the DOJ attorney asked the FBI whether Steele had ties to any political campaign, a footnote was added to the application that indicated that Steele was hired to perform political opposition research. *Id.* ¶¶ 89–92.

The footnote did not, however, reveal that Steele was paid with Democratic National Committee funds, a fact allegedly known to senior DOJ and FBI officials. *Id.* ¶¶ 93, 96.

The warrant application was submitted to the FISC on October 21, 2016. *Id.* ¶ 95. Defendant Joe Pientka III, an FBI supervisory special agent on the Crossfire Hurricane team, signed the authorization for its submission. *Id.* ¶ 198. Comey signed the warrant application. *Id.* ¶ 150. Based on Steele's reports, the application claimed that Page met with at least two Russian officials during a July 2016 trip to Russia. *Id.* ¶ 95. Allegedly, Pientka did not verify or correct the application's false statement that "Steele's reporting had been corroborated and used in criminal proceedings." *Id.* ¶ 199. Nor did he confirm, as FBI policy required, that Steele's FBI handling agent had reviewed and approved the application's content. *Id.* In fact, Page alleges that the handling agent had not done so because Somma failed to seek his review. *Id.* ¶ 206. According to the complaint, the application failed to disclose (1) Steele's funding source, (2) Page's work as a CIA operational contact, or (3) a witness's exculpatory statement that no one in the Trump campaign coordinated with Russia. *Id.* ¶¶ 87, 95–96. Further, it did not contain a "cautionary warning to be vigilant against politically motivated false reports" regarding Russia. *Id.* ¶ 95.

3. *Second FISA Warrant*

On October 31, 2016, Mother Jones published a story about Steele's reports to the FBI. *Id.* ¶ 101. After Steele admitted that he was the source for the story,

his FBI handling agent told him to stop collecting information for the FBI and that it was unlikely that the agency would continue to work with him. *Id.* ¶¶ 101–103. On November 17, the FBI closed Steele as a source "for cause." *Id.* ¶ 104. FBI officials including Strzok and defendant Brian Auten, an FBI supervisory intelligence analyst on the Crossfire Hurricane team, investigated Steele's credibility during trips to London in November and December; several former colleagues reported on Steele's poor judgment and habit of pursuing politically risky people. *Id.* ¶¶ 105, 174–175, 180. Allegedly, Lisa Page, Strzok, Pientka, and other FBI personnel then learned more about Steele's anti-Trump bias from DOJ official Bruce Ohr, who told them that Steele's reports were being relayed to the Clinton campaign. *Id.* ¶ 106.

Yet the FBI continued to receive information from Steele through various intermediaries. *Id.* ¶¶ 107–108. And his reliability continued to be called into question. Page further alleges that after Pientka and Somma received information from the Deputy Assistant Secretary of State that cast doubt on some of Steele's claims, no one from the Crossfire Hurricane team followed up with her to learn more. *Id.* ¶ 109. The FBI also learned in December that one of Steele's sources was possibly a Russian spy and intelligence officer. *Id.* ¶ 110.

The second warrant application to surveil Page was submitted to the FISC on January 12, 2017, also signed by Comey. *Id.* ¶¶ 111, 152. It acknowledged that the FBI's relationship with Steele was "suspended." *Id.* ¶ 111. But according to Page, it asserted, falsely, that Steele's information was

reliable because earlier reporting had been verified and used in criminal proceedings. *Id.* The application did not mention Steele's questionable credibility due to his political motivations and the fact that one of his sources was a possible Russian intelligence officer. *Id.* ¶¶ 112–113. Nor did it include "any foreign intelligence information that had been gathered during the first three months" of Page's surveillance, as none had been produced. *Id.* ¶¶ 114–115.

4. *Third FISA Warrant*

In late January 2017, the FBI, including Auten and Somma, interviewed Igor Danchenko, one of Steele's sources, for information about Page. *Id.* ¶¶ 120, 184, 209. The complaint alleges that Danchenko's statements "contradicted or undermined" the allegations that Steele had attributed to him. *Id.* And in March, two FBI agents, including Somma, conducted an "ambush interview" of Page. *Id.* ¶¶ 122, 210. They interviewed him four more times that month, and the information he provided did not support the contention that he was a Russian agent. *Id.* ¶ 121.

The third warrant application was submitted to the FISC on April 7, 2017, again signed by Comey, who was aware of the results of the Danchenko interview. *Id.* ¶¶ 122, 153. The application stated that Danchenko was "truthful and cooperative," but allegedly did not disclose that his answers contradicted Steele's allegations. *Id.* ¶ 121. And it claimed that the requested warrant would "continue to produce foreign intelligence information," even though no such evidence had been revealed in the past

six months of surveillance. *Id.* ¶ 123. DOJ has since conceded to the FISC that it lacked probable cause when it sought the third warrant. *Id.* ¶ 119.

5. *Fourth FISA Warrant*

Before the submission of the fourth warrant application, Page publicly stated that he had previously assisted the U.S. government. *Id.* ¶ 129. Accordingly, the affiant for the fourth application asked defendant Kevin Clinesmith, then-FBI assistant general counsel, whether Page had ever been a source for the CIA. *Id.* On June 15, a CIA liaison told Clinesmith in an email that Page had been a CIA source. *Id.* ¶ 130. Thereafter, Clinesmith falsely told the affiant that Page had been a "sub source" but "never a source." *Id.* ¶ 131. When the affiant asked for proof in writing, Clinesmith altered the email from the CIA liaison to state that Page was "not a [CIA] source." *Id.*[2] Relying on this email, the affiant signed the application. *Id.* ¶ 132.

The fourth warrant application was submitted to the FISC on June 29, 2017 and signed by McCabe. *Id.* ¶¶ 133, 163. Again, it did not disclose Page's status as a CIA operational contact or the results of the Danchenko interviews. *Id.* ¶¶ 134–135. It also asserted that the warrant would "continue to produce foreign intelligence information," despite, as Page alleges, the lack of any such information produced during the previous nine months of surveillance. *Id.*

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[2] On August 19, 2020, Clinesmith pled guilty to making a false statement under 18 U.S.C. § 1001(a)(3). SAC ¶ 131; *see United States v. Clinesmith*, Minute Entry, No. 20-cr-165 (D.D.C. Aug. 19, 2020).

¶ 136. DOJ has since conceded to the FISC that it lacked probable cause when it sought the fourth warrant. *Id.* ¶ 127.

Page claims that the defendants, in seeking these four warrants, failed to comply with the FISA statute, FISC rules, and FBI policies. *Id.* ¶¶ 52–62. He also alleges that the defendants, after unlawfully obtaining the four warrants and thus his electronic communications, "used and disclosed" them to obtain the subsequent warrants, to "unlawfully pursue investigative ends," and to leak information to the media. *Id.* ¶¶ 140–142. According to Page, the United States has conceded in filings with the FISC that it has used and disclosed information obtained from the warrants in ways prohibited by that court. *Id.* ¶ 231.

6. *Media coverage and investigation*

On April 11, 2017, the Washington Post first reported about the FISA warrants obtained to surveil Page. *Id.* ¶ 221. The investigation of Page, it explained, was part of the FBI's Russia probe that had begun in July 2016. *Id.* The article revealed that a FISA warrant had been issued in 2016 and renewed at least once, based on a "lengthy declaration" with evidence that Page was a Russian agent. *Id.* It also mentioned Page's alleged meeting with one of the two sanctioned Russians, as disclosed by the Steele report. *Id.* Soon after, a New York Times article reported about the Russia probe and the Steele dossier, briefly discussing Page's alleged Russia ties. *Id.* ¶ 224. Lisa Page and Strzok exchanged texts about these articles. *Id.* ¶¶ 220, 222–223, 225. The complaint further alleges that they collaborated to leak protected

information about Carter Page to the media, *see id.*, and that McCabe approved this plan, *id.* ¶ 225.

The DOJ OIG began investigating the Page warrants in March 2018. *Id.* ¶ 232. On December 9, 2019, the OIG released the Horowitz Report, which revealed that the FISA warrants lacked probable cause and were "unlawfully obtained." *Id.* ¶ 233. In the months before the report's release, the OIG provided it to some of the defendants in this case for review and comment. *Id.* ¶ 234. During this time, Page sent numerous emails to DOJ and the OIG, asserting his right under the Privacy Act to review and amend the forthcoming report. *Id.* ¶¶ 238, 240, 242, 244. But his requests went largely unanswered; the OIG general counsel told him only that the OIG would not contact him for an interview. *Id.* ¶ 249. Page alleges that the Horowitz Report contains numerous errors that he has "a right to have amended." *Id.* ¶ 250.

B. Procedural History

On November 27, 2020, Page filed suit, bringing claims against individual, institutional, and unknown defendants. *See* Compl., Dkt. 1. He brought claims under FISA, 50 U.S.C. § 1810, and *Bivens* against defendants Comey, McCabe, Clinesmith, Strzok, Lisa Page, Pientka, Somma, and Auten. *Id.* ¶¶ 216–234, 243–250; *see also* SAC ¶¶ 256–274, 283–289. He sued the United States under the Federal Tort Claims Act (FTCA), Compl. ¶¶ 235–242; *see also* SAC ¶¶ 275–282, and DOJ and the FBI under the Privacy Act, Compl. ¶¶ 251–263; *see also* SAC ¶¶ 290–302. He filed an Amended Complaint on April 15, 2021. Am. Compl., Dkt. 51.

Meanwhile, Page was in the process of exhausting his administrative remedies under the PATRIOT Act. SAC ¶ 306; 18 U.S.C. § 2712(b)(1). He presented an administrative claim to DOJ on September 30, 2020, which was denied on April 22, 2021. SAC ¶ 306. Accordingly, Page filed his Second Amended Complaint on June 8, 2021, adding a claim against the United States for a violation of the PATRIOT Act, 18 U.S.C. § 2712. *Id.* ¶¶ 303–311.

Each individual defendant separately moves to dismiss the FISA and *Bivens* claims. *See* Mots. to Dismiss, Dkts. 80–87. The United States, the FBI, and DOJ move to dismiss the FTCA, Privacy Act, and PATRIOT Act claims. *See* Gov't Mot. to Dismiss, Dkt 88.

II. LEGAL STANDARDS

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a defendant to move to dismiss an action for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Federal law empowers federal district courts to hear only certain kinds of cases, and it is "presumed that a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 377 (1994). When deciding a Rule 12(b)(1) motion, the court must "assume the truth of all material factual allegations in the complaint and construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged, and upon such facts determine [the] jurisdictional questions." *Am. Nat. Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (citations and internal quotation marks omitted). But the court "may undertake an

independent investigation" that examines "facts developed in the record beyond the complaint" in order to "assure itself of its own subject matter jurisdiction." *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1107 (D.C. Cir. 2005) (internal quotation marks omitted). A court that lacks jurisdiction must dismiss the action. Fed. R. Civ. P. 12(b)(1), 12(h)(3).

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a defendant to move to dismiss the complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion, a complaint must contain factual matter sufficient to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A facially plausible claim is one that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This standard does not amount to a specific probability requirement, but it does require "more than a sheer possibility that a defendant has acted unlawfully." *Id.*; *see also Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level."). A complaint need not contain "detailed factual allegations," *Iqbal*, 556 U.S. at 678, but alleging facts that are "merely consistent with a defendant's liability . . . stops short of the line between possibility and plausibility," *id.* (internal quotation marks omitted).

Well-pleaded factual allegations are "entitled to [an] assumption of truth," *id.* at 679, and the court construes the complaint "in favor of the plaintiff, who must be granted the benefit of all inferences that can

be derived from the facts alleged," *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012) (internal quotation marks omitted). The assumption of truth does not apply, however, to a "legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). An "unadorned, the defendant-unlawfully-harmed-me accusation" is not credited; likewise, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Ultimately, "[d]etermining whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

III. ANALYSIS

The defendants seek to dismiss the complaint on statute of limitations grounds and for failure to state a claim. The United States also moves to dismiss the FTCA claim and one of the Privacy Act claims on the basis that the Court lacks jurisdiction over them. The Court will first address the claims against the individual defendants, followed by the claims against the institutional defendants.

A. Individual Defendants

Page brings four counts against the individual defendants for FISA violations, one for each warrant, under 50 U.S.C. § 1810. SAC ¶¶ 256–274. He also brings a claim under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), seeking damages for alleged violations of his Fourth Amendment rights. SAC ¶¶ 283–289. The Court will address each claim in turn.

1. *FISA Claims*

FISA governs the procedures for "governmental electronic surveillance of communications for foreign intelligence purposes." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013); 50 U.S.C. § 1801 *et seq.* (1978). To obtain a surveillance order, a federal officer must submit an application to a FISC judge that satisfies various statutory criteria. 50 U.S.C. § 1804(a)(1)–(9). For instance, the applicant must include, upon oath or affirmation, "a statement of the facts and circumstances relied upon by the applicant to justify his belief that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power." *Id.* § 1804(a)(3), (a)(3)(A). The judge shall approve the application if, among other requirements, "there is probable cause to believe that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power." *Id.* § 1805(a)(2), (a)(2)(A). The judge makes this determination "on the basis of the facts submitted by the applicant." *Id.* § 1805(a)(2).

A person may be criminally liable "if he intentionally . . . (1) engages in electronic surveillance under color of law except as authorized" by FISA, the Wiretap Act, and certain other federal statutes, or "(2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized" by the same statutes. *Id.* § 1809(a). An "aggrieved person" has a civil cause of action against those who violated

§ 1809(a).[3] *Id.* § 1810. Page alleges that the individual defendants violated §§ 1809(a) and 1810 both by unlawfully engaging in electronic surveillance and using or disclosing the fruits of that surveillance. SAC ¶¶ 260, 264, 268, 272.

The defendants argue that these claims are time-barred. Alternatively, each defendant claims that Page fails to sufficiently allege that he or she violated the statute. The Court finds that the claims are not time-barred but that Page does not state a claim against any of the individual defendants.

i. Statute of Limitations

A statute of limitations defense may be raised in a pre-answer Rule 12(b)(6) motion only "when the facts that give rise to the defense are clear from the face of the complaint." *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 578 (D.C. Cir. 1998). When a "cause of action created by a federal statute" has no express limitations period, courts "generally borrow the most closely analogous state limitations period." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 414 (2005) (internal quotation marks omitted). In rare cases, courts borrow analogous federal limitations periods but only where applying the state limitations period would frustrate federal policy. *Id.* at 415; *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34–35 (1995).

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[3] An "aggrieved person" is a "person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance." 50 U.S.C. § 1801(k).

FISA's civil cause of action does not contain a statute of limitations. *See* 50 U.S.C. § 1810. The Court cannot locate, and the parties do not provide, any case that has decided the appropriate statute of limitations for a FISA claim. The parties disagree over the proper statute of limitations period. The defendants argue that Page's FISA claim is most analogous to libel, slander, or invasion of privacy, so D.C.'s one-year limitations period should apply.[4] *See* D.C. Code § 12-301(4) (libel or slander); *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1061–62 (D.C. 2014) (invasion of privacy). Alternatively, they point to the two-year limitation for violations of the federal Wiretap Act, *see* 18 U.S.C. § 2520(e) (running from "the date upon which the claimant first has a reasonable opportunity to discover the violation"), and the federal Stored Communications Act, *see id.* § 2707(f) (running from "the date upon which the claimant first discovered or had a reasonable opportunity to discover the violation").[5] Page rejects these and instead relies on the three-year limitations period that D.C. law prescribes for actions "for which a limitation is not otherwise specifically prescribed."

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[4] *See* McCabe Mot. to Dismiss at 24–25 & n.9, Dkt. 80; Clinesmith Mot. to Dismiss at 15, Dkt. 81; Strzok Mot. to Dismiss at 9, Dkt. 82; Lisa Page Mot. to Dismiss at 15, Dkt. 83; Pientka Mot. to Dismiss at 7, Dkt. 84; Somma Mot. to Dismiss at 10–11, Dkt. 85; Auten Mot. to Dismiss at 11, Dkt. 86; Comey Mot. to Dismiss at 18, Dkt. 87.

[5] *See* McCabe Mot. to Dismiss at 24 n.10; Clinesmith Mot. to Dismiss at 18; Strzok Mot. to Dismiss at 9; Pientka Mot. to Dismiss at 7; Somma Mot. to Dismiss at 13; Auten Mot. to Dismiss at 11; Comey Mot. to Dismiss at 18.

Pl.'s Omnibus Opp'n at 65, Dkt. 98 (citing D.C. Code § 12-301(8)).[6]

The Court agrees with Page. As a starting point, applying an analogous federal limitations period is the "exception," and the defendants provide nothing to overcome "[t]he presumption that state law will be the source of a missing federal limitations period." *N. Star Steel Co.*, 515 U.S. at 35; *see also Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 157–70 (1987) (Scalia, J., concurring) (questioning the legitimacy of borrowing analogous federal limitations periods). Looking to D.C. law, the residual three-year limitations period, *see* D.C. Code § 12-301(8), fits best. Page's claim is for an unlawful search, which is not akin to the intentional torts listed in D.C. Code § 12-301(4). Courts in this district, when borrowing analogous state limitations periods, have applied the residual three-year period when the claim at issue does not resemble those enumerated intentional torts. *See Bame v. Clark*, 466 F. Supp. 2d 105, 109 (D.D.C. 2006) (applying the three-year limit to an unlawful search claim); *Berman v. Crook*, 293 F. Supp. 3d 48, 56 (D.D.C. 2018) (applying the three-year limit to an unlawful search claim based on alleged falsity in the warrant application); *Lederman v. United States*, 131 F. Supp. 2d 46, 61–62 (D.D.C. 2001) (applying the three-year limit to First and Fourth Amendment claims). Page's FISA claim more closely resembles these constitutional claims, as he alleges

[6] McCabe and Pientka recognize that the three-year limitations period could apply. *See* McCabe Mot. to Dismiss at 24–25; Pientka Mot. to Dismiss at 7.

"unwarranted government intrusion," *Bame*, 466 F. Supp. 2d at 109, as opposed to a common-law intentional tort committed by "private persons," *see Lederman*, 131 F. Supp. 2d at 61 (quoting *Payne v. Gov't of Dist. of Columbia*, 559 F.2d 809, 817 n.32 (D.C. Cir. 1977)). Accordingly, the Court will apply the three-year time bar, meaning Page's claim must have accrued on or after November 27, 2017 to be timely.

Federal law governs the accrual of federal claims, and it specifies that the statute of limitations begins to run when the plaintiff has a "complete and present cause of action." *Loumiet v. United States*, 828 F.3d 935, 947 (D.C. Cir. 2016) (citation omitted). Federal courts "generally apply a discovery accrual rule when a statute is silent on the issue, as [FISA] is here." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). And "discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Id.*; *see also Sprint Commc'ns Co. v. FCC*, 76 F.3d 1221, 1228 (D.C. Cir. 1996) ("Accrual does not wait until the injured party has access to or constructive knowledge of all the facts required to support its claim.").

The complaint reveals that, at the latest, Page learned about the FISA warrants when the Washington Post broke the story on April 11, 2017. SAC ¶ 221. The article disclosed quite a bit of information about Page's claim: (1) the FBI and DOJ were involved; (2) the agencies convinced a FISC judge that there was probable cause to believe that Page was an agent of Russia; (3) a partially unverified "dossier compiled by a former British intelligence officer" alleged that Page met with a Putin confidant in Russia; and (4) a warrant issued in 2016 and was

renewed at least once. *Id.*; *see also* Comey Mot. to Dismiss Ex. 5 (Wash. Post Article) at 2, Dkt. 87-7. Plus, Page is quoted in the article, saying, "This confirms all of my suspicions about unjustified, politically motivated government surveillance." Wash. Post Article at 3.[7] He "dismissed what he called 'the dodgy dossier' of false allegations" and denied that he met with the Russian. *Id.* at 4. Accordingly, by April 11, 2017, Page knew that he was subject to surveillance by the FBI and DOJ, and he suspected that the allegations, and the ensuing warrants, were baseless.

In a typical case, that might be enough for a claim to accrue. For example, in a medical malpractice case, the claim accrues when the plaintiff knows that "he has been hurt and who has inflicted the injury." *United States v. Kubrick*, 444 U.S. 111, 122 (1979). Accrual does not wait until he knows that "his injury was negligently inflicted," because a "reasonably diligent" plaintiff can "seek[] advice in the medical and legal community" and can thus learn "if he has been wronged." *Id.* at 122–23. This holds true even where "a considerable effort may be required" to determine whether a claim is actionable. *Rotella*, 528 U.S. at 556.

But in some contexts, more is required before a plaintiff is deemed to be on notice of his claim. In *Klein*

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[7] Page did not include this portion of the article in his complaint. But because the complaint "specifically references" and relies on the article, the Court may consider it in its entirety without converting the motion into one for summary judgment. *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1133 (D.C. Cir. 2015). Page does not object to the defendants' reliance on the article. *See* Pl.'s Omnibus Opp'n at 64–67.

v. City of Beverly Hills, for instance, the plaintiff brought a § 1983 suit alleging that police detectives obtained search warrants based on false statements and omissions. 865 F.3d 1276, 1278 (9th Cir. 2017). The court held that this judicial deception claim began accruing not when the unlawful search occurred, but rather when the underlying affidavit was "reasonably available." *Id.* at 1278–79. Without the affidavit, which revealed that the officers misled the judge, the plaintiff could not "discover the underlying illegality." *Id.* at 1279. In order to ensure that plaintiffs not file "unripe and factually unsupported" suits to "preserve their claims," the court ruled that "accrual need not begin at the time of the search" as long as "a diligent plaintiff has pursued the underlying affidavit without success." *Id.*; *see also Berman*, 293 F. Supp. 3d at 56 (plaintiff's claim for unlawful search based on a faulty warrant accrued the year that he learned of the search and received a redacted affidavit, "including the portions with the statements that he now alleges were false").

Similarly, the plaintiffs in *Hobson v. Wilson* alleged that they were victims of an unlawful FBI program that infringed their First Amendment rights. 737 F.2d 1, 38–39 (D.C. Cir. 1984), *overruled in part on other grounds by Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163 (1993). Because the defendants "offered no evidence of what plaintiffs could have done to find out more about their claims, short of filing suit," the D.C. Circuit found that their claims accrued only when they knew both that they were targets of FBI investigation and surveillance *and* that the program was

unconstitutional. *Id.* at 35 n.107, 38–41. As the Circuit explained, a plaintiff's suspicion or awareness of government surveillance or investigation, standing alone, "cannot conceivably constitute [actual] notice of possible" illegality, "without creating the anomalous situation of requiring persons to file suit on a hunch, only to be dismissed for failure to state a claim." *Id.* at 38–39.

Thus, in the context of government searches and surveillance, the rationale for the typical application of the discovery rule—that a diligent plaintiff, after discovering his injury, can gather enough information to state a claim within the limitations period—does not necessarily apply. This is especially true for FISA claims given the "secrecy shrouding the FISA process." *United States v. Daoud*, 755 F.3d 479, 486 (7th Cir. 2014) (Rovner, J., concurring). Indeed, when the government notifies a criminal defendant that it plans to introduce evidence obtained from FISA surveillance of him, even then he is rarely given access to the underlying FISA application. *Id.* at 484 (majority opinion); *id.* at 490 (Rovner, J., concurring).

Here, the face of the complaint does not reveal when Page's claim accrued. Even though Page knew in April 2017 that he was under FISA surveillance and suspected that it was unjustified, it is far from clear that a diligent investigation would have revealed enough evidence of illegality to avoid "fil[ing] suit on a hunch." *Hobson*, 737 F.2d at 39. The complaint does not allege that Page had access to the underlying affidavits. *See generally* SAC. Nor did the April 2017 Washington Post article describe the contents of the affidavits, and it is unlikely that Page would have been

granted full access to them. *See Daoud*, 755 F.3d at 486 (Rovner, J., concurring). Though his suspicions of unlawful surveillance did not trigger the need to sue, it did "require[] him to make inquiries in the exercise of due diligence." *Hobson*, 737 F.2d at 35; *see also Klein*, 865 F.3d at 1279 (the accrual date is delayed to a point after notice of the search as long as the plaintiff has diligently "pursued the . . . affidavit without success"). It is unclear from the complaint what investigative steps, if any, Page took or could have taken after April 2017. It is possible that he failed to search for the facts needed for his claim, or that he was adequately on notice of his claim well before the release of the Horowitz Report on December 9, 2019, which Page contends is the proper accrual date. *See* Pl.'s Omnibus Opp'n at 9, 67. But at this juncture, the complaint does not conclusively show that Page was sufficiently on notice of his claims before November 27, 2017. Accordingly, the Court will not dismiss his FISA claims as time-barred and will instead proceed to the merits.[8]

ii. Engaging in Electronic Surveillance

Page alleges that "the individual Defendants and others, known and unknown to [him], engaged in electronic surveillance against [him] that was not lawfully authorized by FISA" and "aided and abetted one another in doing so." SAC ¶ 260; *see also id.*

[8] The defendants refer to materials outside the complaint to demonstrate Page's knowledge of his claims. *See, e.g.*, Clinesmith Mot. to Dismiss at 17. Even if the Court were inclined to take judicial notice, none of these documents shows that, before November 27, 2017, Page was on sufficient notice of his claims so as to trigger accrual.

¶¶ 264, 268, 272. As an initial matter, the Court finds, and the defendants do not contest, that Page's surveillance, at least as alleged, was unlawful. Surveillance pursuant to a warrant obtained without probable cause is not "authorized" by FISA. 50 U.S.C. § 1809; *see also id.* §§ 1804(a), 1805(a). The complaint alleges material errors and omissions in each application that plausibly misled the FISC into an erroneous finding of probable cause. *See, e.g.*, SAC ¶¶ 16–19, 42–46. Indeed, the government has already conceded as much for the last two warrants. *Id.* ¶¶ 50–51.

Because Page's claims are rooted in FISA §§ 1809(a) and 1810, the Court must look there to determine if he has a cause of action against these defendants for the concededly unlawful searches. Section 1810 provides "a cause of action against any person who committed [a] violation [of § 1809]," which in turn prohibits "intentionally . . . engag[ing] in [unauthorized] electronic surveillance," § 1809(a).[9] Therefore, the relevant question is whether the complaint adequately alleges that these defendants "intentionally engage[d] in electronic surveillance" within the meaning of the statute. *Id.* Page argues that the defendants are liable as both aiders and abettors as well as principals, because they "supervis[ed]," "facilitat[ed]," "prepar[ed]," "approv[ed]," and "submit[ted]" the "false" applications, which "cause[d] others to physically engage in the unlawful surveillance." *See* Pl.'s

[9] The Court addresses Page's "use or disclosure" claims under §§ 1809(a) and 1810 below in Part III.A.1.iii.

Omnibus Opp'n at 32, 34, 49, 51. But his FISA claim fails for two reasons: § 1810 does not allow for aiding and abetting liability, and the phrase "engage in electronic surveillance" does not cover any of the defendants' alleged actions.

a. Aiding and Abetting Liability

"[W]hen Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 182 (1994). Instead, courts presume that "statutory silence on the subject of secondary liability means there is none." *Owens v. BNP Paribas S.A.*, 235 F. Supp. 3d 85, 93 (D.D.C. 2017) (quoting *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 689 (7th Cir. 2008)). Neither FISA § 1809(a) nor § 1810 reference any form of secondary liability. Thus, the statute's "plain language shows that Congress had one category of offenders in mind—i.e., those who directly" engage in unauthorized surveillance. *Council on Am.-Islamic Rels. Action Network, Inc. v. Gaubatz*, 891 F. Supp. 2d 13, 27 (D.D.C. 2012). Congress's express inclusion of an aiding and abetting provision in another section of FISA, *see* 50 U.S.C. § 1801(b)(1)(B), (E) (defining "[a]gent of a foreign power"), further indicates that it did not "intend[] § [1810] to authorize civil liability for aiding and abetting through its silence," *Owens*, 235 F. Supp. 3d at 93 (citation omitted).

Page offers little in response. Because the criminal aiding and abetting statute, 18 U.S.C. § 2, applies to criminal violations of 50 U.S.C. § 1809(a), he assumes that aiding-and-abetting liability also applies to the civil cause of action in § 1810. Pl.'s Omnibus Opp'n at 16. But Congress has not enacted an analogous *civil* aiding and abetting provision and instead takes a "statute-by-statute approach." *Cent. Bank of Denver*, 511 U.S. at 182–83. And § 1810 makes no mention of aiding and abetting liability. Moreover, courts, including this one, have held that plaintiffs cannot bring a civil action using a secondary liability theory under the Stored Communications Act, which similarly incorporates that Act's criminal provision. *See Gaubatz*, 891 F. Supp. 2d at 27; *Broidy Cap. Mgmt. v. Muzin*, No. 19-cv-150, 2020 WL 1536350, at *11 (D.D.C. Mar. 31, 2020) (collecting cases). Thus, to state a claim under § 1810, Page must allege that the individual defendants *personally* engaged in unauthorized surveillance, not simply that they *aided* those who did. *See Cent. Bank of Denver*, 511 U.S. at 177–78.

b. "Engaging in Electronic Surveillance" Defined

To determine the meaning of the phrase "engage[] in electronic surveillance," the Court starts, as it must, with the text. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). To "engage" means "to take part" or "participate." *Engage*, Merriam-Webster's New Collegiate Dictionary 378 (1977). And the common meaning of "electronic surveillance" is akin to "[e]avesdropping," *Electronic Surveillance*, Black's Law Dictionary (5th ed. 1979), which in turn is defined

as "listen[ing] surreptitiously to" or "observ[ing]" an individual in "a private place," or "[i]nstalling or using . . . any device" to do so," *Eavesdropping*, Black's Law Dictionary (5th ed. 1979). *See also Wiretapping*, Black's Law Dictionary (5th ed. 1979) ("A form of electronic eavesdropping where, upon court order, enforcement officials surreptitiously listen to phone calls"); *Surveillance*, Oxford English Dictionary (2d ed. 1989) ("Watch or guard kept over a person[.]"). More importantly, FISA itself defines "electronic surveillance." That definition includes, as relevant here:

> [T]he acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

50 U.S.C. § 1801(f)(1).[10]

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[10] While this first definition is relevant to Page as a "target[ed]" and "known United States person who is in the United States," *id.*, FISA also includes three other definitions for "electronic surveillance," *see id.* § 1801(f). Each of the other three definitions is similarly limited to the "acquisition by an electronic, mechanical, or other surveillance device," *id.* §§ 1801(f)(2), (3), or "installation or use of an electronic, mechanical, or other surveillance device," *id.* § 1801(f)(4).

The statute's criminal and civil liability provisions cover those who participate in the acquisition, by a particular device, of the contents of certain communications sent or received by a targeted person. The breadth of the phrase "engage in electronic surveillance" depends on the term "acquisition." If it were understood expansively to encompass the entire FISA surveillance process, the statute could presumably provide liability for many different actors: those who took part in the decision to surveil (with or without a warrant), the preparation and submission of the warrant application (if any), and the collection of the communications, among other things. But text, structure, and context point toward a much narrower reading. *See Robinson*, 519 U.S. at 341. Turning first to the text, the ordinary meaning of "acquisition" is "the *act* of acquiring," *Acquisition*, Merriam-Webster's New Collegiate Dictionary 11 (1977) (emphasis added), not the process behind it. That "acquisition" is followed in the statute by the term "by an electronic, mechanical, or other surveillance device" further indicates that its statutory meaning is tethered to the actual collection of the communications by specified means, as opposed to the pre-collection investigation or authorization stage. One who engages in acquisition is one who takes part in the act of obtaining communications by using a device. *See also* 50 U.S.C. § 1810(f)(4) ("[E]lectronic surveillance" also means "the *installation* or *use* of an electronic, mechanical, or other surveillance *device* in the United States for monitoring *to acquire information*." (emphasis added)).

This narrower reading of FISA's definition of "electronic surveillance" comports with common usage of that term. "Surveillance" has long been understood to refer to the specific act of collecting information by listening to or watching someone. *See, e.g.*, *Katz v. United States*, 389 U.S. 347, 354 (1967) ("The agents confined their surveillance to the brief periods during which [the petitioner] used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself." (footnote omitted)); *Lopez v. United States*, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting) (comparing "electronic surveillance, whether the agents conceal the devices on their persons or in walls or under beds, and conventional police stratagems such as eavesdropping and disguise"). That activity is distinct from the process of getting a warrant. *See, e.g.*, *United States v. U.S. Dist. Court* (*Keith*), 407 U.S. 297, 315 (1972) (addressing whether the Fourth Amendment "requir[es] a warrant before [electronic] surveillance is undertaken"); *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 179 (1977) (Stevens, J., dissenting) (referring to "the Government's application for permission to engage in surveillance by means of a pen register"). To interpret the phrase "engage in electronic surveillance" to include the process of getting the warrant would trample on this common understanding. The application for an order approving electronic surveillance and the actual surveillance are not one and the same.

Other provisions of FISA confirm this interpretation. FISA defines "[a]gent of a foreign power" to include, among others, "any person other

than a United States person who . . . *engages in* the international proliferation of weapons of mass destruction, or *activities in preparation* therefor . . . or knowingly *aids or abets* [or *conspires* with] any person in the conduct of such proliferation or activities in preparation therefor[.]" 50 U.S.C. § 1801(b), (b)(1)(E) (emphasis added). This language implies that "engaging in" an activity does not include preparing for it or aiding the primary actors.[11] And unlike that section, FISA's liability provisions omit any reference to preparation, aiding, abetting, or conspiring. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quotation omitted)).

Further, the FISA application must state "the period of time for which the electronic surveillance is required to be maintained," 50 U.S.C. § 1804(a)(9), implying that the surveillance has not yet begun. In

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[11] The defendants point to the Supreme Court's decisions in *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022), and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), to support their argument that the phrase "engage in" means "to do." *See* Rough Hr'g Tr. at 5–6, 10–12. In both cases, the Court indicated that "engaged in" has a narrower meaning than other formulations, such as "affecting" or "involving." *Saxon*, 142 S. Ct. at 1789 (citing *Circuit City*, 532 U.S. at 118). These decisions offer limited support, however, because both addressed the meaning of "engaged in foreign or interstate commerce" under 9 U.S.C. § 1, which has a particular statutory history that is not relevant here. *See Saxon*, 142 S. Ct. at 1789–90; *Circuit City*, 532 U.S. at 111–21.

fact, Page's complaint recognizes this distinction: it alleges that the defendants "unlawfully obtained the four warrants" and then "used the warrants to engage in surveillance of him." SAC ¶ 140. And § 1809(b), the statutory defense for a § 1809(a) violation, refers to "electronic surveillance [that] was authorized by and conducted pursuant to a search warrant or court order of a court of competent jurisdiction." If engaging in electronic surveillance included the process of getting the court order, this sentence would make very little sense.

FISA's provisions detailing "minimization procedures," 50 U.S.C. §§ 1801(h), 1804(a)(4), 1805(c)(2)(A), likewise confirm that "acquisition" is a specific, narrow stage in the FISA process. Minimization procedures, which balance privacy concerns with "the need of the United States to obtain, produce, and disseminate foreign intelligence information," specifically differentiate between the "acquisition," "retention," and "dissemination" of information. *See id.* § 1801(h)(1). In the minimization context, "acquisition" refers to the actual gathering of information, for instance, by "tapp[ing]" a switchboard line. *In re Sealed Case*, 310 F.3d 717, 731 (FISA Ct. Rev. 2002) ("By minimizing *acquisition*, Congress envisioned that, for example, 'where a switchboard line is tapped but only one person in the organization is the target, the interception should probably be discontinued where the target is not a party' to the communication." (quoting H. Rep. No. 95–1283, at 55–

56)).[12] Acquisition thus refers to the information collection phase of FISA.

A helpful parallel can be found in the "physical search" provision of FISA. Like an electronic surveillance, a physical search can occur only after the FISC approves an application that establishes probable cause that the target is a foreign power or agent of a foreign power. 50 U.S.C. §§ 1823(a)(3)(A), 1824(a)(2)(A).[13] But a person is liable for an unlawful physical search only if he "intentionally . . . under color of law for the purpose of obtaining foreign intelligence information, *executes* a physical search within the United States except as authorized by statute." *Id.* § 1827(a) (emphasis added). Section 1828 allows "any

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[12] The government properly minimizes information during the acquisition phase if, for instance, "before executing the FISC order the FBI verified the facilities subject to the approved" surveillance and "subsequently, the collections were conducted during the approved times using the least physical intrusion necessary." *United States v. Turner*, 840 F.3d 336, 342 (7th Cir. 2016). On the other hand, minimization at the retention stage includes "destroy[ing]" information that has already been collected, if it "is not necessary for obtaining[,] producing, or disseminating foreign intelligence information." *In re Sealed Case*, 310 F.3d at 717 (quoting H. Rep. at 56) (second alteration in original). And at the dissemination stage, minimization requires "restrict[ing]" collected information "to those officials with a need for such information." *Id.*

[13] A "physical search" means "any physical intrusion within the United States into premises or property (including examination of the interior of property by technical means) that is intended to result in a seizure, reproduction, inspection, or alteration of information, material, or property, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes[.]" 50 U.S.C. § 1821(5).

aggrieved person . . . whose premises, property, information, or material has been subjected to a physical search" to sue "any person who committed such violation." *Id.* § 1828. Congress thus created a remedy only against those who execute, or "carry out," the unlawful search, as opposed to those who procure the order that allows the search to happen. *Execute*, Oxford English Dictionary (2d ed. 1989).

The Wiretap Act also serves as a useful comparison.[14] A person violates the Act if he "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication" unless it is authorized by statute. 18 U.S.C. § 2511(1)(a). The definition of "intercept" is nearly identical to one for "electronic surveillance": "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." *Id.* § 2510(4). By prohibiting both intercepting (i.e., acquiring) and procuring another to intercept, the Act implies that "acquisition" itself does not include a procurement component. And unlike the Wiretap Act, FISA does not include the procurement phrase, supporting the conclusion that FISA covers only

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[14] The Wiretap Act, enacted in 1968, "provided procedures for obtaining electronic surveillance warrants in certain criminal investigations." *United States v. Belfield*, 692 F.2d 141, 144 (D.C. Cir. 1982). FISA was passed ten years later to address electronic surveillance in the national security space. *Id.* at 145. The Wiretap Act and FISA prescribe "the exclusive means by which electronic surveillance, as defined in [FISA], and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f).

acquisition, not the procurement of others to acquire the target's communications.

Accordingly, one who "engage[s] in electronic surveillance" under §§ 1809(a) and 1810 is one who participates in *collecting* the target's communications using certain devices.[15] To be sure, surveillance pursuant to a warrant cannot occur absent an application and order of approval from the FISC. *See* Pl.'s Omnibus Opp'n at 49. But Congress chose to create individual liability only for the actors involved in conducting the surveillance, rather than those responsible for gaining approval to do so. Those who work on the FISA applications may "aid[], abet[], counsel[], command[], induce[], or procure[]" the

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[15] The Court has found, and the parties have provided, very little caselaw on §§ 1809 and 1810. Although the few relevant cases do not analyze the meaning of phrase "engage in electronic surveillance," as the Court has done here, they are generally consistent with the Court's ruling. *See United States v. Koyomejian*, 946 F.2d 1450, 1459 n.16 (9th Cir. 1991) ("[Section] 1809(a) is best understood as subjecting to criminal liability anyone who *performs* electronic surveillance as defined by FISA" without authorization (emphasis added)). In *Fazaga v. FBI*, 965 F.3d 1015 (9th Cir. 2020), *rev'd on other grounds*, 142 S. Ct. 1051 (2022), the court found that allegations that agents "had audio surveillance" in their house, "were responsible for planting [the] devices," and had once entered the mosque where they had electronic surveillance devices, plausibly stated a claim under § 1810 for "install[ing] or us[ing] . . . [a] device . . . for monitoring to acquire information." *Id.* at 1038; 50 U.S.C. § 1801(f)(4). That court went further by implying that supervising agents might have been liable had the complaint alleged that they "ordered or arranged for[] the planting of the recording devices," *id.* at 1039, but the court did not decide that issue. And it did not perform a textual analysis of the meaning of "engage in electronic surveillance," as the Court does here.

eventual surveillance, *see* 18 U.S.C. § 2, but as explained above, Congress did not provide for aiding and abetting liability in § 1810, and the statutory terms are not broad enough to encompass those actions.

This plain-text understanding—that Congress allowed suit against only those who conduct unauthorized surveillance, and not those who at the application stage mislead the FISC to approve that surveillance—may seem odd. But it is not so "absurd when considered in the particular statutory context," as the Court must. *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998). FISA was enacted in 1978 to address the issue of warrantless surveillance in the national security context. In *Katz*, the Supreme Court held that the Fourth Amendment applied to electronic surveillance, 389 U.S. at 353, but left open whether the warrant requirement applied "when the President was acting pursuant to his powers to protect the national security or to conduct the nation's foreign affairs," *Belfield*, 692 F.2d at 145 (citing *Katz*, 389 U.S. at 358 n.23). Later, in *Keith*, the Court explained that there was no national security exception to the warrant requirement with regard to "domestic threats to national security," and left open whether warrants were required "with respect to activities of foreign powers or their agents." 407 U.S. at 321–22. Congress, in response to *Keith* and "to post-Watergate concerns about the Executive's use of warrantless electronic surveillance," enacted FISA to "establish a regularized procedure" for such surveillance "in the foreign intelligence and counterintelligence field." *Belfield*, 692 F.2d at 145. FISA generally, with a few

exceptions, "requires a court order authorizing foreign intelligence electronic surveillance," and details numerous steps that must be followed to get an order. *Id.* at 145–46.

In sum, FISA was passed to counter the abuses of *warrantless* surveillance. This historical context helps explain why § 1809(a) applies to agents who conduct unauthorized surveillance— typically, that means without a court order—rather than those who help obtain faulty warrants. This gap in coverage seems evident now, but it likely was not in 1978. Accordingly, the Court's understanding of § 1809(a)'s ordinary meaning is bolstered by FISA's history.

Further, those aggrieved by surveillance conducted pursuant to a warrant lacking in probable cause are not entirely without a remedy. As discussed, they can sue the agents who conduct the search, if the agents act intentionally. And if the government seeks to use FISA-obtained evidence against them in a criminal trial, they may move to suppress such evidence on the grounds that it was unlawfully acquired. *See* 50 U.S.C. § 1806(e).

c. Allegations Against Individual Defendants

Having defined FISA's scope, the Court now turns to Page's allegations against the individual defendants.[16] Though his allegations are troubling,

[16] Many of the defendants ask the Court to consider the Horowitz Report in full, claiming that its conclusions conflict with some of Page's allegations. *See, e.g.*, Strzok Mot. to Dismiss at 4 n.3, 13; Pientka Mot. to Dismiss at 2 n.3, 14–15; Somma Mot. to Dismiss at 3 n.2, 16–17. At the hearing, the plaintiff did not oppose this

Page does not allege that any of the individual defendants personally conducted the surveillance or acquired or collected his communications. For this reason, his FISA claims must be dismissed.

Comey, McCabe, Strzok, and Lisa Page. Some of the defendants, such as Comey, McCabe, Strzok, and Lisa Page, allegedly approved, encouraged, and facilitated Page's investigation and the warrant applications.

James Comey, the FBI director during the first three FISA warrant applications, SAC ¶ 26, read the first application and signed all three, *id.* ¶¶ 150, 152, 153. His "certification" confirmed to the FISC that the information sought was foreign intelligence information that could not reasonably be obtained by normal investigative techniques, and that a "significant purpose of the surveillance [was] to obtain foreign intelligence information." 50 U.S.C.

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request. Rough Hr'g Tr. at 71. The Court, however, declines to consider the entire Report. True, the Report is extensively referenced in the complaint. But the Court cannot wholly incorporate it by reference because it is not "integral to [Page's] claim." *Banneker*, 798 F.3d at 1133 (citation omitted). That is, it is not akin to a contract "that is a necessary element of [a breach of contract] claim." *Id.* Rather, Page references it "to show how [he] learned some facts in the complaint." *Id.* at 1134. He does "not purport to and [is] not required to adopt the factual contents of the report wholesale." *Id.* Indeed, he alleges that some of its contents are inaccurate. SAC ¶ 250. The Court can certainly consider the Report to "show any inaccuracy in [Page's] allegations about its contents." *Id.* at 1134 n.6. But it cannot, as some of the individual defendants argue, "tak[e] . . . as true" all of the Report's contents, including its conclusions about the individual defendants' intent and motivations, to contradict Page's allegations. *Id.*

§ 1804(a)(6). According to Page, Comey gave a "green light" to apply for the first FISA warrant "without further scrutiny" of Steele, despite some concerns about his bias. SAC ¶¶ 91, 159. He also was aware of certain key information that was not fully disclosed in the various applications, including, among others, Hillary Clinton's plan to connect Trump and Russian election interference, Steele's funding source, and Page's previous status as a CIA operational contact. *Id.* ¶¶ 73, 81, 144, 146, 148, 153. Andrew McCabe, the Deputy Director of the FBI during the Page surveillance, signed the foreign-intelligence certification for fourth FISA application. *Id.* ¶ 27. His alleged actions are similar to Comey's—he too gave the "green light" to proceed with the FISA application despite the concerns about Steele's bias, *id.* ¶ 91, and "ignored warnings that more information about [his] motives was needed before relying on his allegations," *id.* ¶ 157. He was told that Steele's work was political opposition research for a political party. *Id.* ¶ 94. DOJ supposedly would not approve the FISA application "without a call from McCabe." *Id.* ¶ 158.

Peter Strzok was the Deputy Assistant Director of Counterintelligence at the FBI and supervised the Page investigation until January 2017. *Id.* ¶ 29. Like Comey, he knew about Clinton's plan to connect Trump and Russia, *id.* ¶ 73, and that Page denied meeting with Russian officials and had previously worked with the CIA and FBI, *id.* ¶¶ 81, 166. He too "pushed to proceed with the application without further scrutiny of Steele" and "[fought] with [the DOJ attorney] for" it. *Id.* ¶¶ 168, 170. As the investigation continued, he learned more about Steele's

questionable credibility. *Id.* ¶¶ 105–106, 171–172. Lisa Page, an FBI lawyer and Special Counsel to McCabe during the Page investigation, also learned about Steele's bias, including that his work was political opposition research. SAC ¶ 94, 106, 195. The complaint alleges that she "facilitated obtaining the initial FISA warrant for Dr. Page in the face of doubts voiced by the DOJ and others," *id.* ¶ 195, and exchanged text messages with Strzok indicating a political motivation, *id.* ¶ 197.

Absent from the complaint is any claim that these four defendants participated in drafting or substantively reviewing the faulty applications themselves, let alone that they performed the FISA surveillance and acquired Page's communications.

Pientka, Auten, Somma, and Clinesmith. Even for the four defendants who did contribute to the material errors in the applications, Page does not claim that they "engage[d] in electronic surveillance," as defined above.

Joe Pientka, a Supervisory Special Agent in the FBI's Washington Field Office, signed an authorization to submit the first application that confirmed compliance with the FBI's "Woods Procedures," which are "designed to ensure the accuracy of the factual assertions in a [FISA] application." SAC ¶¶ 31, 60, 198. He was responsible for reviewing the "Woods File" to confirm that there was appropriate documentation for each factual assertion in the application. *Id.* ¶ 198. But the file was "inaccurate, incomplete, and unsupported by appropriate documentation," *id.*, and Pientka

allegedly "failed to verify and correct the false statement" that "Steele's reporting had been corroborated and used in criminal proceedings," *id.* ¶ 199.

Auten and Somma were allegedly responsible for that false statement, along with numerous other material omissions. *Id.* ¶¶ 179, 206. Brian Auten was an FBI Supervisory Intelligence Analyst who worked on the Crossfire Hurricane investigation from its start in July 2016 through 2017. *Id.* ¶¶ 33, 175. He helped the agents prepare the applications by reviewing the probable cause sections for accuracy, filling in gaps, and providing information about Steele and his sub-sources. *Id.* ¶¶ 175–176. He "falsely enhanced [Steele's] credibility" by writing the misstatement discussed above and failing to disclose that Steele's colleagues gave negative feedback about his judgment and that some of his reporting was inaccurate. *Id.* ¶¶ 179–181. In January 2017, he interviewed Danchenko, one of Steele's key sub-sources, and found that he "contradicted key claims in Steele's reports"; this was not reported to the FISC. *Id.* ¶¶ 184, 209.

Stephen Somma was an FBI counterintelligence investigator and "Case Agent 1" on the Page investigation. *Id.* ¶ 201. He allegedly failed to disclose exculpatory statements from Page and other witnesses that he did not, contrary to Steele's reports, meet with sanctioned Russians. *Id.* ¶ 203. And he misled and withheld information from DOJ attorneys regarding Page's status as a CIA operational contact and Steele's political bias and funding source. *Id.* ¶¶ 205, 207. Like Auten, he "mischaracterized the extent to which the FBI had previously relied on . . . Steele's prior

reporting" and did not disclose that Danchenko contradicted assertions made in the initial FISA application. *Id.* ¶¶ 206, 209. According to the OIG, Somma was "primarily responsible for some of the most significant errors and omissions in the FISA applications." *Id.* ¶ 32.

Finally, Kevin Clinesmith was an FBI Assistant General Counsel during the Page investigation who provided support to the Crossfire Hurricane team. SAC ¶¶ 28, 122, 185. The affiant for the fourth warrant application asked him whether Page had ever been a "source (operational contact) for the CIA." *Id.* ¶ 129. Clinesmith knew that if Page had been a source, that fact needed to be disclosed to the FISC, but including it "would expose the material omission of this information" from the first three warrants. *Id.* ¶ 130. A CIA liaison told him that Page had been a source, *id.*, but Clinesmith told the affiant that Page was a "sub source" and "never a source," ultimately altering the liaison's email to that effect, *id.* ¶ 131. The affiant relied on the doctored email to sign the fourth application, which did not include "information about [Page's] history or status as a CIA operational contact." *Id.* ¶ 191–194.

If proven, these allegations clearly demonstrate wrongdoing. *See Franks v. Delaware*, 438 U.S. 154, 164–65 (1978) ("When the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing." (quotation marks omitted and alteration adopted)); *Daoud*, 755 F.3d at 489 (Rovner, J., concurring) ("[I]t has been widely assumed, if not affirmatively stated, in the decisions

of other courts that *Franks* applies to FISA applications."). Indeed, Clinesmith entered a plea in *United States v. Clinesmith* for making a false statement, in violation of 18 U.S.C. § 1001.[17] But Page does not allege that *any* of the individual defendants, including the unknown John Doe defendants and those most responsible for the applications' critical errors, took part in obtaining the surveillance information, either by setting up the devices or gathering or listening to Page's communications.[18] Thus, the Court cannot plausibly infer from this complaint that any of the individual defendants, known or unknown, "engaged in electronic surveillance," in violation of §§ 1809(a) and 1810.

iii. Using or Disclosing Information from Electronic Surveillance

Sections 1809(a) and 1810 also create a remedy against those who intentionally "disclose[] or use[] information obtained under color of law by electronic surveillance, knowing or having reason to know" that the surveillance was unauthorized. Page's additional allegations that the individual defendants used and disclosed the fruits of the allegedly unlawful surveillance in numerous ways, SAC ¶¶ 229–230, are conclusory and thus do not state an actionable use or disclosure claim.

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[17] *See supra* note 2.

[18] In his opposition brief and at the hearing, Page concedes that he "has not named as a defendant any FBI who personally engaged in the physical execution of the unlawful warrants as these persons are as yet unknown and unknowable to him." Pl.'s Omnibus Opp'n at 32 n.5; Rough Hr'g Tr. at 24–25.

According to Page, the defendants used and disclosed FISA-acquired information to obtain the renewal warrants and other investigative measures against him or others; to investigate and prosecute others; to request assistance from other law enforcement and intelligence agencies; to include in government databases; and to justify his ongoing surveillance to other officials. *Id.* ¶ 230. But he does not allege that any particular defendant took any of these actions. *Id.*; *see also id.* ¶ 229. And "a plaintiff cannot satisfy the minimum pleading requirements under Rule 8 of the Federal Rules of Civil Procedure by lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct." *Toumazou v. Turkish Republic of Northern Cyprus*, 71 F. Supp. 3d 7, 21 (D.D.C. 2014) (citation and internal quotation marks omitted). Indeed, Page cannot show that a defendant *intentionally* used or disclosed information obtained through unlawful surveillance, as required by 50 U.S.C. §§ 1809(a) and 1810, without providing any details about his or her individual actions. To the extent Page claims that the defendants aided and abetted each other's use or disclosure violations, *cf.* Pl.'s Omnibus Opp'n at 16–18, that claim also fails for the reasons explained above in Part III.A.1.ii.a.

Page's allegations are also vague in other respects: they do not explain what information was leaked, to whom it was leaked, or when or how it was leaked. And his allegations that the surveillance produced "no evidence at all" that he acted as a Russian agent undercuts his claim that its results were used to procure the renewal warrants. SAC ¶¶ 123, 136.

Accordingly, the Court cannot "draw the reasonable inference that [any of] the defendant[s] [are] liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Although Page's media leak allegations are stated with particularity, they too fail to state a claim for another reason. He asserts that Comey, McCabe, Strzok, Lisa Page, and others disclosed "the existence of the FISA Warrants, the contents of the warrant applications, and the results of the Warrants" to the New York Times, the Washington Post, and others. SAC ¶ 226. But only the use or disclosure of information "obtained" by the electronic surveillance, not the fact of the surveillance or the basis for the warrants, violates § 1809(a). Neither the Times nor the Post article cited in the complaint contains any mention of the fruits of Page's surveillance. *See id.* ¶¶ 221, 224; Wash. Post Article; Comey Mot. to Dismiss, Ex. 6 (N.Y. Times Article), Dkt. 87-8. And the complaint does not cite any other media reports that contained FISA-obtained information, nor do the Strzok/Lisa Page text messages mention a plan to leak such information. SAC ¶¶ 220, 222–223. Page's bare allegation that the defendants disclosed the results of his surveillance to the media, without any further detail, does not raise his "right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

The Court will thus dismiss the FISA claims in Counts One through Four against each individual defendant. Because the Court concludes that Page fails to state a claim that the defendants engaged in electronic surveillance, or used or disclosed its results, it need not address the defendants' arguments that

they are protected by a statutory defense and/or qualified immunity.[19]

2. *Bivens Claims*

The defendants move to dismiss the *Bivens* claim for failure to state a claim, both on the merits and on statute of limitations grounds. For the reasons explained above in Part III.A.1.i, the Court disagrees that the claim is time-barred. Page's *Bivens* claim is governed by the three-year limitations period in D.C. Code § 12-301(8), *see Berman*, 293 F. Supp. 3d at 56, and the complaint does not show that the claim accrued before November 27, 2017. The Court will nevertheless dismiss the claim because an extension of the *Bivens* remedy to this "new context" is unwarranted. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1859 (2017).

The Supreme Court has set forth a two-step inquiry that governs whether an extension of *Bivens* is appropriate. First, a court must "inquire whether the request involves a claim that arises in a new context or involves a new category of defendants." *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020) (citation and internal quotation marks omitted). The Supreme Court's understanding of what constitutes "a new context" is "broad." *Id.* (internal quotation marks omitted). The test is whether "the case is different in a

[19] As noted, § 1809 includes a statutory defense to prosecution if "the defendant was a law enforcement or investigative officer engaged in the course of his official duties and the electronic surveillance was authorized by and conducted pursuant to a search warrant or court order of a court of competent jurisdiction." 50 U.S.C. § 1809(b).

meaningful way from previous *Bivens* cases" decided by the Supreme Court. *Abbasi*, 137 S. Ct. at 1859. Second, if the claim arises in a new context, the *Bivens* claim must be rejected if there are "special factors indicating that the Judiciary is at least arguably less equipped than Congress to weigh the costs and benefits of allowing a damages action to proceed." *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022) (citation and internal quotation marks omitted). A court cannot recognize a *Bivens* remedy "[i]f there is even a single reason to pause" before applying it in a new context. *Id.* (citation and internal quotation marks omitted). Page's claims arise in a new context, and there are several reasons to pause.

Page's *Bivens* claim presents a new context because it is based on unlawfully obtained FISA warrants. SAC ¶ 287. Although Page, like the plaintiff in *Bivens*, alleges a Fourth Amendment violation as the basis for his constitutional claim, *see* 403 U.S. at 389, "[a] claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized," *Hernandez*, 140 S. Ct. at 743. In *Bivens*, the Supreme Court created an implied damages remedy under the Fourth Amendment for an allegedly unconstitutional search and arrest carried out in an apartment. 403 U.S. at 389. But as the Fourth Circuit has recognized, "a claim based on unlawful electronic surveillance presents wildly different facts and a vastly different statutory framework from a warrantless search and arrest." *Attkisson v. Holder*, 925 F.3d 606, 621 (4th Cir. 2019). And here, some of the defendants, such as Comey and McCabe, are high-

ranking officials, unlike the "line-level" agents sued in *Bivens*. *Id.* In this case, both the nature of Page's Fourth Amendment claim and the "rank of the officers involved," *Abbasi*, 137 S. Ct. at 1860, signal a new context.

Special factors also counsel against creating a *Bivens* remedy in this new context. Page's surveillance occurred as part of a high-level investigation into alleged foreign interference in a presidential election. SAC ¶¶ 5–6, 221, 224. "[A] *Bivens* cause of action may not lie where, as here, national security is at issue." *Egbert*, 142 S. Ct. at 1805. Plus, a court cannot extend *Bivens* if Congress has already provided "an alternative remedial structure." *Id.* at 1804 (quoting *Abbasi*, 137 S. Ct. at 1858). Congress has comprehensively legislated in the electronic surveillance space "without authorizing damages for a Fourth Amendment violation." *Attkisson*, 925 F.3d at 621. It has instead created several private causes of actions under a number of statutes governing surveillance, including FISA, 50 U.S.C. § 1810, the Wiretap Act, 18 U.S.C. § 2520(a), the Stored Communications Act, *id.* § 2707(a), (g), and the PATRIOT Act, *id.* § 2712. These alternatives "alone" are "reason enough to limit the power of the Judiciary to infer a new *Bivens* cause of action." *Egbert*, 142 S. Ct. at 1804 (citation and internal quotation marks omitted).

Accordingly, the Court will dismiss the *Bivens* claim in Count Six against each individual defendant.

B. Institutional Defendants

Page brings claims against the United States under the FTCA and the PATRIOT Act. SAC ¶¶ 275–282, 303–311. He also asserts a Privacy Act claim against DOJ for failure to amend his records, *id.* ¶¶ 290–295, and a Privacy Act claim against DOJ and the FBI for unlawful disclosures, *id.* ¶¶ 296–302. The Court will address each claim in turn.

1. *FTCA Claim*

The FTCA "waive[s] the sovereign immunity of the United States for certain torts committed by federal employees." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (citing 28 U.S.C. § 1346(b)). Federal courts have jurisdiction over these claims if they are "actionable" under § 1346(b). *Id.* at 477. The claim must be

> [1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. (alteration in original) (quoting § 1346(b)). Under the FTCA, "all elements of a meritorious claim are also jurisdictional." *Brownback v. King*, 141 S. Ct. 740, 749 (2021). Accordingly, for a court to have subject-matter jurisdiction, and "to state a claim upon which relief can

be granted," the "plaintiff must plausibly allege all six FTCA elements." *Id.*

Page has not plausibly pleaded the sixth element: that the United States, if a private person, would be liable under D.C. law. He alleges that the individual defendants committed an "abuse of process" by acting with an "ulterior motive to use the FISA warrant process to accomplish an end not permitted by law: to obtain the surveillance of . . . Page and the Trump presidential campaign without probable cause." SAC ¶ 280 (emphasis omitted); *see* 28 U.S.C. § 2680(h). Under D.C. law, however, abuse of process occurs when "process has been used to accomplish some end which is without the regular purview of the process, or which compels the party against whom it is used to do some collateral thing which he could not legally and regularly be required to do." *Jacobson v. Thrifty Paper Boxes, Inc.*, 230 A.2d 710, 711 (D.C. 1967). That an official has acted "spitefully, maliciously, or with an ulterior motive in instituting" process is not enough. *Scott v. District of Columbia*, 101 F.3d 748, 755 (D.C. Cir. 1996). Instead, the process must be *used* "for an immediate purpose other than that for which it was designed and intended." *Id.* (quoting Restatement (Second) of Torts § 682 cmt. b). For example, "[t]he usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it." *Id.* at 755–56 (quoting Restatement (Second) of Torts § 682 cmt. b).

Here, Page points only to the defendants' "unlawful end" or "ulterior motive" "to obtain the surveillance of Dr. Page and the Trump presidential

campaign without probable cause." SAC ¶¶ 16, 280 (emphasis omitted); *see also* Pl.'s Opp'n at 21, Dkt. 99 ("[The SAC] alleges that the Government's agents perverted the FISA warrant process by making material misstatements and omissions to obtain four successive warrants without probable cause for the ulterior motive of surveilling . . . Page and the Trump presidential campaign."). As D.C. courts have held, that alone is insufficient to state a claim for abuse of process. *See Bown v. Hamilton*, 601 A.2d 1074, 1080 (D.C. 1992); *Scott*, 101 F.3d at 755. True, Page alleges that the defendants made false statements in the FISA application process so that the warrants would be granted in the absence of probable cause. SAC ¶ 16. But neither allegation suffices to state an abuse of process claim. *See Dormu v. District of Columbia*, 795 F. Supp. 2d 7, 33 (D.D.C. 2011) (granting summary judgment for defendants on an abuse of process claim even though the officers lacked probable cause to arrest the plaintiff); *Rauh v. Coyne*, 744 F. Supp. 1186, 1194 (D.D.C. 1990) (explaining that abuse of process "does not arise from a misrepresentation to the Court"); *Moradi v. Protas, Kay, Spivok & Protas, Chartered*, 494 A.2d 1329, 1330, 1333 n.7 (D.C. 1985) (noting that the plaintiff did not state a claim for abuse of process where (1) the defendant's agent had "negligently or falsely swor[n] that he had served summonses" on him in three cases, (2) the defendant had then obtained a default judgment and writ of attachment in each case, and (3) the defendant, knowing the plaintiff was not served, had obtained a judgment of condemnation (internal quotation marks omitted)).

Page's reliance on out-of-jurisdiction cases, *see* Pl.'s Opp'n at 21–22, cannot overcome clear authority from D.C. courts, as the proper inquiry is only whether a private person would be liable under D.C. law. 28 U.S.C. § 1346(b). Page cites one D.C. case, *Hall v. Field Enterprises, Inc.*, 94 A.2d 479 (D.C. 1953),[20] but it also does not help. In that case, the defendants had "fraudulently" and "without legal justification" filed suit against the plaintiff, achieved a fraudulent judgment, "without proper justification caused to be issued a writ of attachment predicated" on that judgment, and unlawfully seized his wages. *Id.* at 480–81. Initially, the court held that these allegations stated an abuse of process claim. *Id* at 481. But later, on a second appeal, the court held that the plaintiff's abuse of process claim failed because the process "was used for its legally intended purpose: to obtain a judgment against the plaintiff and to obtain satisfaction of that judgment" by garnishing his wages. *Hall v. Field Enters., Inc.*, 114 A.2d 840, 841 (D.C. 1955). Here, too, the warrants were used for

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[20] Page also cites *Whelan v. Abell*, 953 F.2d 663 (D.C. Cir. 1992), and *Neumann v. Vidal*, 710 F.2d 856 (D.C. Cir. 1983), but both cases "have been superceded by more recent decisions embracing the more restrictive standard of" *Bown,* 601 A.2d at 1079–80, and *Morowitz v. Marvel,* 423 A.2d 196, 198–99 (D.C. 1980). *Nader v. Democratic Nat'l Comm.*, 555 F. Supp. 2d 137, 161 (D.D.C. 2008) (citing *Moore v. United States,* 213 F.3d 705 (D.C. Cir. 2000); and *Scott v. District of Columbia,* 101 F.3d 748 (D.C. Cir. 1996)). In these cases, the D.C. Court of Appeals decided that simply initiating a legal proceeding with an ulterior motive is in and of itself insufficient to give rise to an abuse of process claim; the process instead must be used to accomplish "some end not contemplated in the regular prosecution of the charge." *Bown*, 601 A.2d at 1080 (quoting *Morowitz*, 423 A.2d at 198).

their legally intended purpose: to surveil Page. *See* SAC ¶ 3.

"[T]he gist of the [abuse of process] action lies in the improper use after issuance" of process. *Hall v. Hollywood Credit Clothing Co.*, 147 A.2d 866, 868 (D.C. 1959). As noted, Page's complaint does not allege that the defendants *used* the warrants wrongfully, "to accomplish some end which the process was not intended by law to accomplish." *Hall*, 94 A.2d at 481. Instead, it merely alleges that he was surveilled pursuant to the warrants, SAC ¶ 3, and such surveillance is the "ordinary purpose" of a FISA order. *See Morfessis v. Baum*, 281 F.2d 938, 940 (D.C. Cir. 1960). Although Page claims that the purpose of the surveillance was to monitor the Trump campaign, the complaint does not allege that the agents obtained the warrants to, for instance, monitor campaign staffers who were not the proper targets of the warrants. Nor does it allege that the defendants used the FISA process to "pressure [Page] into taking any action or prevent him from taking action, or to achieve any other collateral purpose." *Scott*, 101 F.3d at 755. Because Page has failed to allege an actionable abuse of process claim, the Court will dismiss the FTCA claim in Count Five for lack of jurisdiction under Rule 12(b)(1).

2. *PATRIOT Act Claim*

In the PATRIOT Act, Congress created a civil cause of action against the United States to recover damages for willful violations of certain sections of FISA. 18 U.S.C. § 2712(a). As relevant here, § 2712(a) allows a person to sue if he has been "aggrieved by any

willful violation of . . . [FISA] section[] 106(a) [50 U.S.C. § 1806(a)]."[21] Section 1806(a), in turn, states that "information acquired from [FISA] electronic surveillance" about "any United States person may be used and disclosed by Federal officers and employees" without that person's consent "only in accordance with [FISA] minimization procedures" and only "for lawful purposes." *See also Fikre v. FBI*, 142 F. Supp. 3d 1152, 1169 (D. Or. 2015) (listing the elements that a plaintiff must allege to state a PATRIOT Act claim for a § 1806(a) violation). Before bringing an action under § 2712(a), the plaintiff must first present it to "the appropriate department or agency" within two years after the claim accrues. 18 U.S.C. § 2712(b)(1)–(2); *see Schuler v. United States*, 628 F.2d 199, 201 (D.C. Cir. 1980) (interpreting identical language in the FTCA). The claim accrues "on the date upon which the claimant first has a reasonable opportunity to discover the violation." 18 U.S.C. § 2712(b)(2).

The basis for Page's PATRIOT Act claim is that "the individual Defendants, acting in violation of the FISA, obtained, disclosed, or used information obtained by electronic surveillance of Mr. Page knowing or having reason to know that the information was obtained through electronic surveillance not lawfully authorized by the FISA." SAC ¶ 307. But this language merely restates the elements for a violation under § 1809(a), rather than one under § 1806(a). And Congress did not include a

[21] An aggrieved person can also sue for violations of 50 U.S.C. § 1825(a), concerning physical searches, and 50 U.S.C. § 1845(a), concerning pen registers or trap and trace devices. 18 U.S.C. § 2712(a).

sovereign immunity waiver for § 1809(a) violations. *See* 50 U.S.C. § 1810 ("an aggrieved person . . . shall have a cause of action against any *person* who committed such violation") (emphasis added);[22] *Al-Haramain Islamic Found., Inc. v. Obama*, 705 F.3d 845, 851–53 (9th Cir. 2012) (Under § 2712(a), a plaintiff "can bring a suit for damages against the United States for [unlawful] *use* of the collected information, but cannot bring suit against the government for collection of the information itself."). Thus, to the extent that Page brings a PATRIOT Act claim for the unlawful acquisition of information, the Court lacks jurisdiction to hear it.

Relying on the same allegations that underlie his "use and disclosure" FISA claim against the individual defendants, Page presents several theories to support his PATRIOT Act claim: (1) the media leaks; (2) the use of the warrant results in renewal applications; and (3) disclosures for a host of investigative purposes—to obtain other investigative measures against him or others, to investigate and prosecute others, to request assistance from other law enforcement and intelligence agencies, to include the information in government databases, and to justify his ongoing surveillance to other officials. SAC ¶¶ 229–230; Pl.'s Opp'n at 11–12.

As an initial matter, Page failed to present his third theory (about other investigative uses) to DOJ

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[22] "Person" is defined as "any individual, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power." 50 U.S.C. § 1801(m). It does not include the United States.

when he filed his administrative claim on September 30, 2020. *See* Gov't Mot. to Dismiss, Ex. 1 (Page Admin. Claim) to Ex. T (Don Decl.), Dkt. 88-22; *see also* Gov't Mot. To Dismiss at 55. Page does not contest this fact. *See* Pl.'s Opp'n at 9–19. The Court therefore treats this argument as conceded and finds that Page cannot bring a claim based on the disclosure of his information for other investigative uses. *Davis v. TSA*, 264 F. Supp. 3d 6, 10 (D.D.C. 2017) (noting that a court may treat as conceded arguments in a motion to dismiss that a plaintiff failed to address in its response).

The Court will not dismiss the remainder of Page's claim as time-barred. Although it is true that Page had notice of the alleged violations before September 30, 2018 (two years prior to his administrative claim), *see* Gov't Mot. to Dismiss at 47–50, the face of the complaint does not conclusively reveal when he could have reasonably discovered every alleged violation. 18 U.S.C. § 2712(b)(2). Simply because Page knew about the FISA renewals does not mean that he knew that the applications contained FISA-obtained information. At least at this stage, the Court cannot determine that Page's entire PATRIOT Act claim has expired under the statute of limitations, and thus, it will not dismiss it on this basis.

The Court will, however, dismiss the PATRIOT Act claim on the merits. First, Page's media leak theory fails for the reasons described in Part

III.A.1.iii.[23] Section 1806(a) prohibits the disclosure of information "obtained" from FISA surveillance, but neither the Post nor the Times article revealed any results from the FISA warrants. *See* SAC ¶¶ 221, 224; Gov't Mot. to Dismiss, Ex. F. (Wash. Post Article), Dkt. 88-8; Gov't Mot. to Dismiss, Ex. G (N.Y. Times Article), Dkt. 88-9.[24] And Page does not point to any other media reports containing FISA information. It is not enough to say, as Page does in his opposition, that it is "not clear what unlawful disclosures of FISA-related information were made to the reporters who wrote these articles," Pl.'s Opp'n at 12. To survive a motion to dismiss, he must allege facts in his complaint that allow the Court to plausibly infer that the defendants disclosed FISA-acquired information. He has not.

Second, Page's alternate theory that the defendants violated the PATRIOT Act because they knowingly used the unlawfully obtained information from the FISA warrants to obtain later warrants, SAC ¶¶ 229, 307; Pl.'s Opp'n at 13, rests on a faulty legal premise. To plead a violation of the PATRIOT Act relying on § 1806(a), Page must allege that the FISA information was used or disclosed in violation of the statutory minimization procedures or *for an unlawful purpose*. The complaint does neither. SAC ¶ 303–311. Page instead claims that the federal officers knew that the disclosed information had been *acquired* through

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[23] For the reasons explained below in Part III.B.3.ii, the Court could also dismiss the media-leak claim as time-barred, because Page knew of the alleged leaks by April 2017. SAC ¶¶ 221, 224.

[24] As explained above, *see supra* note 7, the Court may consider these articles, referenced in the complaint, in full, without converting the motion to dismiss into one for summary judgment.

unauthorized surveillance. *See* SAC ¶ 307; Pl.'s Opp'n at 11, 13 (misstating the applicable standard for a PATRIOT Act claim based on a violation of § 1806(a)). This is an element of §§ 1809(a) and 1810—but not § 1806(a)—claims. And Congress has waived the United States's sovereign immunity for § 1806(a) claims only. *See Al-Haramain Islamic Found.*, 705 F.3d at 851–53. The use of information knowingly obtained through unauthorized surveillance *itself* does not, as Page argues, *see* Pl.'s Opp'n at 13, qualify as an unlawful purpose. Absent clear statutory language, which does not exist here, the Court rejects Page's invitation to graft § 1809(a)'s elements onto § 1806(a).[25] *See Loughrin v. United States*, 573 U.S. 351, 357 (2014) ("[W]hen Congress includes particular language in one section of a statute but omits it in another . . . this Court presumes that Congress intended a difference in meaning." (internal citation and quotation marks omitted)); *Bates v. United States*, 522 U.S. 23, 29 (1997) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."). The unlawful *collection* of information is not equivalent to *using* the information, once obtained, for an unlawful purpose, in violation of § 1806(a).

Plus, this theory rests on factually thin and internally contradictory allegations. As explained in Part III.A.1.iii, Page's unadorned allegation that the FISA warrant results were used to procure the renewal warrants is undercut by his other assertions

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[25] Page's citation to legislative history is irrelevant. *See* Pl.'s Opp'n at 13 (quoting H.R. Rep. No. 95-1720, at 33 (1978), a Committee Report that discusses the criminal penalty in § 1809(a), not the use of information provision in § 1806(a)).

that the second application "did not outline any foreign intelligence information that had been gathered during the first three months" and that the surveillance under each warrant produced "no evidence at all" that he acted as a Russian agent. SAC ¶¶ 114, 123, 136; *see also* Pl.'s Opp'n at 13 (merely speculating that the applications included FISA-acquired information). Taken together, these are not "enough to raise [his] right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

Finally, Page offers no factual detail that supports his single, conclusory assertion that the United States has conceded that it has used and disclosed the FISA information in some ways "which were then specifically prohibited by the FISC." SAC ¶ 231. He points to only one specific admission from the government—that it lacked probable cause for the third and fourth FISA warrants. SAC ¶ 43; *see also* Gov't Mot. to Dismiss at 58. Beyond that, he does not identify any government concessions about improper disclosures, failures to minimize, or violations of specific FISC prohibitions. SAC ¶ 231. Nor does he reference any filings before the FISC. *Id.* Without more, the Court cannot plausibly infer from the complaint that the government used or disclosed FISA information in violation of the minimization procedures or for an unlawful purpose.

The Court will therefore dismiss Page's PATRIOT Act claim in Count Nine.

3. *Privacy Act Claims*

"The Privacy Act regulates the collection, maintenance, use, and dissemination of information

about individuals by federal agencies." *Wilson v. Libby*, 535 F.3d 697, 707 (D.C. Cir. 2008) (citation and internal quotation marks omitted); *see* 5 U.S.C. § 552a. An "agency that maintains a system of records shall," upon request, permit an individual to access and/or amend records pertaining to him. *Id.* § 552a(d). The Act also "requires that an agency 'permit' an individual 'who disagrees with the refusal of the agency to amend his record' to request a review of that decision." *Doe v. Rogers*, 498 F. Supp. 3d 59, 71 (D.D.C. 2020) (quoting 5 U.S.C. § 552a(d)(3)). And it allows individuals to file a civil action for injunctive relief against the agency if it has "refuse[d] to comply with" a request for access or has made a final determination "not to amend an individual's record in accordance with his request." *Id.* §§ 552a(g)(1)(A)–(B), (g)(2)–(3). The Act also sets rules for the disclosure of records contained in a system of records. *Id.* § 552a(b). An individual may bring a claim for improper disclosure under § 552a(g)(1)(D) and receive monetary damages if the agency acted intentionally or willfully. *Id.* § 552a(g)(1)(D), (g)(4).

Page brings two counts under the Privacy Act. SAC ¶¶ 290–302. He seeks injunctive relief to compel DOJ to amend inaccurate records, *id.* ¶ 294, and requests damages from DOJ and the FBI for unlawful disclosures to media outlets. *Id.* ¶¶ 297, 300. The Court will address each in turn.

i. Failure to Amend

According to Page, the Horowitz Report "contains numerous errors," and he requests an order requiring DOJ to amend it to correct those unspecified

inaccuracies. SAC ¶¶ 250, 292–294; 5 U.S.C. § 552a(g)(1)(A), (g)(2)(A).

After an individual requests an amendment of a record, the Privacy Act requires the agency to either correct any portion "which the individual believes is not accurate, relevant, timely, or complete," or explain its refusal to amend. 5 U.S.C. § 552a(d)(2)(B). The individual can then request a review of any refusal. *Id.* § 552a(d)(3). And he may sue after the agency makes a final determination not to amend or fails to comply with the statute's review provisions. *Id.* § 552a(g)(1)(A).

The parties disagree about whether Page has properly exhausted his administrative remedies for his failure to amend claim. The government contends that the exhaustion of administrative remedies is jurisdictional. Gov't Mot. to Dismiss at 29–31 (citing, *e.g.*, *Dick v. Holder*, 67 F. Supp. 3d 167, 187 (D.D.C. 2014)). Page argues instead that exhaustion is an affirmative defense that the complaint must reveal on its face. Pl.'s Opp'n at 29.[26]

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[26] That is true for certain statutes. *See, e.g.*, *Jones v. Bock*, 549 U.S. 199, 216 (2007) (holding that the Prison Litigation Reform Act's exhaustion requirement for prisoner actions under 42 U.S.C. § 1983 is an affirmative defense). But under others, exhaustion requirements may be jurisdictional, and a court will dismiss an unexhausted claim under Rule 12(b)(1). *See Thompson v. DEA*, 492 F.3d 428, 438 (D.C. Cir. 2007). The authority that Page cites in support of his view that exhaustion is an affirmative defense appears to be an outlier and relies on a Title VII, rather than Privacy Act, case. Pl.'s Opp'n at 29 (citing *Ramstack v. Dep't of the Army*, 607 F. Supp. 2d 94, 104 (D.D.C. 2009)).

The Court agrees with the government. Under D.C. Circuit precedent, "[e]xhaustion of [Privacy Act] administrative remedies is a prerequisite to bringing civil suit to compel amendment." *Nagel v. U.S. Dep't of Health, Educ. & Welfare*, 725 F.2d 1438, 1441 (D.C. Cir. 1984); *see also Haase v. Sessions*, 893 F.2d 370, 373 (D.C. Cir. 1990) (same for access claims). Courts in this circuit treat Privacy Act exhaustion as jurisdictional. *See Barouch v. DOJ*, 962 F. Supp. 2d 30, 67 (D.D.C. 2013) (collecting cases).

Page nonetheless asserts that he exhausted his administrative remedies before the Horowitz Report was publicly released. SAC ¶¶ 233, 238–244. In particular, in fall 2019, after the Inspector General's investigation was nearly finished and was about to enter the "review and comment phase," *id.* ¶ 237, Page sent multiple emails to DOJ, the OIG, and various officials at those agencies asking to view and amend the "forthcoming report" pursuant to the Privacy Act. *Id.* ¶¶ 238, 240, 242, 244 (referring to three emails from October 10, 16, and 21, and "no fewer than two emails" from September). On October 16, a DOJ official responded that his request was under review. *Id.* ¶ 243. And on November 12, Page was told only that he would not be contacted for an OIG interview. *Id.* ¶ 249.

Page received the final Horowitz Report when it was made public on December 19. *See id.* ¶ 233.[27] But

[27] Page does not assert an access claim under the Privacy Act for the draft Horowitz Report. *See* SAC ¶¶ 290–295; Pl.'s Opp'n at 28–38. Nor does he seek damages for the agency's failure to

Page does not allege that he has contacted anyone at DOJ to seek an amendment of the *finalized* Horowitz Report. *See generally* SAC. And the government offers undisputed evidence that he did not. *See* Gov't Mot. to Dismiss, Ex. DD (Malis Decl.) ¶ 8, Dkt. 88-32; Pl.'s Opp'n at 28–29 (not claiming otherwise).[28] Thus, the agency has not been given the chance "in the first instance," *Dickson v. Off. of Pers. Mgmt.*, 828 F.2d 32, 40 (D.C. Cir. 1987), to correct any portion of the final report that Page might identify as "not accurate, relevant, timely, or complete," 5 U.S.C. § 552a(d)(2)(B)(i). Without having asked DOJ to make "specific amendments" to the public report, his amendment claims are premature. *Hill v. U.S. Air Force*, 795 F.2d 1067, 1069 (D.C. Cir. 1986).

To be sure, DOJ never informed Page of his right to appeal. Pl.'s Opp'n at 29–30 (citing *Harper v. Kobelinski*, 589 F.2d 721, 723 (D.C. Cir. 1978)). But he does not allege that he received a denial (either for access or amendment) in the first place, a prerequisite for an appeal. SAC ¶ 249 (quoting the November 12 response letter from the DOJ official: "This letter does not address his requests under the Privacy Act[.]"). And "[t]he statute provides no exemption from administrative review when an agency fails, even by several months, to abide by a deadline [to respond to an amendment request]." *Dickson*, 828 F.2d at 40

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maintain accurate records under 5 U.S.C. § 552a(g)(4), a claim that does not require exhaustion. *Nagel*, 725 F.2d at 1441 n.2.

[28] The Court may consider facts in the record outside the pleadings to determine the exhaustion question because it must assure itself of its own jurisdiction. *Settles*, 429 F.3d at 1107.

(plaintiff could not file civil action before appealing the agency's denial, even though the agency was late to respond to the request for correction). Therefore, DOJ's failure to fully respond to Page's access claims does not excuse him from participating in the administrative process (which, in any event, he only initiated for the draft report). Plus, a review of Page's email requests reveals that he did not ask for any specific amendments to either the draft or the final report. *See* Malis Decl. Exs. A–C (for example, asking on October 10, 2019 to "review . . . the FISA abuse Inspector General report draft" for "accuracy purposes").[29] Thus, he never identified any inaccuracies in the report for DOJ to consider.

Page can still, however, request that DOJ fix any mistakes in the final Horowitz Report through the normal administrative process. *See Hill*, 795 F.2d at 1071 ("[N]othing in our disposition of this case prevents appellant from seeking to have his official agency records corrected."). But, at least as of now, Page has not exhausted his administrative remedies. Because "failure to exhaust administrative remedies under the Privacy Act is a jurisdictional deficiency," *see Barry v. Haaland*, No. 19-cv-3380, 2021 WL 1177798, at *7 (D.D.C. Mar. 29, 2021) (citation

[29] The Court may consider these documents to assure itself of its jurisdiction, *see Settles*, 429 F.3d at 1107, and because they are documents on which the complaint necessarily relies, *see Hinton v. Corrs. Corp. of Am.*, 624 F. Supp. 2d 45, 46 (D.D.C. 2009). *See Sandoval v. DOJ,* 296 F. Supp. 3d 1, 12 (D.D.C. 2017) (considering the plaintiff's administrative requests, produced by the defendant, to determine whether he exhausted).

omitted), the Court will dismiss his Privacy Act claim in Count Seven for lack of jurisdiction.[30]

ii. Unlawful Disclosures

Page also sues DOJ and the FBI for leaks of his information in violation of the Privacy Act. SAC ¶¶ 226, 296–302. He alleges that the defendants, including Comey, McCabe, Strzok, and Lisa Page, unlawfully disclosed "the existence of the FISA Warrants, the contents of the warrant applications, and the results of the Warrants" to media outlets such as the New York Times, the Washington Post, and "possibly others." *Id.* ¶ 226. The Court concludes that Page's unlawful disclosure claim is time-barred because he knew about the alleged disclosures to the media for more than two years before he filed this action.

"Privacy Act claims for monetary damages based on improper disclosure . . . have four elements: '1) the disclosed information is a record contained within a system of records; 2) the agency improperly disclosed the information; 3) the disclosure was willful or intentional; and 4) the disclosure adversely affected the plaintiff.'" *Doe v. DOJ*, 660 F. Supp. 2d 31, 44–45 (D.D.C. 2009) (quoting *Logan v. Dep't of Veterans Affs.*, 357 F. Supp. 2d 149, 154 (D.D.C. 2004)). An action under the Privacy Act "may be brought . . . within two years from the date on which the cause of action arises." 5 U.S.C. § 552a(g)(5). "[T]he cause of action

[30] Page's earlier Privacy Act suit against DOJ does not affect the exhaustion analysis because that case alleged different Privacy Act violations from previous years. *See* Compl., Dkt. 1, *Page v. DOJ*, 19-cv-3149 (D.D.C. Oct. 21, 2019).

does not arise and the statute of limitation does not begin to run until the plaintiff knows or should know of the alleged violation." *Tijerina v. Walters*, 821 F.2d 789, 798 (D.C. Cir. 1987).

The Privacy Act section of the complaint identifies only two media reports: the April 11, 2017 Washington Post article and the April 22, 2017 New York Times article. SAC ¶¶ 221, 224; Pl.'s Opp'n at 39 (not identifying any other disclosures). The Post article, which broke the story about the FISA warrants, cites anonymous "law enforcement and other U.S. officials" for details about the Page investigation. SAC ¶ 221; Wash. Post Article at 2. The Times article, which is mainly about then-FBI Director Comey, mentions Page only once. Citing a "former senior American intelligence official," it describes how Page's trips to Russia "rais[ed] new concerns among counterintelligence agents." SAC ¶ 224; N.Y. Times Article at 11.[31] The rest of the article was sourced from "interviews with more than 30 current and former law enforcement, congressional and other government officials." *Id.* at 2. Page himself is quoted in both articles. *See* Wash. Post Article at 3 (explaining that the FISA surveillance was "unjustified" and "politically motivated"); N.Y. Times Article at 11 (describing the Russians he met as "mostly scholars").

Page certainly had "inquiry notice," if not actual notice, of these articles, and thus the alleged leaks,

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[31] As explained above, *see supra* note 7, the Court may consider the Post and Times articles, referenced in the complaint, in full, without converting the motion to dismiss into one for summary judgment.

when they were published in April 2017. *See Agelli v. Burwell*, 164 F. Supp. 3d 69, 75 (D.D.C. 2016) (Privacy Act claim may accrue before the plaintiff "acquires actual knowledge of the agency's alleged misconduct"). And nowhere in Page's complaint or opposition brief does he claim that he was unaware of the articles, or the potential leaks, at the time. *See generally* SAC; Pl.'s Opp'n at 39. Therefore, his Privacy Act disclosure claims expired two years after publication—on April 11 and April 22, 2019. *See Hill v. DOD,* 981 F. Supp. 2d 1, 8 (D.D.C. 2013) ("Each disclosure of protected information represents a separate violation" that might trigger a separate limitations period.). This is true even though Page did not necessarily have "knowledge of the precise details of the disclosure." *Id.* at 7.

Thus, contrary to his contention otherwise, Pl.'s Opp'n at 39, Page's cause of action accrued, and the clock started to run, on April 11 and April 22, 2019, even though he did not then know the identities of the leakers. True, a Privacy Act plaintiff must eventually show that the disclosure was intentional or willful, which may require knowing who leaked the information. *Convertino v. DOJ*, 684 F.3d 93, 99 (D.C. Cir. 2012). But a Privacy Act claim runs against the agency, so a plaintiff does not need to name the responsible individual to sue. And more importantly, while a plaintiff will need to establish more detail at the summary judgment stage, *see id.*, he does not have to "allege the full details of . . . a disclosure at the pleading stage." *Feldman v. CIA*, 797 F. Supp. 2d 29, 41 (D.D.C. 2011) (denying motion to dismiss where the plaintiff alleged that the record was protected by the

Privacy Act and pled sufficient facts to infer its leak because various agency employees learned of its details though they had no connection to the underlying investigation). After all, "a plaintiff can hardly be expected to know the full details behind an improper disclosure prior to discovery, since those details are most likely to be under the control of the defendant," *id.*, particularly here, where the articles disclosed sensitive information possessed only by law enforcement and intelligence agencies.

In sum, Page's complaint shows that he knew of the alleged disclosure violations in April 2017, yet he did not file suit until November 2020. It is evident from the face of the complaint that the statute of limitations period ran in April 2019, well before Page filed suit. *See Kursar v. TSA*, 751 F. Supp. 2d 154, 166 (D.D.C. 2010). For this reason, the Court will dismiss Page's Privacy Act claim in Count Eight as time-barred.

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As alleged, the FBI's conduct in preparing the FISA warrant applications to electronically surveil Page was deeply "troubling." *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, Order at 2, Misc. No. 19-02 (FISA Ct. Dec. 17, 2019). Indeed, the government has conceded that it lacked probable cause for two of the warrants. *In re Carter W. Page*, Op. and Order Regarding Use and Disclosure of Information at 2 (FISA Ct. June 25, 2020). And the FISC has found that the government violated its "duty of candor in all four applications." *Id.* at 3. Similarly, Page alleges that the individual defendants

intentionally provided false information and omitted material facts in all four applications. SAC ¶¶ 16–20. To the extent these allegations are true, there is little question that many individual defendants, as well as the agency as a whole, engaged in wrongdoing. Even so, Page has brought no actionable claim against any individual defendant or against the United States.

In part, that is because Page faces at least three statutory roadblocks. First, Congress has not created a private right of action against those who prepare false or misleading FISA applications. Both the plain language and the structure of FISA make clear that civil liability under 50 U.S.C. § 1810 attaches only to those who conduct or perform electronic surveillance. Second, Congress has not provided for damages claims against federal officers for constitutional violations stemming from unlawful electronic surveillance in the national security context. And third, Congress has not waived the United States's sovereign immunity for this kind of claim.

For those claims that *are* available to Page under the law, he has failed to sufficiently allege or exhaust them. He has not adequately pled that any FISA-obtained information was improperly used or disclosed. To the extent that he has a viable claim under the Privacy Act, he has neither exhausted his administrative remedies nor filed a timely claim. And his abuse of process claim, as alleged, is not cognizable under D.C. law.

When it comes to Page's core claim—that the defendants misled the FISC to obtain surveillance warrants without probable cause—the Court cannot

create a cause of action that Congress did not enact. "[P]rivate rights of action to enforce federal law must be created by Congress," *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), and courts may not usurp that power "no matter how desirable that might be as a policy matter," *id.* at 287. Any future remedy for these alleged FISA abuses must come from Congress, not this Court.

CONCLUSION

For the foregoing reasons, the Court grants the individual defendants' motions to dismiss and the government's motion to dismiss. A separate order consistent with this decision accompanies this memorandum opinion.

/s/ Dabney L. Friedrich
DABNEY L. FRIEDRICH
United States District Judge

September 1, 2022

Appendix D

USCA Case #23-5038 Document #2125295
Filed: 07/14/2025

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5038 **September Term, 2024**

1:20-cv-03460-DLF

Filed On: July 14, 2025

Carter Page,

Appellant

v.

James B. Comey, et al.,

Appellees

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas*, Rao, Walker, Childs, Pan*, and Garcia, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk

BY: */s/*
Lillian R. Wright
Deputy Clerk

*Circuit Judges Katsas and Pan did not participate in this matter.

Appendix E

Case 1:20-cv-03460-KBJ Document 73
Filed: 06/08/21

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARTER W. PAGE, Plaintiff, v. JAMES COMEY ANDREW McCABE KEVIN CLINESMITH PETER STRZOK LISA PAGE JOE PIENTKA III STEPHEN SOMMA, BRIAN J. AUTEN DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATON, UNITED STATES OF AMERICA, JOHN DOES 1-10, and JANE DOES 1-10, Defendants.	CIVIL NO.: 20-cv-3460-KBJ **JURY TRIAL** **DEMANDED**

SECOND AMENDED COMPLAINT

1. On November 10, 2020, Defendant Andrew McCabe testified in front of the Senate Judiciary Hearing that "any material misrepresentation or error in a FISA application is unacceptable. Period. The FBI should be held to the standard of scrupulous accuracy that the [FISA] court demands." When pushed to explain "Who is responsible for ruining Mr. Carter Page's life?" McCabe finally responded, "We are all responsible for the work that went into that FISA." This lawsuit seeks that accountability and damages against the individuals and agencies who wronged Plaintiff, Carter W. Page ("Dr. Page").

2. Specifically, Dr. Page seeks relief herein for Defendants' multiple violations of his Constitutional and other legal rights in connection with unlawful surveillance and investigation of him by the United States Government. Dr. Page was targeted because of his lawful association with the 2016 Presidential campaign of Donald Trump. Dr. Page is entitled to relief for Defendants' unjustified and illegal actions (including violations of federal criminal law), which violated federal statutes enacted to prevent unlawful spying on United States persons, as well as the Constitution.

3. The complained of misconduct occurred in connection with the submission of four false and misleading warrant applications to engage in electronic surveillance of Dr. Page, ostensibly pursuant to the Foreign Intelligence Surveillance Act ("FISA"). Four separate Article III judges unwittingly approved the false applications for which no probable cause existed to authorize the warrants that were submitted in October 2016, January 2017, April 2017,

and June 2017, thereby unlawfully resulting in spying on Dr. Page. As was first disclosed on December 9, 2019 by the U.S. Department of Justice ("DOJ") Office of Inspector General ("OIG") Horowitz, and subsequently admitted by (i) DOJ, in letters to the Foreign Intelligence Surveillance Court ("FISC") and testimony by acting Attorneys General, (ii) the Federal Bureau of Investigation ("FBI"), including through testimony of the former Director and Deputy Director, and/or has been determined by (iii) the FISC, the *four separate applications*[1]) to surveil Dr. Page were submitted despite there being no probable cause to suspect that Dr. Page was acting as a Foreign Agent of Russia. Consequently, the Defendants' unlawful actions allowed them to illegally spy (domestically and internationally) on Dr. Page, a patriotic American citizen, who has a clearly established right to be free from such unlawful surveillance and conduct by the Defendants.

4. The Defendants' conduct, which began not later than August 2016, and continued through at least September 2017, constituted a fraud on the FISC and violated the Constitutional and other rights of Dr. Page.

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[1] For clarity, the four separate FISA Warrants when discussed individually are referred to herein in the order of the application submitted to the FISC. For example, the October 2016 FISA application is the "First FISA Warrant", and first renewal submitted in January 2017 is referenced as the "Second FISA Warrant", while the April and June 2017 FISA renewal applications are referenced as the "Third FISA Warrant" and "Fourth FISA Warrant," respectively.

I. OVERVIEW OF THE VIOLATIONS

5. On July 31, 2016, the FBI opened a counterintelligence investigation named Operation Crossfire Hurricane, putatively concerning the Foreign Agent Registration Act (FARA), to determine whether "individual(s) associated with the Trump campaign are witting of and/or coordinating activities with the Government of Russia." Soon thereafter, Dr. Page and three other individuals with whom he had little or no relationship were targeted by the FBI in the Crossfire Hurricane investigation.

6. The Crossfire Hurricane investigation was conducted as a "headquarters special," rather than being conducted by an FBI Field Office—as is typical with most FISA investigations—because of its sensitivity involving the 2016 Presidential election and a desire by senior FBI officials to keep close control on the investigation and disclosure of it.

7. The importance of this investigation was obvious to everyone involved in it. On September 2, 2016, Defendant Lisa Page advised Defendant Peter Strzok that the President "wants to know everything we are doing."

8. The FBI investigation soon devolved into an effort to obtain from the FISC a FISA warrant authorizing spying and electronic surveillance on Dr. Page.

9. The FBI did not have probable cause to lawfully obtain a FISA warrant. Instead, the FBI used documents furnished by Christopher Steele, a Confidential Human Source ("CHS") to unlawfully conceal this legal deficiency. As the Crossfire

Hurricane team knew, CHS Steele had been paid by the Democratic Party and/or the Hillary Clinton presidential campaign to perform "political opposition research" and dig up dirt on a connection between the Trump campaign and Russia in order to divert attention from the investigation of Clinton's email practices while she was Secretary of State.

10. In accordance with core principles of the U.S. Constitution, reinforced by the nation's legal and cultural aversion to spying on its citizens, Congress and the executive branch have enacted rigorous requirements that must be met before electronic surveillance of a U.S. citizen is legally permitted. To surveil an American citizen, the FISA requires that there be probable cause that the target is an "agent of a foreign power" who is "knowingly engag[ing]…in clandestine intelligence activities." In short, to legitimately obtain a FISA warrant against Dr. Page, the FBI had to demonstrate that he was a Russian agent who was knowingly engaging in intelligence activities on behalf of Russia.

11. On August 17, 2016, shortly after the inception of the Crossfire Hurricane investigation, the Central Intelligence Agency ("CIA"), provided information regarding Dr. Page to members of the Crossfire Hurricane team. This information established that Dr. Page had been a CIA "operational contact" from 2008 – 2013 (and had similar interactions with the FBI). Dr. Page had assisted the CIA in combatting intelligence-related activities pursued by Russia and other foreign countries *against* the United States' interests. Further, the CIA's employee had given a positive assessment of Dr. Page's candor.

12. On September 7, 2016, the CIA sent an investigative referral to FBI Director James Comey and Deputy Assistant Director of Counterintelligence Peter Strzok notifying them that Hillary Clinton had approved a plan concerning U.S. Presidential candidate Donald Trump and Russian hackers hampering U.S. elections as a means of distracting the public from her use of a private mail server. (Letter of Director of National Intelligence, dated September 29, 2020.)

13. During this same investigative phase, the FBI used a second CHS to surreptitiously ask Dr. Page about his activities. In this monitored conversation, Dr. Page denied that he either: (i) knew anything about improper or unlawful communications or activities between Russian and American citizens, or (ii) had engaged in any improper—much less illegal—activity with any individual that was harmful to the interests of the United States. This conversation was recorded without Dr. Page's knowledge and was provided to the FBI.

14. Only twelve days after receiving the CIA investigative referral warning the FBI about a potential disinformation plan by Hillary Clinton's campaign involving a falsely alleged connection between the Trump campaign and Russia. On September 19, 2016, the FBI received information regarding Dr. Page from CHS Steele consistent with the CIA's express warning to the FBI about receiving a false report containing this specific claim. In particular, two documents, prepared by CHS Steele, falsely alleged unlawful communications and activities involving Dr. Page and two Russians with

close ties to Russian President Vladimir Putin. The FBI "focused on" these two documents from Steele to base its claim that there was probable cause to obtain a FISA warrant against Dr. Page.

15. On September 23, 2016, an article was published in YAHOO! NEWS alleging meetings between Dr. Page and the same two Russian individuals. The FBI treated this article as corroboration for CHS Steele's claims when, in fact, there was no corroboration of these false claims because CHS Steele was also the source for the Yahoo article. In response to the false YAHOO! NEWS article, on September 25, 2016, Dr. Page sent a letter to then-FBI Director Comey in which he categorically denied that he had any such communications with the Russian individuals and documented his previous cooperation with the CIA and the FBI to combat Russian spying. These false allegations against Dr. Page made by CHS Steele were not investigated by the FBI in accordance with its own manuals and procedures. For the FBI to disregard its procedures was particularly egregious in this case because the FBI knew that CHS Steele: (a) was being paid to provide political "opposition research" on this topic; (b) was essentially the exclusive source of information supporting probable cause for the FISA warrant applications, and (c) the CIA had warned the FBI of a potential political scheme involving false reporting of collaboration between the Trump campaign and Russians.

16. The more fundamental problem was that the FBI was so intent on obtaining a FISA warrant to enable it to spy on the Trump campaign that it did not fully and accurately disclose to the FISC the evidence

it had obtained as to whether Dr. Page was a Russian agent. In order to mislead the FISC into concluding that there was probable cause to believe that Dr. Page was a Russian agent, the Defendants caused false or misleading information to be provided to the FISC. This conduct was undertaken to achieve the unlawful end sought by Defendants: to obtain surveillance despite the absence of probable cause.

17. Throughout the FISA process, the FBI did not advise the FISC that Page had been, for many years, an "operational contact" of the CIA. The FBI did not advise the FISC that CHS Steele had been paid by the Democrat party and/or the Clinton campaign to provide opposition research on Donald Trump. The FBI did not advise the FISC that one of Steele's alleged sources of information against Dr. Page had himself been investigated for attempting to recruit Americans to help spy for Russia. The FBI did not advise the FISC that Steele's "Primary Sub-source" contradicted critical information that Steele attributed to him. Instead, the FBI represented to the FISC that the Primary Sub-source was "credible," without disclosing to the FISC that what the Primary Sub-Source had "credibly" reported to the FBI was that the information Steele attributed to him was inaccurate and misleading.

18. Ultimately an FBI attorney altered an email from the CIA in order to falsely deny that Dr. Page had been a CIA source serving for many years as an operational contact.

19. In reality, there was no "probable cause" to support surveillance of Dr. Page. If FBI procedures

had been followed and an honest and thorough investigation conducted, and if the FBI had fully and accurately reported what it knew, the FISA warrants against Dr. Page would neither have been sought nor issued.

20. The individual Defendants fabricated or intentionally disregarded critical evidence, and misled the FISC, in order to obtain the FISA warrants. This case is about holding accountable the entities and individuals who are responsible for the most egregious violation and abuse of the FISA statute since it was enacted over forty years ago.

II. PARTIES

21. Plaintiff Carter W. Page is a natural person who is a United States citizen. Dr. Page is a graduate of the United States Naval Academy who served on active duty in the United States Navy (including deployments at sea and other assignments worldwide, many in intelligence-related billets) from 1993 until 1998, reaching the rank of Lieutenant. After completing his active military service, Dr. Page served as an International Affairs Fellow at the Council on Foreign Relations and focused his research on energy-related developments in the strategically important Caspian Sea region. Dr. Page earned a Master of Arts degree in National Security from Georgetown University while on active duty, and subsequently completed the MBA program at New York University ("NYU") in 2001. This led to a position as an investment banker with Merrill Lynch. Dr. Page eventually became the Chief Operating Officer of Merrill Lynch's energy and power group in New York.

In 2012, Dr. Page was awarded his Ph.D. degree from SOAS University of London (School of Oriental and African Studies). He ran the Globalization and International Affairs program at Bard College in New York, and subsequently returned to NYU to teach courses on energy and politics. During the 2016 U.S. Presidential election, Dr. Page was a volunteer member of an informal foreign policy advisory committee to then-candidate Donald J. Trump's election campaign. Although a campaign volunteer, Dr. Carter never met or spoke to then-candidate Trump.

A. Entity Defendants

22. Defendant United States of America is sued for Dr. Page's injuries caused by the wrongful acts of its employees acting within the scope or office of their employment.

23. Defendant Federal Bureau of Investigation is a bureau within the United States Department of Justice with offices at 935 Pennsylvania Avenue, N.W., Washington, D.C. 20535. References to any actions taken by FBI in this Complaint encompass its officials, appointees, employees, agents, and/or contractors, both known and unknown to Plaintiff.

24. Defendant United States Department of Justice is an executive agency of the United States with offices at 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530, and includes its Office of Inspector General ("DOJ OIG"). References to any actions taken by DOJ or DOJ OIG in this Complaint encompass their officials, appointees, employees,

agents, and/or contractors, both known and unknown to Plaintiff.

B. Individual Defendants

25. The individuals named herein have responsibility and liability for the legal claims identified herein, as set forth above and below. In addition, individuals as yet unidentified or unknown to Plaintiff are also responsible and liable for the legal claims set forth herein. Because of the clandestine and classified or "law enforcement sensitive" protected nature of the actions taken in pursuit of the Crossfire Hurricane investigation and the FISA warrant applications, and the protection given to the identity of individuals by the DOJ OIG in the Horowitz Report, Plaintiff is as yet unable to identify by name these additional individuals.

26. Defendant James Comey was the Director of the FBI from September 2013 to May 2017. Defendant verified under penalty of perjury three false FISA warrant affidavits regarding Dr. Page in October 2016, January 2017, and April 2017. He was dismissed by the President of the United States on May 9, 2017. He is sued in his individual capacity.

27. Defendant Andrew McCabe was the Deputy Director of the FBI from February 2016 to January 2018. He was an original and primary participant in the Crossfire Hurricane investigation. Defendant McCabe was the FBI's lead signatory of the final FISA renewal affidavit against Dr. Page in June 2017. He is sued in his individual capacity.

28. Defendant Kevin Clinesmith was an Assistant General Counsel in the National Security and Cyber

Law Branch of the FBI's Office of General Counsel from July 2015 to September 2019. In August 2020, Mr. Clinesmith "pleaded guilty . . . in the U.S. District Court for the District of Columbia to a false statement offense based on intentionally altering an email in connection with the submission of the FISA renewal application against Dr. Page." (DOJ Press Release, Aug. 19, 2020). See Information, *U.S.A. v. Clinesmith*, No. 20-cr-00165-JEB (D.D.C. Aug. 14, 2020). He is sued in his individual capacity.

29. Defendant Peter Strzok was a career FBI agent until August 2018 and served as Deputy Assistant Director of Counterintelligence. He supervised the investigation of Dr. Page until approximately January 2017. He is sued in his individual capacity.

30. Defendant Lisa Page is a former lawyer at the FBI. She is sued in her individual capacity.

31. Joe Pientka III, during the relevant period, served as a Supervisory Special Agent of a Foreign Counterintelligence Squad at the FBI's Washington Field Office. He is sued in his individual capacity.

32. Stephen Somma, a.k.a. "Steve Holt," is an FBI agent. (He originally presented himself as "Steve Holt" to Dr. Page during a series of meetings in March 2017.) According to the DOJ OIG, Mr. Somma is "primarily responsible for some of the most significant errors and omissions in the FISA applications" against Dr. Page." He is sued in his individual capacity.

33. Brian J. Auten was an FBI Supervisory Intelligence Analyst. He is sued in his individual capacity.

34. John Does #1–10, individuals whose identities or specific involvement in the conduct alleged in this Complaint may not yet be known to the Plaintiff, are sued in their respective individual capacities.

35. Jane Does #1–10, individuals whose identities or specific involvement in the conduct alleged in this Complaint may not yet be known to the Plaintiff, are sued in their respective individual capacities.

III. JURISDICTION AND VENUE

36. This Court has original subject matter jurisdiction over Dr. Page's federal claims under 28 U.S.C. §§ 1331 and 1346(b)(1) because they arise under federal law and because the United States is a defendant.

37. This Court has personal jurisdiction over the individual defendants who reside outside the District of Columbia, pursuant to D.C. Code § 13-423(a)(3), as Plaintiff's claims for relief arise from their acts, directly or by an agent, causing tortious injury in the District of Columbia by an act or omission in the District of Columbia.

38. This Court has personal jurisdiction over the federal government defendants pursuant to 18 U.S.C. § 2712, 28 U.S.C. § 2674, 5 U.S.C. § 552a(g)(1)(D), and 5 U.S.C. § 552(a)(4)(B).

39. Venue is proper in the District of Columbia pursuant to 28 U.S.C. § 1391(b)(2) because this is where a substantial part of the events or omissions giving rise to the claims occurred and this is where the government entities are located.

IV. THE FISA APPLICATIONS AND WARRANTS

A. The FISA Warrants Were Unlawful - Admissions and Rulings

40. The four FISA warrants to surveil Dr. Page were obtained unlawfully because there was not probable cause to seek them. As has now been established, the warrants were issued only because of the FBI's omissions and misrepresentations to the FISC.

41. The December 2019 report entitled *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation* issued by the DOJ OIG ("Horowitz Report"), the analysis from the Senate Select Committee on Intelligence, findings in Special Counsel Mueller's Report, and rulings of the FISC establish that there is not and never was any evidence that Dr. Page acted in concert with Russia or its agents—because he did not—and that the four FISA warrants to surveil him were unlawful.

42. The Horowitz Report established numerous material failures by the FBI to follow the Woods Procedures and other DOJ and FBI policies. Among other things, the FBI failed to verify the accuracy of information included in the warrant applications. In many instances, the FBI either had no supporting documentation, misrepresented what the supporting documentation stated, or the supporting documentation showed that the factual assertion made in the application was incorrect. In total, the Horowitz Report found 17 distinct, significant errors and omissions in the FISA Warrant applications submitted regarding Dr. Page. This was the public

disclosure that the FISA warrants lacked probable cause and were unlawful.

43. Since not a single proven fact ever established complicity with Russia involving Dr. Page, there never was probable cause to seek or obtain the FISA Warrants targeting him on this basis. The DOJ now assesses, and has formally admitted to the FISC, that with respect to at least the last two warrant applications, "*if not earlier*, there was insufficient predication to establish probable cause to believe that [Dr.] Page was acting as an agent of a foreign power." (Emphasis supplied.)

44. In this vein, two Deputy Attorney Generals, Sally Yates and Rod Rosenstein, who signed and approved FISA warrant applications regarding Dr. Page, have testified they would not have signed the applications had they known of the misrepresentations and omissions at the time they signed the applications.

45. Further, the DOJ has admitted in filings submitted to the FISC, under FISC Rule 13(a), that there were material omissions and misstatements in the FISA warrants applications. These letters include but are not limited to, the following: *Preliminary Supplemental Rule 13(a) letter regarding applications submitted to the Court targeting Carter W Page in Docket Numbers 2016-1182, 2017-0052, 2017-0375, and 2017-0679* (Oct. 25, 2019); *Supplemental Rule 13(a) letter regarding applications submitted to the Court targeting Carter W. Page in Docket Numbers 2016-1182, 2017-0052, 2017-0375, and 2017-0679* (Nov. 27, 2019); *Additional Rule 13(a) letter regarding*

applications submitted to the Court targeting Carter W. Page in Docket Numbers 2016-1182, 2017-0052, 2017-0375, and 2017-0679 (Dec. 9, 2019).

46. In addition, the FISC has issued several rulings, (authored by the former FISC chief, the Honorable Rosemary M. Collyer, and the current FISC Chief, the Honorable James E. Boasberg), finding that the warrants to surveil Dr. Page contained material omissions and misstatements, lacked candor, and/or that the warrants were not lawfully obtained.

47. For example, by order dated December 17, 2019, at page 3, the FISC stated: "The frequency with which representations made by FBI personnel turned out to be unsupported or contradicted by information in their possession, and with which they withheld information detrimental to their case, calls into question whether information contained in other FBI applications is reliable."

48. And, by Order of Jan. 7, 2020 Regarding Handling and Disposition of Information, the FISC states: "The Court understands the government to have concluded, in view of the material misstatements and omissions, that the Court's authorizations in Docket Numbers 17-375 and 17-679 were not valid. The government apparently does not take a position on the validity of the authorizations in Docket Numbers 16-1182 and 17-52, but intends to sequester information acquired pursuant to those dockets in the same manner as information acquired pursuant to the subsequent dockets."

49. In an order dated March 5, 2020, the FISC again reiterated the seriousness and materiality of the

false information contained in the applications for the FISA Warrants and said: "There is thus little doubt that the government breached its duty of candor to the Court with respect to those applications [involving Dr. Page]." The FISC then said: "The frequency and seriousness of these errors in a case that, given its sensitive nature, had an unusually high level of review at both DOJ and the Federal Bureau of Investigation have called into question the reliability of the information proffered in other FBI applications."

50. Further, in an order dated June 25, 2020 (declassified on September 11, 2020), the FISC said: "The government acknowledges that there were material omissions, and the Court has found violations of the government's duty of candor, in all four applications [regarding Dr. Page]." In analyzing what lawful use may now be made of the results of the surveillance of Dr. Page (such as Dr. Page using them as proof in a lawsuit against the government) the FISC observed: "[50 U.S.C.] §§ 1809(a)(2) and 1827(a)(2) specifically address the circumstances of this case, *where we already know that information was obtained through unlawful surveillance and search*, . . . [.]" (Emphasis added).

51. While the DOJ admitted to the FISC that the third and fourth FISA warrants were not valid, neither was it prepared to defend the first and second warrants. As the FISC noted in its last order on this topic issued June 25, 2020:

> As noted above, the government admits that at least the third and fourth Page applications lacked adequate factual

support. See Dec. 9, 2019, Letter at 2, 19. It further admits that "the restrictions on use or disclosure in Sections 1809 and 1827 apply at least" to information acquired under color of the third and fourth dockets, without addressing whether they apply to information acquired under color of the first two dockets. See Feb. 5, 2020, Resp. at 28. In fact, in response to the Court's directive to explain why retaining the Page FISA information "in the manner intended by the government, and any contemplated use or disclosure of it," comport with §§ 1809(a)(2) and 1827(a)(2), Jan. 7, 2020, Order at 2, the government declined to argue, even alternatively, that those provisions do not apply (or apply differently) to information obtained under the first two dockets. See Feb. 5, 2020, Resp. at 28-29. Under the circumstances, the Court will assume that §§ 1809(a)(2) and 1827(a)(2) apply to information acquired under color of the first and second dockets just as, per the government's admission, they apply to information acquired under color of the third and fourth.

B. <u>The FISA Warrants Were Unlawful - Federal Laws and Procedures Violated</u>

52. To obtain these unlawful warrants, the Defendants, known and unknown, violated numerous laws, rules, regulations, policies, and procedures.

53. To surveil an American citizen, the FISA requires that there be probable cause establishing two elements. **First**, that the person is acting on behalf of a foreign power. And **second**, that the American citizen is engaged, in their capacity as a foreign agent, in one of five specified activities: current or future criminal conduct, sabotage, terrorism, using a false identity, or abetting someone engaged these activities. (50 USC 1801(b)(2)).

54. Moreover, the FISA requires that certain information be represented to the FISC to obtain an initial warrant and to obtain a renewal of a warrant. (50 USC §§ 1804; 1805.)

55. The Defendants, known and unknown, failed in numerous and material ways to comply with the requirements of the FISA, made misstatements and misrepresentations, and omitted relevant and necessary information in seeking the FISA warrants against Dr. Page.

56. The FISC also has a set of rules governing the presentation of warrant applications to it. Significantly, one of these rules, Rule 13a, requires the government *to immediately correct* any misstatement or omission of material fact in a warrant application.

57. FISC Rule 13 provides:

> **Correction of Material Facts.** If the government discovers that a submission to the Court contained a misstatement or omission of material fact, the government, in writing, must immediately inform the Judge to whom the submission was made of:
>
> (1) the misstatement or omission;
>
> (2) any necessary correction;
>
> (3) the facts and circumstances relevant to the misstatement or omission;
>
> (4) any modifications the government has made or proposes to make in how it will implement any authority or approval granted by the Court; and
>
> (5) how the government proposes to dispose of or treat any information obtained as a result of the misstatement or omission.

58. Defendants, known and unknown, did not comply with the FISC rules, made misstatements and misrepresentations, and omitted relevant and necessary information in seeking the FISA warrants against Dr. Page.

59. In addition, Defendants, known and unknown, were required to follow the FBI's own policies and procedures for conducting investigations (criminal and counterintelligence), but failed to do so in numerous and material ways in the investigation of Dr. Page.

60. Defendants, known and unknown, were required to comply with the "Woods Procedures," dated April 5, 2001 (as amended), which are a set of procedures designed to ensure the accuracy of the factual assertions in an application for a FISA Warrant. Each warrant application submitted with respect to Dr. Page included a certification to the FISC that "The FBI has reviewed this verified application for accuracy in accordance with its April 5, 2001 procedures …[.]" But Defendants, known and unknown, failed in numerous and material ways to comply with the Woods Procedures, as explained in the Horowitz Report and DOJ letters and filings to the FISC.

61. As a result of their failure to follow these laws, rules, regulations, policies, and procedures, and as a result of the way they conducted these investigations, and the way they misrepresented, misstated, and omitted information, Defendants, known and unknown, violated Dr. Page's clearly established right under the Fourth Amendment to the U.S. Constitution to be free of unreasonable searches and seizures, and under 50 U.S.C. § 1801 et seq., of unlawful electronic surveillance.

62. The FISA process is a classified process. Its procedures and the acts taken by the DOJ, FBI, and the FISC to apply for, issue and carry out a warrant are secret (non-public) pursuant to statutory law.

63. In addition, the DOJ and FBI carry out their law enforcement and intelligence duties by protected, non-public means, regardless of whether they are formally classified or not, pursuant to statute,

regulation, agency custom, executive and law enforcement privileges, etc.

64. Defendants used these secrecy measures to carry out their unlawful acts.

65. These various secrecy measures also made the discovery of any unlawful or unauthorized acts by DOJ and FBI employees difficult, or in some cases impossible to discover with or without the use of legal compulsion.

66. The Defendants used these grounds of secrecy, in an of themselves often lawful, to conceal from Dr. Page the unlawful acts perpetrated upon him and the discovery of them by him.

67. At all times relevant to this complaint, the individual Defendants were employees and agents of the United States.

68. The individual Defendants were acting within the scope of their employment for the United States when they engaged in the actions described in this Complaint and in actions as yet unknown to Dr. Page in furtherance of the claims in this Complaint.

69. The United States is liable for the actions of its employees and agents under the principles of respondeat superior and by statutory designation.

V. THE FOUR FISA WARRANTS

This complaint discusses some, but not all, of the material misrepresentations and omissions infecting each of the FISA Warrants.

A. The First FISA Warrant

70. On August 8, 2016, Peter Strzok and Lisa Page had a text exchange in which Page asked Strzok "[Trump's] not ever going to become president, right? Right?!" and Strzok replied "No. No he won't. We'll stop it"

71. On August 15, 2016, Strzok sent Lisa Page a text message in which he said "I want to believe the path you threw out for consideration in Andy's [McCabe's] office - that there's no way he gets elected - but I'm afraid we can't take that risk. It's like an insurance policy in the unlikely event you die before you're 40."

72. On or about August 17, 2016, the CIA delivered materials to "certain members" of the Crossfire Hurricane team documenting that Carter Page was an "operational contact."

73. On September 7, 2016, the CIA sent an investigation referral to FBI Director James Comey and Deputy Assistant Director of Counterintelligence Strzok regarding "U.S. Presidential candidate Hillary Clinton's approval of a plan concerning U.S. Presidential candidate Donald Trump and Russian hackers hampering U.S. elections as a means of distracting the public from her use of a private mail server."

74. On or about September 19, 2016, Steele gave six reports to the FBI, with two of these reports mentioning Dr. Page by name. These reports alleged improper or unlawful communications or activities between Dr. Page and two sanctioned Russians with close ties to Russian President Vladimir Putin.

Michael Gaeta, the FBI Agent assigned to "handle" Steele as a CHS, said that it was "obvious" Steele's work was "politically motivated."

75. The FBI did not conduct any meaningful investigation of Steele's facially implausible allegation- that there was a "well-developed conspiracy of cooperation between the Trump Campaign and Russia," utilizing Dr. Page as an intermediary between the candidate Trump and Vladimir Putin.

76. Pursuant to the terms of his CHS agreement with the FBI, Steele was prohibited from talking to the media about the allegations in the Steele Reports. A September 23, 2016 YAHOO! NEWS article alleged that meetings had occurred between Dr. Page and two sanctioned Russian individuals according to a "well-placed Western Intelligence source." Steele was, in fact, the source for the YAHOO! NEWS article.

77. The FBI allegedly did not ask Steele if he was the source referenced in the YAHOO! NEWS article.

78. The FBI falsely cited the YAHOO! NEWS article in the warrant application as independent corroboration of the allegations in the Steele reports, however.

79. Moreover, this false implication of corroboration was made to the FISC despite the fact that earlier versions of the draft warrant application stated that Steele, in fact, *was* the source of the information in the YAHOO! NEWS article. Indeed, the draft warrant application continued to reflect that Steele was the source of the information in the YAHOO! NEWS article until October 14, 2016, only

two weeks before the application was approved by the FISC.

80. The draft text in the warrant application about the YAHOO! NEWS article was changed, by a person or persons unknown, after October 14, 2016, to the false assertions that were actually submitted to the FISC. In a statement designed to obscure the issue and FBI's true state of knowledge, the application stated that the FBI "assessed" that either Steele's business associate or his client likely provided the information in the YAHOO! NEWS article. The application then asserted that FBI did not believe that Steele provided the information to YAHOO! NEWS, although the FBI had no factual basis for that assertion.

81. Furthermore, on September 25, 2016, Dr. Page sent Defendant Comey a letter denying he had had communications with any sanctioned Russian officials. Dr. Page stated in the letter that he had decades' long record of interactions with the CIA and FBI. This was consistent with the prior CIA reports provided to the FBI involving Dr. Page, which established that he had such a record. Comey received this letter and distributed it to the Crossfire Hurricane team, including its supervisor, Defendant Peter Strzok.

82. In addition, CHS Steele was also found to be offering his "Dossier" to the State Department, conduct that was against FBI protocol, which required Steele to deal with his FBI Handling Agent solely.

83. Kathleen Kavalec, then the Deputy Assistant Secretary of State, met with Steele on October 11,

2016, and forwarded her notes of the meeting to the FBI. During the meeting, Steele admitted he was encouraged by his "client" to get his research out before the 2016 election. This was more evidence signaling a political motivation by CHS Steele further consistent with the warning September 7th CIA investigative referral about receiving such false reporting. The notes from Deputy Kavalec—a diplomat and not a federal law enforcement officer—also show she found flaws with Steele's implausible allegations, which cast doubt on his credibility.

84. On or about September 29, 2016, FBI agent Stephen Somma provided "incomplete, inaccurate, and in certain respects contrary [information] to the information the [CIA] provided to the Crossfire Hurricane team" when an DOJ Office of Intelligence (OI) attorney asked whether Dr. Page had been a "source" for the CIA. The FBI then knew that Dr. Page had been a CIA "operational contact" from 2008-2013, which was the time period relevant to the Crossfire Hurricane investigation and the FISA Warrants.

85. Other witness interviews conducted by the FBI were wholly inconsistent with the allegations against Dr. Page in the two documents Steele provided, but the FBI purposefully withheld this information from the DOJ.

86. In monitored communications between Dr. Page and another CHS (Stefan Halper), Dr. Page repeatedly denied that he had any involvement with Russia on behalf of the Trump campaign before, during, and after his affiliation with the Trump

campaign. This relevant and exculpatory information was never disclosed by the FBI to DOJ attorneys.

87. Separately, statements made by George Papadopoulos in FBI-monitored conversations with a CHS that took place in September and October 2016, similarly denied that anyone involved in the Trump Campaign was coordinating with Russia. This exculpatory information was not disclosed in the First FISA Warrant application.

88. According to a document circulated among FBI Crossfire Hurricane team members and supervisors in early October 2016, Sergei Millian, one—of CHS Steele's alleged sources for the allegations against Dr. Page—had known historical contact with persons and entities suspected of being linked to Russian Intelligence. Yet the FBI did not follow up by interviewing Millian before proceeding to seek the First FISA Warrant against Dr. Page. Nor did the FBI disclose its failure to verify the information provided by Steele in its application for the First FISA Warrant in October 2016.

89. On October 7, 2016, DOJ attorney Stuart Evans asked the FBI whether Steele was affiliated with a political campaign. On October 10, 2016, FBI agent Stephen Somma provided an answer that was only partially responsive. On October 11, 2016, Evans learned that Steele had been performing political opposition research and expressed concerns about Steele's reliability due to his political bias and its impact on information provided to the FBI.

90. This FISA application had heightened sensitivity and therefore received additional attention

because it concerned a putative effort by a foreign power to influence the upcoming 2016 U.S. elections and because of the connection of the FISA target (Dr. Page) to one of the presidential campaigns.

91. On October 12, 2016, Peter Strzok and other FBI personnel briefed Comey and McCabe about Evans' concerns. The FBI brushed aside those concerns and pressed the DOJ to proceed with the warrant application. That same day Lisa Page emailed McCabe that she had communicated to Evans that both McCabe and Comey had given a "green light" to applying for the FISA warrant and had asked Evans where things stood. She added that "This might take a high-level push. Will keep you posted."

92. DOJ held up the warrant application because of concerns that Steele's bias may need to be disclosed to the FISC. Ultimately a footnote was added to the application which stated that:

> Source #1 [Steele], who now owns a foreign business/financial intelligence firm, was approached by an identified U.S. person, who indicated to Source #1 that a U.S.-based law firm had hired the identified U.S. person to conduct research regarding Candidate #1's ties to Russia (the identified U.S. person and Source #1 have a long-standing business relationship). The identified U.S. person hired Source #1 to conduct this research. The identified U.S. person never advised Source #1 as to the motivation behind the research into Candidate #1's ties to Russia.

> The FBI speculates that the identified U.S. person was likely looking for information that could be used to discredit Candidate #1's campaign.

93. This misleading footnote ignores the fact that Steele was being paid with Democratic National Committee funds, which its law firm, Perkins Coie, funneled to CHS Steele through the political opposition research firm Fusion GPS. The FBI knew that fully and accurately disclosing the motivations behind Steele's critical allegations on which it was relying would undermine any finding of probable cause and would prevent it from obtaining a warrant.

94. On October 18, 2016, then-Associate Attorney General Bruce Ohr, whose wife worked for political opposition research firm Fusion GPS, briefed Steele's accusations regarding Dr. Page to McCabe and Lisa Page. He advised them that Steele's work product was not for the U.S. Government, but rather for a private political party, and was political opposition research.

95. The First FISA Warrant application was submitted to the FISC on October 21, 2016. It asserted that "the FBI has learned that Page met with at least two Russian officials during [a trip to Russia in July 2016]," relying on CHS Steele's allegations. But it did not fully disclose Steele's bias and motives. Nor did it disclose the information provided by the CIA to the FBI, either that Dr. Page had been an operational contact for many years, or the cautionary warning to be vigilant against politically motivated false reports being submitted with false allegations of connections between Russian individuals and U.S. citizens.

96. Neither the First FISA Warrant application nor any of the subsequent renewal applications disclosed or referenced any role that the Democratic National Committee or any party/campaign had in funding the efforts by Steele, even though those efforts were known to senior DOJ and FBI officials.

97. The application for the First FISA Warrant also falsely represented that "The FBI has reviewed this verified application for accuracy in accordance with its April 5, 2001 procedures [the Woods Procedures], which include sending a copy of the draft to the appropriate field office(s)."

98. There was insufficient evidence of probable cause to support issuance of a warrant against Dr. Page when the application for the First FISA Warrant was submitted to the FISC.

99. The application for the First FISA warrant was false and misleading.

100. If the application for the First FISA warrant had not been false and misleading, the warrant would not have been issued by the FISC.

B. The Second FISA Warrant

101. On October 31, 2016, an article appeared in Mother Jones titled "A Veteran Spy Has Given the FBI Information Alleging a Russian Operation to Cultivate Donald Trump." The sub-headline asked, "Has the bureau investigated this material?" FBI Agent Michael Gaeta, who was the assigned "handler" for CHS Steele, was convinced Steele was the source for the article and confronted him about it. Steele admitted he was behind the Mother Jones story.

102. Agent Gaeta's reaction to CHS Steele's behavior was surprise and disbelief. Gaeta thought that Steele's actions and attitude were not just "crazy source-related stuff," but "one of the craziest" he had seen in two decades of handling sources.

103. On or about November 1, 2016, Agent Gaeta advised Steele that he must cease collecting information for the FBI, and it was unlikely that the FBI would continue a relationship with him because of this serious violation of the CHS protocols.

104. Agent Gaeta reported Steele's misbehavior to FBI supervisors, including William Priestap, and on November 17, 2016, the FBI officially closed Steele as a source for cause.

105. In November 2016, Priestap and Peter Strzok went to London to assess Steele's credibility by gathering the opinions of persons who previously had professional contacts with Steele. They found some who described Steele as "smart" and a "person of integrity." But several lamented Steele's "poor judgment" or "lack of judgment" and his habit of "pursuing people [with] political risk but no intel value."

106. On November 21, 2016, DOJ official Bruce Ohr met with Lisa Page, Peter Strzok, Joe Pientka, and other FBI officials to discuss "Steele's background and reliability as a source and to identify his source network." Ohr advised them that Steele "was desperate that Donald Trump not get elected and was passionate about him not becoming the U.S. president." He also said that Steele had been hired by "a lawyer who does opposition research" and the

information about Trump and Russia was being relayed to Hillary Clinton's presidential campaign.

107. Thereafter, Ohr communicated with the FBI on 13 separate occasions in a successful effort to provide information he received from former CHS Steele, as well as information received from Glenn Simpson of Fusion GPS, and also a thumb drive of opposition research created by Ohr's wife, who was a Fusion GPS employee. In essence, Ohr became a go-between by which the FBI maintained ongoing contact with former CHS Steele and continued to rely on his allegations notwithstanding that Steele had been fired and supposedly terminated as a source of reliable information.

108. Another back-channel by which the FBI continued to gather new "reporting" by Steele was David Corn, the Mother Jones reporter who had written the article about Steele's accusations. Corn was a longtime friend of then-FBI General Counsel James Baker. Corn gave Steele memos to Baker and then Baker passed them on to Priestap.

109. An FBI liaison informed the Crossfire Hurricane team (at a minimum Agents Joe Pientka and Stephen Somma) in late November 2016 that: (i) Deputy Assistant Secretary of State Kavalec had met with Steele; (ii) she had taken notes of their meeting; (iii) the liaison could obtain information from Kavalec about the meeting; and (iv) according to Kavalec, the information from Steele's reporting about a Russian consulate being located in Miami was inaccurate. But the FBI liaison received no directives from the Crossfire Hurricane team to gather

information from Kavalec regarding *her* contact with Steele. The FBI did continue to receive information from Steele even though he had been terminated as a CHS source - for cause.

110. In December 2016, the FBI learned that one of Steele's alleged sources was Sergei Millian who had himself been the subject of an investigation by the FBI in 2009-2010 as a "National Security Threat" and possible Russian spy. In 2010, the FBI had initiated a request for FISA surveillance of Millian but withdrew the request after Millian left the United States. The FBI was to consider reopening the investigation if Millian ever returned to the United States. In addition, in late December 2016, Mr. Ohr told the FBI that he had met with Glenn Simpson of Fusion GPS and that Simpson had assessed that Millian was a Russian intelligence officer who was central in connecting Trump to Russia.

111. The application for the Second FISA Warrant was submitted to the FISC on January 12, 2017. It asserted that its relationship with Steele had been "suspended" (not terminated) because of his unauthorized disclosure of information to the press. Nonetheless, the FBI assessed that Steele's information was still reliable because previous information he had reported to the FBI had been verified and used in criminal proceedings. This was not true.

112. The FBI also failed to include relevant information provided to the FBI in November and December 2016 related to Steele's motivations and

reliability, which undermined his credibility and the trustworthiness of the information he provided.

113. Nor did the application disclose the evidence that Millian, the alleged ultimate source of the allegations against Dr. Page, might well be a Russian intelligence officer.

114. Notably, the application did not outline any foreign intelligence information that had been gathered during the first three months. Instead, the application contained the misleading conclusory statement that the requested warrant would "continue to produce foreign intelligence information."

115. On information and belief, the initial three months of FISA surveillance of Dr. Page had produced no foreign intelligence information and revealed no evidence at all of Dr. Page acting as a foreign agent of Russia.

116. There was insufficient evidence to support issuance of a warrant against Dr. Page when the application for the Second FISA Warrant was submitted to the FISC.

117. The application for the Second FISA Warrant was false and misleading.

118. If the application for the Second for the FISA Warrant had not been false and misleading, the warrant would not have been issued by the FISC.

C. <u>The Third FISA Warrant</u>

119. The Department of Justice has conceded to the FISC that there was insufficient evidence to support a

finding of probable cause when it sought the Third FISA Warrant.

120. The FBI interviewed Igor Danchenko over the course of three days, from January 24-26, 2017. Danchenko gave the FBI information that contradicted or undermined the allegations about Dr. Page that former CHS Steele had attributed to him. He said Steele's reporting was "misstated or exaggerated," and some of Danchenko's information was based on "rumor and speculation"; Danchenko "never expected Steele to put [Danchenko's] statements in reports or present them as facts"; Danchenko "made it clear to Steele that he/she had no proof to support the statements from [his] sub-sources and that 'it was just talk'"; Danchenko's information was "word of mouth and hearsay," "conversations that [he] had with friends over beers," statements made "in jest," etc.

121. These inconsistencies were not disclosed to the FISC in the application for the Third FISA Warrant. Rather, the application stated that Danchenko had been interviewed and found to be "truthful and cooperative." This was deliberately misleading because it invoked Danchenko's apparent credibility to buttress the allegations attributed to him in the two previous applications when, in fact, the information he provided undercut those allegations and the credibility of the persons' allegedly asserting them against Dr. Page: Millian, and vicariously, Steele.

122. In March 2017, two FBI agents conducted an "ambush interview" of Dr. Page, who spoke freely with

them, without the benefit of counsel. These two agents subsequently interviewed Dr. Page four additional times during March 2017. These interviews lasted a total of approximately ten hours. Dr. Page was candid and cooperative with the agents, and his answers undermined any contention that he was acting as an agent of a foreign power. An attorney advising Dr. Page then spoke to FBI attorney (and now defendant) Kevin Clinesmith about the FBI's interest in Dr. Page. Clinesmith was (unbeknownst to Dr. Page) assigned to provide support to FBI personnel working on Crossfire Hurricane. One topic they discussed was Evgeny Buryakov, a Russian spy who had posed as a New York banker. Dr. Page had cooperated with the FBI's investigation of Buryakov, who was convicted and sentenced to prison. Buryakov had just completed his sentence and was about to be deported to Russia. Further, Dr. Page's role as an FBI informant against the Russians in that case had recently been publicly revealed which meant that Dr. Page was certain to be contacted by the media for comment. Media reports of Dr. Page's comments would highlight that Dr. Page was a loyal American and not a Russian agent. Clinesmith told Dr. Page's attorney that he would prefer Dr. Page not comment or else hold off comment. Several days later, on April 7, 2017, the application for the Third FISA Warrant was submitted.

123. The FBI again asserted that the requested warrant would "continue to produce foreign intelligence information" although, upon information and belief, the prior six months of FISA surveillance of Dr. Page had revealed no evidence at all of Dr. Page acting as a foreign agent of Russia.

124. There was insufficient evidence to support issuance of a warrant against Dr. Page when the application for the Third FISA Warrant was submitted to the FISC.

125. The application for the Third FISA Warrant was false and misleading.

126. If the application for the Third FISA Warrant had not been false and misleading, the warrant would not have been issued by the FISC.

D. <u>The Fourth FISA Warrant</u>

127. The Department of Justice has conceded to the FISC that there was insufficient evidence to support a finding of probable cause when it sought the Fourth FISA Warrant.

128. The previous three FISA Warrant applications had concealed the fact that Dr. Page had been a CIA "operational contact."

129. Prior to the submission of the application for the Fourth FISA Warrant, Dr. Page had publicly stated that he had assisted the U.S. government in the past. During the preparation of the application, an FBI Supervisory Special Agent ("SSA") who would be the affiant for the application, asked Clinesmith to inquire of the CIA whether Dr. Page had ever been a source (operational contact) for the CIA.

130. Clinesmith knew that *if* Dr. Page had been a source for the CIA, that information must be disclosed to the FISC. However, disclosing this exculpatory fact now would expose the material omission of this same information from the prior three FISA Warrants. On June 15, 2017, Clinesmith sent a disingenuous email

to a CIA liaison inquiring whether Dr. Page had ever been a source for the CIA, and the CIA liaison responded by email that Dr. Page had been a CIA source. The CIA liaison directed Clinesmith's attention to the August 17, 2016 memorandum and supporting materials that CIA had previously provided to the FBI.

131. On June 19, 2017, in response to further inquiry from the SSA who was designated to sign the Fourth FISA Warrant on behalf of the FBI, Clinesmith falsely advised the SSA that Dr. Page had been a "sub source" but was "never a source" for the CIA. The SSA asked whether the FBI had this representation in writing and Clinesmith falsely stated that it did and that he would forward the document to the SSA. To conceal the exculpatory fact that Dr. Page had been a CIA source, and the omission of that fact from the prior three FISA Warrant applications, Clinesmith altered the email from the CIA liaison to falsely state that Dr. Page was "not a source" for the CIA. (Clinesmith subsequently pled guilty to making a false statement in violation of 18 U.S.C. Section 1001 (a)(3), *United States v. Clinesmith*, No. 20-cr-165 (D.D.C. August 19, 2020).

132. In reliance on the email altered by Clinesmith, the SSA designated to sign the Fourth FISA Warrant application did so.

133. On June 29, 2017, the application for the Fourth FISA Warrant was submitted to the FISC.

134. The application for the Fourth FISA Warrant, like the three preceding applications, did not advise the FISC that Dr. Page had been an operational

contact for the CIA, although the FBI Crossfire Hurricane team had this information in its possession since August 2016.

135. The application for the Fourth FISA Warrant again stated that Steele's Primary Sub-source, Danchenko, had been interviewed and found to be "truthful and cooperative." This was deliberately misleading because it invoked Danchenko's apparent credibility to buttress the allegations attributed to him in the three previous applications when, in fact, the information he provided undercut those allegations.

136. The FBI again asserted that the requested warrant would "continue to produce foreign intelligence information" although, upon information and belief, the prior nine months of FISA surveillance of Dr. Page had revealed no evidence at all of Dr. Page acting as a foreign agent of Russia.

137. There was insufficient evidence to support issuance of a warrant against Dr. Page when the application for the Fourth FISA Warrant was submitted to the FISC.

138. The application for the Fourth FISA Warrant was false and misleading.

139. If the application for the Fourth FISA Warrant had not been false and misleading, the warrant would not have been issued by the FISC.

140. Having unlawfully obtained the four warrants to surveil Dr. Page, the individual Defendants and other FBI personnel, both known and unknown to Dr. Page, used the warrants to engage in surveillance of

him in the manner and for the time periods prescribed in the four warrants.

141. Pursuant to each of the FISA warrants and all of them collectively, Defendants, known and unknown to Dr. Page, obtained Dr. Page's electronic communications, both written and oral, in the manner and for the time periods prescribed in the four warrants.

142. Having obtained communications pursuant to each of the four FISA Warrants, the Defendants, both known and unknown, thereafter used and disclosed those communications, to among other things, obtain the subsequent FISA Warrants, unlawfully pursue investigative ends, and for unlawful leaks to the media and others.

VI. INDIVIDUAL DEFENDANTS' ACTIONS, OMISSIONS AND MISREPRESENTATIONS

143. In addition to the actions described elsewhere in this complaint, the Defendants engaged in the following actions.

A. James Comey

144. On or about August 17, 2016, Comey received information from the CIA establishing that Dr. Page was an "operational contact" for the CIA during the period of 2008-2013.

145. On or about September 7, 2016, a senior CIA official forwarded an investigative referral to Comey and Peter Strzok about a potential plan to divert attention from presidential candidate Hillary Clinton's alleged mis-use of a private email server when she was Secretary of State by alleging the

existence of collaboration between the Trump campaign and Russian hackers to interfere in the election.

146. Comey first learned of the existence of the Steele dossier not later than the end of September 2016, probably the third week of September. He understood at that time that the dossier was funded by political opposition to Presidential candidate Donald Trump. Dr. Page wrote to Comey on September 25, 2016, denying that he participated in any collaboration with Russians on behalf of the Trump campaign. He also referred to his long-term interactions with the CIA and FBI.

147. Dr. Page's letter to Comey was received and shared with the Crossfire Hurricane team. "At a minimum, the letter provides us a pretext to interview," Strzok wrote to Lisa Page on Sept. 26, 2016.

148. Comey approved the FBI's monitoring and surveillance of Dr. Page by CHS Stefan Halper and, on information and belief, was advised about the results of the conversation in which Dr. Page refuted the allegations that he was an agent of Russia.

149. Despite the foregoing, the FBI did not interview Dr. Page before applying for the First FISA Warrant. And the application did not advise the FISC that Dr. Page had been a source for the CIA.

150. Nonetheless, Comey signed the first three FISA Warrant applications to surveil Dr. Page. Comey signed the application for the First FISA Warrant that was submitted to the FISC on October 21, 2016. Comey read this application because of its sensitivity.

151. Comey was updated on the status of the Crossfire Hurricane investigation every 2 to 4 weeks. These status updates were provided by, among others, McCabe, Priestap, and Strzok. Comey was often briefed on specific investigative actions the Crossfire Hurricane team had taken or planned to take. Evans late as May 2017, mere days before his removal as FBI Director, Comey was briefed on the status of the Crossfire Hurricane investigation, by Auten, who was five levels below him in the FBI hierarchy.

152. Comey signed the application for the Second FISA Warrant that was submitted on January 12, 2017. In that same month, Comey described the information from CHS Steele—which was relied on by the FBI for the 'probable cause" required in order to obtain the FISA Warrants—as "unverified" in a conversation with President Trump.

153. Comey knew that Danchenko had been identified as Steele's Primary Sub-source and, on information and belief, knew the results of the FBI's interview of Danchenko in late January 2017. Nonetheless, on or about April 7, 2017, Comey signed the application for the Third FISA Warrant.

154. Comey's endorsement of these applications falsely assured the FISC that the Woods Procedures had been followed.

B. <u>Andrew McCabe</u>

155. McCabe served as the deputy director of the FBI under Comey and was involved in decisions to surveil Dr. Page from early in the Crossfire Hurricane investigation.

156. On or about August 25, 2016, McCabe directed a supervisor working on the Crossfire Hurricane investigation to contact the FBI New York Field Office for information that could assist the Crossfire Hurricane investigation. At that time, agents in the New York Field Office had possession of Steele's reports.

157. On information and belief, McCabe approved the Crossfire Hurricane team's use of Steele in the investigation. McCabe ignored warnings that more information about Steele's motives was needed before relying on his allegations. Specifically, DOJ Principal Deputy Attorney General Mary McCord told McCabe during a phone call that the FISA application needed more information about who hired Steele.

158. On October 11, 2016, Strzok messaged Lisa Page that the FISA application to surveil Dr. Page could not gain approval at DOJ without a call from McCabe.

159. On October 12, 2016, Strzok and others briefed McCabe and Comey about the concerns of DOJ attorney Stuart Evans had about Steele. Evans wanted more scrutiny of Steele's motives, and believed that before pursuing a surveillance warrant against someone associated with a presidential campaign, leadership of both the FBI and DOJ should explicitly sign off on the request. McCabe and Comey were "supportive" and approved moving forward with the FISA warrant application without further scrutiny of CHS Steele, from whom the FBI's "probable cause" information was received.

160. In or about October 2016, then-Associate Attorney General Bruce Ohr briefed McCabe about Steele's accusations regarding Dr. Page.

161. McCabe acknowledged that he received regular briefings on the progress of Crossfire Hurricane and discussed the investigation with Comey at regular briefings.

162. McCabe approved the application for the Second FISA Warrant, including the assertion that the three-month surveillance of Dr. Page, pursuant to the First FISA Warrant, had been "very productive" although the surveillance had yielded no evidence of any coordination between Dr. Page and Russian officials.

163. McCabe signed the application for the Fourth FISA Warrant. McCabe stated to the OIG that he did not recall whether he reviewed the entire FISA application package or whether he relied primarily upon the cert memo (sic) and his familiarity with the Carter Page investigation before he made the required certification.

C. <u>Peter Strzok</u>

164. Peter Strzok was the FBI Deputy Assistant Director for Counterintelligence and performed a supervisory role for the Crossfire Hurricane investigation.

165. According to Strzok, Comey and McCabe had "okayed" the Crossfire Hurricane team's approach to use Steele's dossier in the investigation.

166. Strzok was aware that, in August 2016, the CIA had confirmed that Carter Page was an "operational contact" for that agency.

167. Strzok was a recipient of the September 7, 2016, investigation referral from the CIA regarding "U.S. Presidential candidate Hillary Clinton's approval of a plan concerning U.S. Presidential candidate Donald Trump and Russian hackers hampering U.S. elections as a means of distracting the public from her use of a private mail server."

168. In October 2016, as the FBI Crossfire Hurricane team was attempting to complete the application for the First FISA Warrant, DOJ attorney Stuart Evans expressed reluctance to proceed with the application. Evans wanted more scrutiny of Steele's motives, and believed that before pursuing a surveillance warrant against someone associated with a presidential campaign, leadership of both the FBI and DOJ should sign off on the request. In messages to Lisa Page, Strzok said, "Currently fighting with Stu for this fisa" and "Hey-The FISA will probably not go forward without a call from [McCabe]."

169. Strzok and the FBI Crossfire Hurricane team assumed the Hillary Clinton campaign or the Democratic Party was paying for Steele's research.

170. On October 12, 2016, Strzok briefed McCabe and Comey about Evans' concerns and pushed to proceed with the application without further scrutiny of Steele.

171. Strzok knew that Danchenko had been identified as Steele's Primary Sub-source and knew

that Danchenko had been interviewed by the FBI in January 2017.

172. Strzok made typewritten annotations to/comments on a February 14, 2017 New York Times article about alleged Russian intelligence ties to the Trump campaign. These comments show that Strzok and others in the FBI were well aware of the issues with the Steele reports that had been revealed by the FBI's January 2017 interview with Steele's Primary Sub-source, Igor Danchenko. Strzok commented that "[r]ecent interviews and investigation, however, reveal Steele may not be in a position to judge the reliability of his sub-source network."

173. The document further shows that the FBI's assertion to the FISC that "the FBI believes that Russia's efforts to influence U.S. policy were likely being coordinated between the RIS [Russian Intelligence Services] and Page, and possibly others" was a knowing misrepresentation. This is evident from comments on the Times article made by Strzok in which he asserted that "[w]e have not seen evidence of any individuals affiliated with the Trump team in contact with IOs [Intelligence Officials] . . . We are unaware of ANY Trump advisors engaging in conversations with Russian intelligence officials.

D. <u>Brian Auten</u>

174. Brian Auten served as a supervisory intelligence analyst in the FBI. He has written an article on the ethics of spying. He had five or six intelligence analysts working under him during the Crossfire Hurricane investigation.

175. Auten was assigned to the Crossfire Hurricane investigation from its inception in July 2016 and supervised its analytical efforts throughout 2017. He played a key supportive role for the agents preparing the FISA applications, including reviewing the probable-cause section of the applications and providing the agents with information about Steele's sub-sources noted in the applications. He also helped prepare and review the renewal drafts.

176. Auten assisted the case agents in providing information on the reliability of Steele and his sources and reviewing for accuracy their information cited in the body of the applications, as well as all the footnotes. His job was also to fill gaps in the FISA applications or bolster weak areas.

177. Auten was aware on or about September 7, 2016, that the FBI received an investigative referral from the CIA regarding U.S. Presidential candidate Hillary Clinton's approval of a plan concerning Donald Trump and Russian hackers hampering U.S. elections as a means of distracting the public from her use of a private email server.

178. Auten was contemporaneously aware of the letter that Dr. Page sent to FBI Director Comey on September 25, 2016, in which he stated that he had interacted with members of the U.S. intelligence community, including the FBI and the CIA, for many decades and that he eagerly awaited FBI's call to discuss any final questions they might possibly have.

179. Auten falsely enhanced the credibility of Steele. While most of Steele's past reporting as an informant for the FBI had not been corroborated and

had never been used in a criminal proceeding, Auten wrote that it had in fact been "corroborated and used in criminal proceedings."

180. Auten failed to disclose to the FISC negative feedback from British Intelligence Service colleagues of Steele. They told Auten during a visit he made to London in December 2016 that Steele exercised "poor judgment" and pursued as sources "people with political risk but no intel value."

181. Auten determined that some of the allegations in Steele's reports were inaccurate, such as the allegation that Paul Manafort used Dr. Page as an intermediary. But he did not include this information in any of the applications for the FISA Warrants.

182. For example, Auten also knew that the Steele reports mentioned a non-existent Russian consulate in Miami, but he did not include this information in any of the applications used for the FISA Warrants.

183. Auten knew at the time that on December 18, 2016, the CIA expressed concern to the FBI about the lack of vetting for the Steele election reporting and believed it should not be included in the intelligence community assessment as it was Internet rumor.

184. Auten also identified issues with Steele's sources. Auten knew of, and met, with Steele's Primary Sub-source, Danchenko. Auten learned in January 2017 that Danchenko was based in the United States, yet intentionally mispresented or failed to correct the statement in the applications for the Third and Fourth FISA Warrants that Danchenko was Russia-based. Auten participated in the 3-day FBI interview of Danchenko that took place in January

2017. While Auten found Danchenko to be truthful and cooperative, he also found that Danchenko contradicted key claims in Steele's reports. Even though Auten knew Steele was working for the Clinton campaign by early January 2017, he did not seek to include this information in the applications for the Third and Fourth FISA Warrants.

E. Kevin Clinesmith

185. Kevin Clinesmith served with the FBI as Assistant General Counsel in the National Security and Cyber Law Branch of the FBI's Office of General Counsel. Clinesmith was responsible for providing legal support to FBI personnel working on Crossfire Hurricane. He was one of the FBI personnel who communicated with the CIA with respect to the Crossfire Hurricane investigation.

186. Clinesmith also provided support to FBI personnel working with the National Security Division of the DOJ to prepare FISA applications to obtain authority from the FISC to conduct surveillance on Dr. Page.

187. Prior to the issuance of the Fourth FISA Warrant, Dr. Page had publicly stated that he had previously worked with (favorably assisted) the U.S. intelligence community agencies.

188. An FBI Supervisory Special Agent, (specific identity as yet unknown to Dr. Page), who was to be the affiant on the Fourth FISA warrant application asked Clinesmith to ask CIA whether Dr. Page had ever been a source for CIA in light of Dr. Page's assertion.

189. On June 15, 2017, Clinesmith sent an email to a CIA liaison inquiring whether Dr. Page was a CIA source in any capacity because the FBI would need to disclose that on the next FISA application.

190. The CIA liaison responded the same day and included a list of documents that the CIA had previously provided to members of the Crossfire Hurricane team that provided the answer, and also confirmed that Dr. Page "was or is" a source for the CIA. Clinesmith acknowledged the email, stated he was examining the documents, and thanked the CIA liaison for the information.

191. The FBI SSA who would be the affiant for the application for the Fourth FISA Warrant followed up with Clinesmith a few days later and asked whether Clinesmith had confirmed if Dr. Page was a CIA source. During a series of instant messages, Clinesmith reported that Dr. Page was a "sub-source" and "was never a source." Clinesmith further stated that the CIA confirmed explicitly that Dr. Page was never a source. The SSA asked if they had that representation in writing and Clinesmith agreed to forward the email from the CIA liaison.

192. On June 19, 2017, after this instant message exchange, Clinesmith forwarded an altered version of the CIA liaison's email to the SSA. Clinesmith altered the original text of the email to read that Dr. Page was "not a 'source.'"

193. Clinesmith had expressed dismay at the prospect of having to write a "terrible footnote" apprising the FISC that such a salient fact – that Dr.

Page had been a source for the CIA – was only at this late date being brought to the Court's attention.

194. Consequently, information about Dr. Page's history or status as a CIA operational contact was not included in the application for the Fourth FISA Warrant. Clinesmith was subsequently criminally charged on August 14, 2020, with one count of making false statements in violation of 18 U.S.C. § 1001(a)(3) for his actions in misleading the SSA and altering the email regarding Dr. Page's status as an operational contact of the CIA.

F. Lisa Page

195. Lisa Page was an FBI attorney and was Special Counsel to Andrew McCabe. She was intent on stopping Donald Trump from being elected President. She facilitated obtaining the initial FISA warrant for Dr. Page in the face of doubts voiced by the DOJ and others.

196. She also facilitated the leaks of information about the FBI's FISA warrants regarding Dr. Page.

197. The text messages between Lisa Page and Strzok about Donald Trump during the Crossfire Hurricane investigation and preparation of the FISA warrants against Dr. Page "were so inappropriate and intertwined with their FBI work that they raised concerns about political bias influencing official duties," according to the Department of Justice.

G. Joe Pientka III

198. Joe Pientka served as an FBI supervisory special agent on Crossfire Hurricane. He signed an authorization to submit the application for the First

FISA Warrant. Pientka was responsible for compliance with the Woods Procedures by confirming the completion of the Woods File for the warrant application, and for double checking the factual accuracy review to confirm that the file contained appropriate documentation for each of the factual assertions in the FISA application. Contrary to Pientka's representation, the Woods File was inaccurate, incomplete, or unsupported by appropriate documentation.

199. Among other things, Pientka failed to verify and correct the false statement in the application for the First FISA Warrant that Steele's reporting had been corroborated and used in criminal proceedings. Pientka also disregarded a requirement in the Woods Procedure to confirm that Steele's Handling Agent, Michael Gaeta, had reviewed and approved the content in the application for the First FISA Warrant.

200. Pientka was aware of Dr. Page's prior support to the FBI in a 2016 federal case in New York involving the incarceration and later deportation of a Russian spy. That information about Dr. Page was not provided to the FISC in any of the FISA Warrant applications, however.

H. <u>Stephen Somma</u>

201. Stephen Somma was an FBI counterintelligence investigator in the New York Field Office and was referred to as "Case Agent 1" in the Horowitz Report. He was one of the original team members of Crossfire Hurricane who had primary responsibility over the investigation of Dr. Page.

202. He opened the case file on Page, and he first proposed surveillance on Page. In approximately August 2016, Somma contacted FBI's Office of the General Counsel (OGC) about the possibility of seeking FISA authority targeting Dr. Page to conduct electronic surveillance.

203. On August 15, 2016, the FBI's OGC told Somma that he needed more to establish probable cause for a FISA warrant targeting Dr. Page. Thereafter, Somma seized on the allegations about Dr. Page provided by CHS Steele as a basis to obtain a FISA Warrant. Somma was also the FBI handler for Stefan Halper, a longtime confidential human source who was tasked with meeting Page and other associates of the Trump campaign. He failed to disclose exculpatory statements that both Page and George Papadopoulos independently made on separate occasions to Halper during secretly recorded conversations before the 2016 election. In particular, Page told Halper that he had no communications with Paul Manafort and denied the alleged meetings with Sechin and Divyekin (the two sanctioned Russians with close ties to Russian President Vladimir Putin).

204. Somma also received information from the CIA in August 2016 that Page had a longstanding relationship with that agency. He did not fully and accurately divulge that information to others at the FBI.

205. When Somma was explicitly asked in late September 2016 by a DOJ attorney assisting on the FISA application about Page's prior relationship with the CIA, Somma did not accurately describe the

nature and extent of the information the FBI received from the CIA. Somma advised the attorney that Dr. Page did meet with a U.S. government agency, but that the interactions took place while Dr. Page was in Moscow (which was between 2004 and 2007) and were "outside scope." Based upon this response, the attorney did not include information about Dr. Page's prior interactions with the CIA in the application for the First FISA Warrant.

206. In seeking the First FISA Warrant, Somma mischaracterized the extent to which the FBI had previously relied on CHS Steele's prior reporting. This resulted from his failure to seek review and approval from Steele's handling agent, as the Woods Procedures required.

207. Somma also sought to hide from DOJ attorneys the political bias that made Steele's reports about Dr. Page suspect. Stuart Evans asked whether Steele "is affiliated with either campaign and/or has contributed to either campaign." On October 7, 2016, the DOJ Unit Chief this question was emailed to the Crossfire Hurricane team. On October 10, 2016, Somma responded but addressed only the second part of the question, stating that Steele was most likely a foreign national and therefore unable to contribute to either campaign. Because he did not fully address the question, the Unit Chief asked him again, on October 11, 2016, whether Steele was affiliated with and/or had contributed to either presidential campaign. Again, Somma answered only the second part of the question, confirming that Steele had not contributed to any campaign and was not a U.S. person. Evans was frustrated and annoyed by this answer and asked the

question a third time. At that point, the FBI finally responded that they assumed Steele had been paid to develop political opposition research.

208. Somma's handwritten notes from a December 2016 team meeting reflect that the Crossfire Hurricane team was told that Steele "may have some judgment problems," but this information was never disclosed in subsequent applications to renew the FISA Warrant.

209. Somma participated in the FBI's January 2017 interview of Igor Danchenko, the Primary Sub-Source in the Steele reports for the allegations about Dr. Page. During this interview, Danchenko gave the FBI information that contradicted assertions made in the initial application for the FISA Warrant. But Somma withheld this development from the FISC in the applications for the Third and Fourth FISA Warrants.

210. In March 2017, Somma and another FBI agent conducted an "ambush interview" of Dr. Page. Dr. Page spoke freely to them, without the benefit of counsel. Somma and the second agent subsequently interviewed Dr. Page four additional times during March 2017. These interviews lasted a total of approximately ten hours. Dr. Page was completely honest with the agents, and his answers undermined any contention that he was acting as an agent of a foreign power.

VII. CONGRESSIONAL INVESTIGATIONS

211. After the FISA abuse targeting Dr. Page was exposed, there were various Congressional investigations. Defendants Comey, McCabe, and

others were questioned under oath during those investigations and made significant admission that the FISA Warrant application process - which they conducted – was flawed, while nevertheless trying to avoid responsibility for it.

212. On September 30, 2020, Comey testified before the Senate Judiciary Committee Hearing on the Oversight of the Crossfire Hurricane Investigation, as follows:

Senator Graham:

> One last question to you, Director Comey, and I'll turn it over to Senator Lee. Knowing then what you know now about all the things that we've come to find, would you have still signed the warrant application against Carter Page in October, January, and April?

Comey:

> No. I would want a much more complete understanding of what we-

. . .

Comey:

> My answer was no, not without a much fuller discussion of how they were thinking about their disclosure obligations to the court.

213. On November 10, 2020, McCabe testified in front of the Senate Judiciary Hearing on the Oversight of the Crossfire Hurricane Investigation, and in his opening statement testified:

> "To me, any material misrepresentation or error in a FISA application is unacceptable.

> Period. The FBI should be held to the standard of scrupulous accuracy that the court demands. FISA remains one of the most important tools in our country's efforts to protect national security."

214. Senator Graham questioned McCabe about the FISA warrants:

> **Senator Graham**:
>
> If you knew then what you know now, would you have signed the warrant application in June of 2017 against Carter Page?
>
> **McCabe**:
>
> No, sir.

215. Senator Graham further questioned McCabe:

> **Senator Graham:**
>
> Okay. Finally, who is responsible for ruining Mr. Carter Page's life? If it's not you, if not Rosenstein, if it's not Comey, if it's not Sally Yates, who's responsible for putting together the information provided to the FISA court that was completely devoid of the truth, lacking material facts, completely misrepresented what Mr. Page did and how he did it, who we look to for that responsibility?
>
> **McCabe:**
>
> Well, sir, I don't agree with the way that you've characterized the entirety of the-
>
> **Senator Graham:**
>
> That's what the court said.

McCabe:

I think as the IG pointed out in the conclusions of their report, that-

Senator Graham:

Who's responsible, Mr. McCabe?

McCabe:

Everyone who … Every person who played a role-

. . .

Senator Graham:

Okay. The question is who's responsible?

McCabe:

And I think that we are all responsible for the work that went into that FISA. I am certainly responsible as a person in a leadership position with oversight over these matters. I accept that responsibility fully. I cannot-

Senator Graham:

Did you mislead the FISA court?

McCabe:

I signed a package that included numerous factual errors or failed to include information that should have been brought to the court.

216. Senator Cornyn also questioned McCabe:

Senator Cornyn:

Mr. McCabe, who should be held accountable for the submission of a foreign intelligence

surveillance act application that contained a lie about Carter Page with regard to his activities on behalf of another agency of the federal government? And who should be held accountable for relying on the now discredited Steele dossier? I think that's the question people would like an answer to. Who should be held accountable?

McCabe:

Senator, I think all of the people involved in this work should be and have been held accountable. I feel like the oversight process that we're engaged in now, the participation and cooperation and the efforts of the inspector general, I think all of these elements of the work that the FBI has done internally to address everything from individuals to processes involved, I think those are all essential steps to ensure that these errors are fixed and that we take appropriate steps not to make them in the future.

217. Senator Kennedy also questioned McCabe:

Senator Kennedy:

Thank you, Mr. Chairman. Mr. McCabe, who is responsible for the misbehavior outlined by an Inspector General Horowitz in his report about [sic] Misfire Hurricane?

McCabe:

Well, it depends on what you're referring to, Senator. If you're referring to the intentional misconduct committed by Mr. Clinesmith, quite

obviously, Mr. Clinesmith's responsible for that. I think from a command perspective, Director Comey and myself and our subordinate leaders are all responsible for the failures in that package that we allowed to go forward

. . .

VIII. UNLAWFUL DISCLOSURES OF PROTECTED INFORMATION AND FAILURE TO PERMIT REVIEW AND AMENDMENT OF GOVERNMENT RECORDS

A. Unlawful disclosure or use of FISA and Privacy Act protected records and information

218. Defendants, known and unknown to Dr. Page, unlawfully leaked FISA and Privacy Act protected records and information concerning Dr. Page to the media.

219. Defendants, known and unknown to Dr. Page, possessed this information concerning Dr. Page from the Crossfire Hurricane investigation, the FISA Warrant applications, and the results of the FISA surveillance.

220. On Monday, April 10, 2017, Peter Strzok texted Lisa Page to discuss a "media leak strategy," stating "I had literally just gone to find this phone to tell you I want to talk to you about media leak strategy with DOJ before you go."

221. On Tuesday, April 11, 2017, the Washington Post broke the story about the FISA Warrants targeting Dr. Page, including that a FISA warrant had

been issued in 2016 and had been renewed at least once. The article included the following statements:

a. The FBI and the Justice Department obtained the warrant targeting Carter Page's communications after convincing a Foreign Intelligence Surveillance Court judge that there was probable cause to believe Page was acting as an agent of a foreign power, in this case Russia, according to the officials.

b. The counterintelligence investigation into Russian efforts to influence U.S. elections began in July, officials have said. The FBI also began investigating Page in July as part of the probe, officials said.

c. The government's application for the surveillance order targeting Page included a lengthy declaration that laid out investigators' basis for believing that Page was an agent of the Russian government and knowingly engaged in clandestine intelligence activities on behalf of Moscow, officials said.

d. In July, Page traveled to Moscow, where he delivered a speech harshly critical of the United States' policy toward Russia.

e. While there, Page allegedly met with Igor Sechin, a Putin confidant and chief executive of the energy company Rosneft, according to a dossier compiled by a former British intelligence officer and cited at a congressional hearing by Rep. Adam B. Schiff (Calif.), the ranking Democrat on the House

Intelligence Committee. Officials said some of the information in the dossier has been verified by U.S. intelligence agencies, and some of it hasn't, while other parts are unlikely to ever be proved or disproved.

f. Page is the only American to have had his communications directly targeted with a FISA warrant in 2016 as part of the Russia probe, officials said.

222. On Wednesday, April 12, 2017, Peter Strzok texted Lisa Page to warn her that two media articles were coming out about her "namesake" Carter Page and one was worse than the other.

223. On Saturday, April 22, 2017, Peter Strzok sent another text to Lisa Page stating that the "article is out!" congratulating her on a job well done, saying "Well done, Page."

224. That same day the New York Times published a lengthy article entitled "Comey Tried to Shield the F.B.I. From Politics. Then He Shaped an Election." Much of this article focused on the investigation of Hillary Clinton's emails but the article then turned to Dr. Page and included the following statements:

a. Days after Mr. Comey's news conference, Carter Page, an American businessman, gave a speech in Moscow criticizing American foreign policy. Such a trip would typically be unremarkable, but Mr. Page had previously been under F.B.I. scrutiny years earlier, as he was believed to have been marked for recruitment by Russian spies. And he was now a foreign policy adviser to Mr. Trump.

b. In late July, the F.B.I. opened an investigation into possible collusion between members of Mr. Trump's campaign and Russian operatives. Besides Mr. Comey and a small team of agents, officials said, only a dozen or so people at the F.B.I. knew about the investigation. Mr. Strzok, just days removed from the Clinton case, was selected to supervise it.

c. In late August, Mr. Comey and his deputies were briefed on a provocative set of documents about purported dealings between shadowy Russian figures and Mr. Trump's campaign. One report, filled with references to secret meetings, spoke ominously of Mr. Trump's "compromising relationship with the Kremlin" and threats of "blackmail."

d. The reports came from a former British intelligence agent named Christopher Steele, who was working as a private investigator hired by a firm working for a Trump opponent. He provided the documents to an F.B.I. contact in Europe on the same day as Mr. Comey's news conference about Mrs. Clinton. It took weeks for this information to land with Mr. Strzok and his team.

e. Mr. Steele had been a covert agent for MI6 in Moscow, maintained deep ties with Russians and worked with the F.B.I., but his claims were largely unverified. It was increasingly clear at the F.B.I. that Russia was trying to interfere with the election.

225. On information and belief, Strzok and Lisa Page collaborated to disclose protected information regarding Dr. Page to the media and sought and obtained approval to do so from McCabe.

226. On information and belief, Defendants, known and unknown to Dr. Page, but including but not limited to, Comey, McCabe, Strzok, and Page, leaked information and records concerning Dr. Page, including but not limited to the existence of the FISA Warrants, the contents of the warrant applications, and the results of the Warrants, that were protected from disclosure under the FISA and the Privacy Act to media outlets, including the New York Times, the Washington Post, and possibly others.

227. The FISA warrant applications targeting Dr. Page identify him by name. The applications are retrievable by Dr. Page's name or other personal identifier in DOJ and FBI record systems.

228. On information and belief, the results obtained from the FISA Warrants approving surveillance of Dr. Page identified him by name (or other personal identifiers) and are retrievable by Dr. Page's name or personal identifier in an FBI records system.

229. The Defendants unlawfully obtained, disclosed, and used information and records regarding Dr. Page, including, but not limited to, the information contained in the warrant applications, the applications themselves and the results of the surveillance on him in ways known and unknown to him due to the secrecy of the FISA and investigative processes. These ways included, but are not limited to:

leaks to the media, obtaining each subsequent renewal warrant, obtaining additional surveillance and investigative information without probable cause,

230. On information and belief, Defendants used the information obtained from the issued FISA warrants to obtain each of the subsequent warrants *as well as* to conceal that: earlier applications had lacked probable cause, contained material errors and omission, made misrepresentations to the FISC that misled the FISC; to obtain or justify additional investigative measures against Dr. Page and/or others; to investigate, prosecute, and review the prosecution of other individuals; to request investigative assistance from other law enforcement and intelligence agencies, both foreign and domestic; to include the information in government databases of searchable surveillance material; and, to justify the on-going or prior unlawful surveillance to other government officials and elected leaders.

231. The United States has conceded in several filings with the FISC that it has used and disclosed the information obtained from the unlawful FISA warrants on Dr. Page in numerous ways, some of which were then specifically prohibited by the FISC. *See* filings in FISC Docket Nos.: 16-1182, 17-52, 17-375, and 17-679.

B. <u>DOJ OIG Investigation</u>

232. The DOJ OIG began an investigation into the FBI and DOJ's handling of the FISA Warrants targeting Dr. Page in March 2018.

233. The Horowitz Report was released on December 9, 2019. This was the first official

authoritative source to disclose that the FISA warrants in their entirety lacked probable cause and due to materials errors and omissions were unlawfully obtained.

234. In the Fall of 2019, in advance of its release, the Horowitz Report was provided by the DOJ OIG to various Defendants and others for review and comment.

235. Dr. Page was not contacted about or afforded an opportunity for review and comment, however, in advance of the report's release.

236. At that time, it was evident that the release of the Horowitz Report was forthcoming, but no date had been publicly set for its release, and the release could have come at any time.

237. On September 13, 2019, IG Horowitz wrote to members of Congress to advise them that his office had nearly concluded its work and would be entering the review and comment phase of its investigation.

238. Both before and immediately upon publication of IG Horowitz's letter, Dr. Page sent emails to DOJ and DOJ OIG seeking his right to review and amend the forthcoming report pursuant to the Privacy Act. Dr. Page sent no fewer than two emails in September asserting his rights, but received no reply to them.

239. Media reports in early October 2019 began to describe the release of the Horowitz Report as imminent.

240. Thus, on October 10, 2019, Dr. Page requested the right to view and amend the Horowitz Report pertaining to the FISA warrants to surveil him, citing

his rights to do so under the Privacy Act. He made these requests by email to the DOJ Office of Privacy and Civil Liberties and copied IG Horowitz and Mr. Durham.

241. DOJ OIG did not respond to Dr. Page's requests of October 10, 2019.

242. On October 16, 2019, Dr. Page inquired into the status of his requests to view and amend the Horowitz Report. He made this inquiry by email to the DOJ Office of Privacy and Civil Liberties, and copied IG Horowitz, Mr. Durham, and Peter A. Winn, the Acting Chief Privacy and Civil Liberties Officer of the DOJ.

243. On October 16, 2019, Mr. Winn replied that they were reviewing Dr. Page's email request. This response did not constitute the "prompt" reply to Dr. Page's request to review and amend records required by the Privacy Act.

244. On October 21, 2019, Dr. Page wrote a third time to DOJ OIG demanding his right to review and amend the Horowitz Report and advising that he would promptly file suit if he was not afforded these rights. He emailed this demand to Mr. Winn and IG Horowitz and copied the DOJ Office of Privacy and Civil Liberties.

245. Dr. Page's repeated demands for his rights to review and amend the Horowitz Report constituted exhaustion of his administrative remedies under the Privacy Act and DOJ regulations.

246. DOJ OIG failed to comply with the Privacy Act and its own regulations regarding administrative remedies in response to Dr. Page's requests.

247. DOJ OIG never complied with its obligations under the Privacy Act or with Dr. Page's rights under the Privacy Act to review and amend information contained in the Horowitz Report.

248. On October 21, 2019, Dr. Page filed suit against the DOJ in the U.S. District Court for the District of Columbia for violation of his rights under the Privacy Act under docket no. 1:19-cv-03149.

249. On November 12, 2019, Dr. Page received a letter from Jonathan Malis, General Counsel for DOJ OIG, in response to his request to view and amend the Horowitz Report. This letter does not address his requests under the Privacy Act, but instead informs Dr. Page that he would not be contacted for an OIG interview. Dr. Page has had no further communication from DOJ regarding his request to view and amend the Horowitz Report.

250. The Horowitz Report contains numerous errors that Dr. Page has a right to have amended to reflect accurate information.

251. On September 11, 2020, Dr. Page filed a stipulation dismissing without prejudice the Privacy Act case, docket no. 1:19-cv-03149, in the U.S. District Court for the District of Columbia.

252. The Horowitz Report is a record which identifies Dr. Page by name. The report names Dr. Page within its first 100 words, contains approximately 558 specific references to Dr. Page, and

the subject of the report is the unlawful surveillance of Dr. Page by Defendants. On information and belief, it is retrievable by Dr. Page's name or personal identifier in a DOJ OIG records system.

253. Further, the Horowitz Report is contained in a DOJ OIG system of records which is retrievable by personal identifiers and the agency in practice retrieves records from the system this way.

IX. DAMAGES TO DR. PAGE

254. As a result of Defendants' actions, Dr. Page has suffered the following kinds of harm and damages, among others:

a. Receiving death and kidnapping threats;

b. Inability to travel safely and freely, either domestically or internationally;

c. Irreparable damage to his reputation;

d. Economic losses, (past, present and future) from the destruction of his ability to continue conducting any kind of business through his own companies, because for example, persons, governments and entities would not contract with him, including banks and other business entities with whom he had previously worked;

e. Economic losses (past, present and future), from being rendered effectively unemployable;

f. Economic losses due to previously unnecessary expenses directly caused from having to relocate and travel and other

security measures in response to death and kidnapping threats;

g. Economic losses due to the otherwise unnecessary expenses of responding to government investigations and being involved in litigation, including document preparation, costs, expenses, expert fees, and attorneys' fees, for this and other cases,

h. Pain and suffering damages – anxiety, stress, etc., for himself, and in response to the effects on close family members of death and kidnapping threats against him.

255. These damages were all foreseeable by the Defendants. Particularly as to the violations of the FISA statute, it was foreseeable to the Defendants that spying on Dr. Carter without probable cause, and leaking the existence of the initial FISA warrant the renewals thereof, and any information obtained pursuant to those warrants would cause damages to Dr. Page.

CAUSES OF ACTION

FIRST CAUSE OF ACTION
FOREIGN INTELLIGENCE SURVEILLANCE ACT (OCTOBER 21, 2016 FISA WARRANT – ORIGINAL)
(Against All Individual Defendants)

256. Plaintiff re-alleges and incorporates by reference the allegations of paragraphs 1-255 above, as if fully set forth herein.

257. It is a criminal offense to "intentionally . . . (1) engage[ ] in electronic surveillance under color of

law except as authorized by" identified statutory provisions, or "(2) disclose[ ] or use[ ] information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized" by FISA or another "express statutory authorization," or to aid or abet such an offense. 50 U.S.C. § 1809(a); 18 U.S.C. § 2.

258. Surveillance is not authorized when the authorization for it has been obtained by false and misleading statements. As the Supreme Court stated in *Franks v. Delaware*, "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a truthful showing." 438 U.S. 154, 164-165 (1978) (internal quotation omitted, alteration and emphasis in original).

259. The FISA provides that "[a]n aggrieved person . . . who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section 1809 of this title shall have a cause of action against any person who committed such violation." 50 U.S.C. § 1810.

260. As set forth above, pursuant to the First FISA Warrant issued on October 21, 2016, which was procured on the basis of false and misleading information provided to the FISC, the individual Defendants and others, known and unknown to Dr. Page, engaged in electronic surveillance against Dr. Page that was not lawfully authorized by FISA, and disclosed or used information obtained by that

electronic surveillance knowing or having reason to know that the information was obtained through electronic surveillance not lawfully authorized by FISA, and aided and abetted one another in doing so.

261. The individual Defendants' acts were willful, knowing, deliberate and malicious.

262. As a direct and proximate result of Defendants' actions, Dr. Page suffered harm. He was falsely portrayed as a traitor to his country, lost at least tens of millions of dollars of business opportunities and future lifetime earning potential, and has suffered and will continue to suffer mental and emotional pain for his lifetime, in addition to other pecuniary harms such as costs, fees, attorneys' fees and other losses.

SECOND CAUSE OF ACTION
FOREIGN INTELLIGENCE SURVEILLANCE ACT (JANUARY 12th, 2017 FISA WARRANT – FIRST RENEWAL)
(Against All Individual Defendants)

263. Plaintiff re-alleges and incorporates by reference the allegations of paragraphs 1-262 above, as if fully set forth herein.

264. As set forth above, pursuant to the Second FISA Warrant issued on January 12, 2017, which was procured on the basis of false and misleading information provided to the FISC, the individual Defendants and others, known and unknown to Dr. Page, without probable cause engaged in electronic surveillance against Dr. Page that was not lawfully authorized by FISA, and intentionally disclosed or used information obtained by that electronic

surveillance knowing or having reason to know that the information was obtained through electronic surveillance not lawfully authorized by FISA, and aided and abetted one another in doing so.

265. The individual Defendants' intentional acts were willful, knowing, deliberate and malicious.

266. As a direct and proximate result of Defendants' actions, Dr. Page suffered harm. He was falsely portrayed as a traitor to his country, lost at least tens of millions of dollars of business opportunities and future lifetime earning potential, and has suffered and will continue to suffer mental and emotional pain for his lifetime, in addition to other pecuniary harms such as costs, fees, attorneys' fees and other losses.

THIRD CAUSE OF ACTION
FOREIGN INTELLIGENCE SURVEILLANCE ACT (APRIL 7th, 2017 FISA WARRANT – SECOND RENEWAL)
(Against All Individual Defendants)

267. Plaintiff re-alleges and incorporates by reference the allegations of paragraphs 1-266 above, as if fully set forth herein.

268. As set forth above, pursuant to the Third FISA Warrant issued on April 7, 2017, which was procured on the basis of false and misleading information provided to the FISC, the individual Defendants and others, known and unknown to Dr. Page, engaged in electronic surveillance against Dr. Page that was not lawfully authorized by FISA, and disclosed or used information obtained by that electronic surveillance knowing or having reason to know that the

information was obtained through electronic surveillance not lawfully authorized by FISA, and aided and abetted one another in doing so.

269. The individual Defendants' acts were willful, knowing, deliberate and malicious.

270. As a direct and proximate result of Defendants' actions, Dr. Page suffered harm. He was falsely portrayed as a traitor to his country, lost at least tens of millions of dollars of business opportunities and future lifetime earning potential, and has suffered and will continue to suffer mental and emotional pain for his lifetime, in addition to other pecuniary harms such as costs, fees, attorneys' fees and other losses.

FOURTH CAUSE OF ACTION
FOREIGN INTELLIGENCE SURVEILLANCE ACT (JUNE 29th, 2017 FISA WARRANT – THIRD RENEWAL)
(Against All Individual Defendants)

271. Plaintiff re-alleges and incorporates by reference the allegations of paragraphs 1-270 above, as if fully set forth herein.

272. As set forth above, pursuant to the Fourth FISA Warrant issued on June 29th, 2017, which was procured on the basis of false and misleading information provided to the FISC, the individual Defendants and others, known and unknown to Dr. Page, engaged in electronic surveillance against Dr. Page that was not lawfully authorized by FISA, and disclosed or used information obtained by that electronic surveillance knowing or having reason to know that the information was obtained through

electronic surveillance not lawfully authorized by FISA, and aided and abetted one another in doing so.

273. The individual Defendants' acts were willful, knowing, deliberate and malicious.

274. As a direct and proximate result of Defendants' actions, Dr. Page suffered harm. He was falsely portrayed as a traitor to his country, lost at least tens of millions of dollars of business opportunities and future lifetime earning potential, and has suffered and will continue to suffer mental and emotional pain for his lifetime, in addition to other pecuniary harms such as costs, fees, attorneys' fees and other losses.

FIFTH CAUSE OF ACTION
FEDERAL TORT CLAIMS ACT
(Against Defendant United States of America)

275. Plaintiff re-alleges and incorporates by reference the allegations of paragraphs 1-274 above, as if fully set forth herein.

276. The Federal Tort Claims Act provides "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

277. Plaintiff has exhausted his administrative remedies under 28 U.S.C. § 2675 of the Federal Tort Claims Act as a prerequisite to instituting a claim against the United States for money damages for injury or loss of property or personal injury caused by the negligent or wrongful act or omission of any employee of the United States Government while

acting within the scope of his or her office or employment.

278. By letter dated May 1, 2020, Plaintiff presented his administrative claim to DOJ. By letter dated May 26, 2020, DOJ issued a final denial of the claim. The May 26, 2020 letter also states that it constitutes DOJ's issuance to Dr. Page of a "right-to-sue" letter.

279. The individual Defendants, known and unknown to Dr. Page, are investigative or law enforcement officers within the meaning of 28 U.S.C. § 2680(h).

280. The individual Defendants, known and unknown to Dr. Page, committed an abuse of process because they acted with an ulterior motive to use the FISA warrant process to accomplish an end not permitted by law: to obtain the surveillance of Dr. Page and the Trump presidential campaign *without probable cause*.

281. The individual Defendants' acts were willful, knowing, deliberate and malicious.

282. As a direct and proximate result of Defendants' actions, Dr. Page suffered harm. He was falsely branded as a traitor to his country, lost at least tens of millions of dollars of business opportunities and future lifetime earning potential, and has suffered and will continue to suffer mental and emotional pain for his lifetime, in addition to other pecuniary harms such as costs, fees, attorneys' fees and other losses.

SIXTH CAUSE OF ACTION
***BIVENS* CLAIM**
(Against All Individual Defendants)

283. Plaintiff re-alleges and incorporates by reference the allegations of paragraphs 1-282 above, as if fully set forth herein.

284. The Fourth Amendment to the United States Constitution "guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971).

285. The individual Defendants knowingly and intentionally, or with reckless disregard for the truth, made or caused to be made false and misleading statements in the applications for the FISA Warrants against Dr. Page, and those false statements were necessary to the finding of probable cause.

286. Reasonable officers in the same circumstances and possessing the same knowledge as the Defendants could not have believed that probable cause existed for a FISA warrant to issue against Dr. Page.

287. A Plaintiff is entitled to damages for injuries resulting from a violation of Fourth Amendment rights by federal officers, including by violations related to unlawfully obtained warrants and/or warrants lacking probable cause. Such violations – regardless of the specific factual form they take - constitute violations of clearly established constitutional rights guaranteed by the Fourth Amendment. *See Bivens*, 403 U.S. at 395-96.

288. The individual Defendants' acts were willful, knowing, deliberate and malicious.

289. Plaintiff is entitled to damages, including punitive damages, for these violations of Plaintiff's rights under the United States Constitution. As a direct and proximate result of Defendants' actions, Dr. Page suffered harm. He was falsely portrayed as a traitor to his country, lost at least tens of millions of dollars of business opportunities and future lifetime earning potential, and has suffered and will continue to suffer mental and emotional pain for his lifetime, in addition to other pecuniary harms such as costs, fees, attorneys' fees and other losses.

SEVENTH CAUSE OF ACTION
PRIVACY ACT
(Failure to Amend)
(Against Defendant Department of Justice)

290. Plaintiff re-alleges and incorporates by reference the allegations of paragraphs 1-289 above, as if fully set forth herein.

291. The Privacy Act provides that when an agency makes a determination not to amend an individual's record in accordance with his request, or fails to make appropriate review of that request, "the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct" and "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case . . . in which the complainant has substantially prevailed" 5 U.S.C. § 552a(g)(1)(A), (g)(2).

292. Dr. Page requested the right to review the Horowitz Report and his corollary right to request the Report be amended upon the identification of errors multiple times in September and October 2019. The agency did not amend the report or conduct a review as required under the Privacy Act.

293. In addition, under 5 U.S.C. § 552a(d)(3)(A), this Court may order appropriate relief including injunctive relief against any action by an officer of the United States or any agency thereof, or mandamus to compel a federal officer or employee to perform a duty required by the Privacy Act.

294. Plaintiff in this action is therefore entitled to injunctive relief compelling Defendant DOJ to amend inaccurate records concerning him.

295. Plaintiff is also entitled to the costs of asserting his rights under the Privacy Act in this and his earlier litigation against the DOJ, including reasonable attorneys' fees.

EIGHTH CAUSE OF ACTION
PRIVACY ACT
(Unlawful Disclosures)
(Against Defendants Department of Justice and Federal Bureau of Investigation)

296. Plaintiff re-alleges and incorporates by reference the allegations of paragraphs 1-295 above, as if fully set forth herein.

297. The Privacy Act provides a civil action when an agency discloses "any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a

written request by, or with the prior written consent of, the individual to whom the record pertains." 5 U.S.C. § 552a(d)(3)(D); 5 U.S.C. § 552a(b).

298. If the agency acted in an intentional or willful manner in violation of either 5 U.S.C. § 552a(d)(3)(D), the individual is entitled to the sum of "actual damages sustained by the individual as a result of the refusal or failure . . . and the costs of the action together with reasonable attorney fees as determined by the court" 5 U.S.C. § 552a(d)(4).

299. Defendants' intentional acts were willful, knowing, deliberate and malicious.

300. Plaintiff is entitled to damages for Defendants' willful violation of Plaintiff's rights under 5 U.S.C. § 552a(d)(3)(D).

301. As a direct and proximate result of Defendants' actions, Dr. Page suffered harm. He was falsely portrayed as a traitor to his country via the disclosures, resulting in the loss at least tens of millions of dollars of business opportunities and future lifetime earning potential, in addition to other pecuniary harms such as costs, fees, attorneys' fees and other losses caused by the violation of his Privacy Act rights.

302. Plaintiff is also entitled to the costs of asserting his rights under the Privacy Act in this and his earlier litigation against Defendant DOJ together with reasonable attorney fees.

NINTH CAUSE OF ACTION
PATRIOT ACT
(Against Defendant United States)

303. Plaintiff re-alleges and incorporates by reference the allegations of paragraphs 1-302 above, as if fully set forth herein.

304. The Patriot Act provides that any person aggrieved by a willful violation of the FISA Act "may commence an action in United States District Court against the United States to recover money damages." 18 U.S.C. § 2712.

305. Plaintiff has exhausted his administrative remedies under 28 U.S.C. § 2675 of the Federal Tort Claims Act as a prerequisite to instituting a claim against the United States for money damages under the PATRIOT ACT, 18 U.S. Code § 2712(b)(1).

306. By letter dated September 30, 2020, Plaintiff presented his administrative claim to DOJ. DOJ later forwarded his claim to the FBI. By letter dated April 22, 2021, the FBI issued a final denial of the claim. The April 22, 2021 letter also states that if Dr. Page is dissatisfied with the determination, he may file suit against the United States. This letter constitutes the FBI's issuance to Dr. Page of a "right-to-sue."

307. The United States is liable to Dr. Page because as set forth above, the individual Defendants, acting in violation of the FISA, obtained, disclosed, or used information obtained by electronic surveillance of Mr. Page knowing or having reason to know that the information was obtained through electronic surveillance not lawfully authorized by the FISA.

308. The individual Defendants' intentional acts were willful, knowing, deliberate, and malicious.

309. Plaintiff was aggrieved by Defendants' actions in violation of the FISA Act and is entitled to damages from Defendant United States for Defendants' willful violation of Plaintiff's rights under the FISA Act and the PATRIOT ACT.

310. As a direct and proximate result of this unlawful surveillance, disclosure and use of information, Dr. Page suffered harm. He was falsely branded as a traitor to his country, lost tens of millions of dollars of business opportunities and future lifetime earning potential and suffered mental and emotional pain and suffering for the past several years that will last a lifetime.

311. Plaintiff is entitled to recover for his harm from the United States in the amount of his actual damages, but in any event for damages of not less than $10,000, and also his litigation costs, reasonably incurred in this action.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against Defendants, jointly and severally, as follows:

1. An award of compensatory and special damages, including liquidated damages, in appropriate amounts to be established at trial and as prescribed by the relevant operative statutes alleged herein, but in no event in an amount less than $75,000,000.00;

2. An award of punitive damages, as determined by a jury or the Court, as prescribed by the relevant operative statutes alleged herein and for his action

under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971);

3. An award of all costs and fees associated with this action and Plaintiff's prior action of 1:19-cv-03149 in the District Court for the District of Columbia;

4. An award of attorneys' fees, as provided by statute and by common law rights;

5. Injunctive relief requiring Defendant Department of Justice to amend records as required under the Privacy Act;

6. Any further injunctive relief as the Court may deem just and proper; and

7. Any such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff demands a jury trial on all claims and issues so triable.

Dated: June 8, 2021 Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 8, 2021, a copy of the foregoing Second Amended Complaint was served electronically on:

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Appendix F

Federal Rules of Civil Procedure Rule 12

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

* * *

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

* * *

Appendix G

Foreign Intelligence Surveillance Act [excerpted]

50 U.S.C. § 1806

§ 1806. Use of information

(a) Compliance with minimization procedures; privileged communications; lawful purposes

Information acquired from an electronic surveillance conducted pursuant to this subchapter concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures required by this subchapter. No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character. No information acquired from an electronic surveillance pursuant to this subchapter may be used or disclosed by Federal officers or employees except for lawful purposes.

(b) Statement for disclosure

No information acquired pursuant to this subchapter shall be disclosed for law enforcement purposes unless such disclosure is accompanied by a statement that such information, or any information derived therefrom, may only be used in a criminal proceeding with the advance authorization of the Attorney General.

(c) Notification by United States

Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.

(d) Notification by States or political subdivisions

Whenever any State or political subdivision thereof intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of a State or a political subdivision thereof, against an aggrieved person any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter, the State or political subdivision thereof shall notify the aggrieved person, the court or other authority in which the information is to be disclosed or used, and the Attorney General that the State or political

subdivision thereof intends to so disclose or so use such information.

(e) Motion to suppress

Any person against whom evidence obtained or derived from an electronic surveillance to which he is an aggrieved person is to be, or has been, introduced or otherwise used or disclosed in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the evidence obtained or derived from such electronic surveillance on the grounds that--

(1) the information was unlawfully acquired; or

(2) the surveillance was not made in conformity with an order of authorization or approval.

Such a motion shall be made before the trial, hearing, or other proceeding unless there was no opportunity to make such a motion or the person was not aware of the grounds of the motion.

(f) In camera and ex parte review by district court

Whenever a court or other authority is notified pursuant to subsection (c) or (d), or whenever a motion is made pursuant to subsection (e), or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or

suppress evidence or information obtained or derived from electronic surveillance under this chapter, the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

(g) Suppression of evidence; denial of motion

If the United States district court pursuant to subsection (f) determines that the surveillance was not lawfully authorized or conducted, it shall, in accordance with the requirements of law, suppress the evidence which was unlawfully obtained or derived from electronic surveillance of the aggrieved person or otherwise grant the motion of the aggrieved person. If the court determines that the surveillance was lawfully authorized and conducted, it shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure.

(h) Finality of orders

Orders granting motions or requests under subsection (g), decisions under this section that electronic surveillance was not lawfully authorized or conducted, and orders of the United States district court requiring review or granting disclosure of applications, orders, or other materials relating to a surveillance shall be final orders and binding upon all courts of the United States and the several States except a United States court of appeals and the Supreme Court.

(i) Destruction of unintentionally acquired information

In circumstances involving the unintentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States, such contents shall be destroyed upon recognition, unless the Attorney General determines that the contents indicate a threat of death or serious bodily harm to any person.

(j) Notification of emergency employment of electronic surveillance; contents; post-ponement, suspension or elimination

If an emergency employment of electronic surveillance is authorized under subsection (e) or (f) of section 1805 of this title and a subsequent order approving the surveillance is not obtained, the judge shall cause to be served on any United States person named in the

application and on such other United States persons subject to electronic surveillance as the judge may determine in his discretion it is in the interest of justice to serve, notice of--

(1) the fact of the application;

(2) the period of the surveillance; and

(3) the fact that during the period information was or was not obtained.

On an ex parte showing of good cause to the judge the serving of the notice required by this subsection may be postponed or suspended for a period not to exceed ninety days. Thereafter, on a further ex parte showing of good cause, the court shall forego ordering the serving of the notice required under this subsection.

(k) Coordination with law enforcement on national security matters

(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this subchapter may consult with Federal law enforcement officers or law enforcement personnel of a State or political subdivision of a State (including the chief executive officer of that State or political subdivision who has the authority to appoint or direct the chief law enforcement officer of that State or political subdivision) to coordinate efforts to investigate or protect against--

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.

(2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 1804(a)(7)(B) of this title or the entry of an order under section 1805 of this title.

50 U.S.C.A. § 1809

§ 1809. Criminal sanctions

(a) Prohibited activities

A person is guilty of an offense if he--

(1) intentionally engages in electronic surveillance under color of law except as authorized by this chapter, chapter 119, 121, or 206 of Title 18, or any express statutory authorization that is an additional exclusive means for conducting electronic surveillance under section 1812 of this title;

(2) intentionally discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by this chapter, chapter 119, 121, or 206 of Title 18, or any express statutory authorization that is an additional exclusive means for conducting

electronic surveillance under section 1812 of this title; or

(3) knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States an application, in whole or in part, for an order for electronic surveillance under this chapter.

(b) Defense

It is a defense to a prosecution under paragraph (1) or (2) of subsection (a) that the defendant was a law enforcement or investigative officer engaged in the course of his official duties and the electronic surveillance was authorized by and conducted pursuant to a search warrant or court order of a court of competent jurisdiction.

(c) Penalty

A person guilty of an offense in this section shall be fined under Title 18, imprisoned for not more than 10 years, or both.

(d) Federal jurisdiction

There is Federal jurisdiction over an offense under this section if the person committing the offense was an officer or employee of the United States at the time the offense was committed.

50 U.S.C.A. § 1810

§ 1810. Civil liability

An aggrieved person, other than a foreign power or an agent of a foreign power, as defined in section 1801(a) or (b)(1)(A) of this title, respectively, who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section 1809 of this title shall have a cause of action against any person who committed such violation and shall be entitled to recover--

(a) actual damages, but not less than liquidated damages equal to the greater of--

(1) if the aggrieved person is a United States person, $10,000 or $1,000 per day for each day of violation; or

(2) for any other aggrieved person, $1,000 or $100 per day for each day of violation;

(b) punitive damages; and

(c) reasonable attorney's fees and other investigation and litigation costs reasonably incurred.

Appendix H

18 U.S.C. § 2712

§ 2712. Civil actions against the United States

(a) In general.--Any person who is aggrieved by any willful violation of this chapter or of chapter 119 of this title or of sections 106(a), 305(a), or 405(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) may commence an action in United States District Court against the United States to recover money damages. In any such action, if a person who is aggrieved successfully establishes such a violation of this chapter or of chapter 119 of this title or of the above specific provisions of title 50, the Court may assess as damages--

(1) actual damages, but not less than $10,000, whichever amount is greater; and

(2) litigation costs, reasonably incurred.

(b) Procedures.--(1) Any action against the United States under this section may be commenced only after a claim is presented to the appropriate department or agency under the procedures of the Federal Tort Claims Act, as set forth in title 28, United States Code.

(2) Any action against the United States under this section shall be forever barred unless it is presented in writing to the appropriate Federal agency within 2 years after such claim accrues or unless action is begun within 6 months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to

which it was presented. The claim shall accrue on the date upon which the claimant first has a reasonable opportunity to discover the violation.

(3) Any action under this section shall be tried to the court without a jury.

(4) Notwithstanding any other provision of law, the procedures set forth in section 106(f), 305(g), or 405(f) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) shall be the exclusive means by which materials governed by those sections may be reviewed.

(5) An amount equal to any award against the United States under this section shall be reimbursed by the department or agency concerned to the fund described in section 1304 of title 31, United States Code, out of any appropriation, fund, or other account (excluding any part of such appropriation, fund, or account that is available for the enforcement of any Federal law) that is available for the operating expenses of the department or agency concerned.

(c) Administrative discipline.--If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or

appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with the reasons for such determination.

(d) Exclusive remedy.--Any action against the United States under this subsection shall be the exclusive remedy against the United States for any claims within the purview of this section.

(e) Stay of proceedings.--(1) Upon the motion of the United States, the court shall stay any action commenced under this section if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related investigation or the prosecution of a related criminal case. Such a stay shall toll the limitations periods of paragraph (2) of subsection (b).

> **(2)** In this subsection, the terms "related criminal case" and "related investigation" mean an actual prosecution or investigation in progress at the time at which the request for the stay or any subsequent motion to lift the stay is made. In determining whether an investigation or a criminal case is related to an action commenced under this section, the court shall consider the degree of similarity between the parties, witnesses, facts, and circumstances involved in

the 2 proceedings, without requiring that any one or more factors be identical.

(3) In requesting a stay under paragraph (1), the Government may, in appropriate cases, submit evidence ex parte in order to avoid disclosing any matter that may adversely affect a related investigation or a related criminal case. If the Government makes such an ex parte submission, the plaintiff shall be given an opportunity to make a submission to the court, not ex parte, and the court may, in its discretion, request further information from either party.