

U.S. House Committee on the Judiciary  
Select Subcommittee on the Weaponization of the Federal Government  
Thursday, February 9, 2023, Hearing

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Great Agency Became a Threat to Democracy*

Americans have lost faith in the Federal Bureau of Investigation, an institution they once regarded as the world’s greatest law enforcement agency. I spent many years with the FBI, and am deeply troubled by this loss of faith. Specific lapses have come to light, many of which will be focused on by this panel. But why did they happen? What changed? The answer begins days after the 9/11 attacks with a cultural change at the Bureau.

Culture is where it starts. The Department of Justice Inspector General’s reports a pattern of deliberate omissions, misstatements, and outright falsifications by different investigative teams. This widespread behavior describes a culture—not just the work of a “few bad apples.” In what is certainly an understatement, the Inspector General (IG) concluded the Bureau’s actions “fell short of what is rightfully expected from a premier law enforcement agency.” That may be because they were acting and thinking as an intelligence agency, rather than a law enforcement agency.

To understand how far the Bureau has fallen, I ask you to look at the good role played by the FBI and FBI agents in past decades. I hope I can impress upon you - from my firsthand experience - the reverence the Bureau had for the Constitution and the concern agents held for the rights of Americans. It was once the norm.

### **A Change in Culture**

Robert S. Mueller III was at Camp David the Saturday morning after the September 11, 2001 attacks. Just days into his tenure as FBI director, he was humiliated when President George W. Bush dismissed his reporting and said he wanted him to prevent another attack. After his experience at Camp David, Mueller resolved and resolutely set about to change the FBI “culture.” That’s the word he used. He was going to make it into an intelligence agency, or in his

repeated terminology, an “intelligence-driven” organization.

That change in culture is at the root of so much of the alarming FBI behavior we have witnessed in recent years. In a law enforcement culture one’s mindset is such that we look towards that day when one has to stand up in court, raise your right hand, and swear to tell the truth, the whole truth, and nothing but the truth. While an intelligence agency uses deceit and deception and has as its end product an estimate – some would say a best guess – guesses aren’t allowed in the courtroom.

Although Mueller as a federal prosecutor had worked with dozens of Special Agents—case agents—in both Boston and San Francisco, he did not know FBI culture nor how the Bureau functioned. He also displayed a hostility to SACs, the Special Agents in Charge of each of the Bureau’s 50-plus field offices.

Mueller did not understand the Bureau’s Office of Origin—“OO”—system, which had been in use for nearly three quarters of a century. One field office ran the case as the office of origin, the OO, sent out leads to other field offices—the Auxiliary Offices (AOs)—who reported back.

In the case of the 9/11 attacks on the Pentagon, the World Trade Towers, and in Pennsylvania, the logical OO would be New York or perhaps the Washington Field Office. Both had experienced international squads. The NYO had two, squads I-45 and I-49, which famously chased Al-Qaeda suspects around the world for years.

But Mueller wanted centralization: Everything at FBI Headquarters, all information and decision making. Headquarters’ compartmentalization is a hallmark of intelligence agencies. Mueller’s predecessor, Louis Freeh, who had been a field agent, strongly believed in empowering the field offices. Not Mueller, he accelerated the centralization; he also believed SACs—the few he had encountered—presided over their territory like dukes. His words.

PENTTBOM, the bureau’s codename for the 9/11 investigation, would thus become the first case in the history of the FBI run from Headquarters. Eliminating layers of supervision, review, and independent judgement; it set a bad precedent. In the future, it would yield poisonous fruit in the Hillary Clinton email investigation and then in the Russian collusion fiasco.

Mueller made numerous other moves to change the culture of the FBI, many of which had negative consequences. Replacing agent executives, he brought in “professionals” to take over key headquarters positions; perhaps enhancing short-term technical proficiency in those positions but losing long-term commitment and

an invaluable knowledge of the institution and its culture.

Mueller's change in culture—from a law enforcement to an intelligence mindset—was greatly exacerbated by Comey's poor leadership, leading the FBI into the ugly morass of the Russian Collusion narrative.

The principal miscreants of Crossfire Hurricane were cast out of the FBI. James Comey, the former FBI Director was the first to go. Next was FBI Deputy Director Andrew McCabe, then the Acting Director. Deputy Assistant Director Peter Strzok, who had initiated the Crossfire Hurricane investigation, was fired on August 10, 2018. Ridding the Bureau of these rotten apples initially gave many hope. But now it's clear their dismissal was not enough. The questions remain, how did it happen and how can it be corrected?

## **Reform Needed**

It is essential to understand what made past reforms possible. Serious congressional inquiries, like the Church and Pike investigations, are necessary. This present Select Subcommittee is a step in the right direction. Hopefully its work will be bipartisan, as the abuses of an intelligence-driven FBI threaten the liberties of those on the left as well as the right. Perhaps establishing a presidential commission, like those that investigated the Iran-Contra Affair and the 9/11 attacks is needed. In 1978, after the Church Committee revealed abuses by the intelligence community, including the FBI's COINTELPRO, significant reforms of America's intelligence community were undertaken. These gave us the Foreign Intelligence Surveillance Act (FISA) and its creation, the Foreign Intelligence Surveillance Court (FISC).

As important as they were, the Church Committee reforms were not the first. In the immediate post World War II years, a new intelligence structure was established. The CIA was created, with a specific—overseas—mission. The “special relationship” with Britain, which was forged in the stress of WWII, was codified. Boundaries were established. The National Security Agency (NSA) and the Central Intelligence Agency (CIA) were to focus overseas, while the FBI was to be the sole entity responsible for domestic efforts against espionage.

The Church Committee reforms—after revelations of these boundaries being overstepped—gave us even more explicit guidelines. Not only those, such as FISA, imposed by Congress. The DOJ and FBI themselves developed the “Attorney General Guidelines” for domestic and international intelligence investigations.

Former federal Judge William H. Webster, who became the FBI director in 1978 the same year that FISA was enacted, set the gold standard for its use and implementation. Later, as CIA director, Judge Webster endeavored throughout his tenure to codify the boundaries of the CIA through a “charter.”

The trauma of the 9/11 attack was a shock to the system of our intelligence agencies. A ricochet was then sent vibrating through the intelligence community with the findings and recommendations of the September 11 commission. The FBI and CIA both received blame and criticism for their lack of information sharing and follow-up on clues. Failure to “connect-the-dots” became a mantra.

The reaction to the scathing September 11 Commission Report and the ensuing “war on terrorism” gave us an FBI and CIA operating in much closer concert. There were unintended consequences. The FBI is now more likely to accept and act on any referral from the CIA.

## **FISA Abuses**

The application, operation, and renewals of the FISA warrant against Carter Page was an abuse. Michael Horowitz, the Department of Justice Inspector General, made that clear in his first report on the Foreign Intelligence Surveillance Act (FISA) warrant targeting Page. Nonetheless, he found it to be legal. But if something is wrong, it being legal does not make it right.

The Inspector General (IG) did identify questionable judgement and several mistakes during the FISA process. Michael Horowitz in his second FISA report documented numerous inaccuracies in the FBI’s warrant applications. As shocking as such sloppiness is, it is not the major problem with these warrants, nor the biggest threat to Americans’ civil liberties.

This use of FISA against a US citizen is what presents a fundamental threat to Americans’ civil liberties. It essentially suspends the Constitution. In 1978, reforms in response to the Church Committee’s revelations gave us the Foreign Intelligence Surveillance Act (FISA) and the Foreign Intelligence Surveillance Court (FISC). For more than two decades it was used solely, as its name implies, to gather intelligence on foreign agents resident in this country.

In addition to the arduously detailed preparation of the FISA application by the case agents, Director Webster had a team of law clerks painstakingly review each application before it was presented to him for signature. The original act had mandated that each application be signed by the FBI Director and then by the

Attorney General. That has since changed and the final sign-off authority has been extended to an ever-increasing number of officials.

The original thinking was if an American is suspected of being an agent of a foreign power, the proper way to pursue that individual was by the espionage act, a criminal statute. That would preclude the use of a FISA warrant against the US person. The criminal code (Title III) would then be the basis for any necessary electronic surveillance (*Elsur*). This requires a higher probable cause standard than FISA, as the information gathered would be evidence for use in court.

The number of FISA warrants has greatly expanded over the years. The FISC reports only 200 warrants in 1979, its first full year of operation. By 2000, the number had risen to 1,000. In reaction to the September 11 attacks there was a tremendous increase in the number FISA warrants—to over 2000 a year—and a looser approach to their approval.

The coverage of a FISA warrant has expanded as well. At first, what is commonly understood as “wiretapping” was authorized. In recent years, the coverage includes all sorts of electronic communications beyond voice: texts, emails, and instant messaging are now included in *Elsur*. Additionally, FISA can authorize physical entry and searches. The nature of today’s data communications also means that FISA surveillance can look “backwards” at older data remaining on servers and other storage facilities.

Over the years, and particularly since September 11, FISA has been amended numerous times and now allows for the surveillance of Americans. But there were safeguards. One safeguard is a requirement the government must show the FISC a less intrusive technique cannot produce the desired information. As Page earlier had cooperated with both the FBI and the CIA, clearly this safeguard was fudged. It was also Bureau practice, pre-2016, to use FISA coverage only on Americans who had a security clearance, possessed national security information, and had shown a willingness to share information with a foreign power. Page did not even hold a security clearance. His rights were abused. The IG said that this was legal; it was not right.

The second IG report’s finding of 700 FISAs against US Persons, by just eight FBI offices in the recent five-year period, indicates a now routine use of this intrusive tool against Americans. Its increasing use has led to FISA being handled in a mundane fashion. Further, the FISA process—unlike Title III criminal

warrants—is done in secrecy. The now quotidian FISA has led to promiscuous spying on Americans, as evidenced by the findings of both IG reports.

The fundamental need is to return FISA to its original purpose of surveilling foreign agents for intelligence purposes, thus preventing abuses against Americans as we saw with Carter Page. Using FISA, rather than a criminal statute to target a US citizen, is an indication of the Bureau drifting away from its law enforcement moorings. This is something that Congress specifically can fix.

## **The First Amendment**

The revelations that the FBI colluded with Twitter to suppress political speech by blacklisting and shadow banning is shocking but sadly not surprising. What is surprising is a strange December 22, 2022 statement from the FBI that the collaboration with Twitter is “nothing more than...traditional...private sector engagements...” This response is not supported by even a casual review of the Twitter documents.

Over the past few years, when shenanigans have been discovered at the Bureau, malefactors have been shown the door. The subsequent theme from Director Christopher Wray is the “bad apples are no longer with us.” We saw that with the miscreants of the Russian Collusion myth. We saw it with a misbehaving agent in the Governor Whitmore kidnapping plot. We saw it with two agents in the gymnasts’ abuse case against Dr. Nassar. And, we saw it most recently when an Assistant Agent in Charge (ASAC) at the Washington Field Office (WFO) walked out the door after his role in minimizing the Hunter Biden laptop scandal came to light. The reluctance by Bureau management to look beyond these transgressors to the underlying culture has deeply troubled many of us former agents.

But what’s even worst in the Bureau’s response to the Twitter revelations is that there is not even the usual half apology – pointing out the dismissal of a “rotten apple” – instead there is now a bold-face denial that anything is wrong. It is now just business-as-usual: “...the FBI provides critical information to the private sector in an effort to allow them to protect themselves...”

The First Amendment guarantees free speech, implicitly prohibiting censorship by government agencies. A private company – as part of its own exercise of free speech - is not prohibited from censoring information. The FBI, by urging Twitter to censor speech, which it could not itself do, was engaging in a perversion – a perversion of the First Amendment. For most of FBI history, agents

were trained that part of the FBI's mission was to be a guarantor of the Bill of Rights. That seems to have been turned on its head.

Monitoring speech is dangerous business. Firstly, it is easy to be mistaken, as was seen with the Steel dossier and other missteps in the Russian collusion fiasco. Secondly, it is not the business of the federal government to be regulating – even suggesting – what is or is not disinformation. Our democracy can tolerate some questionable speech. That is the price of free speech.

## **Emphasis on the Constitution**

A renewed emphasis on the US Constitution as a cornerstone of the Bureau's work is needed. Special Agents, in their initial and ongoing training, have always been instructed about our Constitution. After all, it is they who interview suspects, conduct searches, and arrest people. A new category of employee has arisen under the post 9/11 paradigm. Intelligence Analysts (IAs), who don't directly interact with citizens in ways that touch on their constitutional guarantees, now play a major role in the Bureau's mission. These are the employees who deal in estimates and best guesses. Their actions also ultimately affect people's liberty. It is imperative that they, too, receive ongoing training about our Constitution.

When I was in training as a new agent, we were each given a pocket copy of the Constitution by our legal instructor. He told us to keep it in our breast pocket. If we did that, we would think about it when interviewing a suspect or conducting a search. If you keep it "close to your heart, you won't go wrong." That may sound corny today, but many of us did hold it close to our hearts. I had learned, for budget reasons some years ago, new agents were no longer being given a copy of the Constitution. Happily, perhaps due to my harping on this point in Op-Eds and in meetings with Bureau executives, I am told that all new FBI employees are now furnished a copy of the Constitution. A little thing perhaps, but little things can result in big changes.

As former FBI Director Webster repeatedly told us: "We must do the work the American people expect of us, in the way the Constitution demands of us." All actions and decisions should again be viewed through that prism.

To change culture, many things must be done consistently, both big and small. The first would be to recognize the problem. Wray has declined to recognize this by taking shelter in the fact that those who were responsible for the various transgressions are no longer employed at the FBI.

## **Role of Congress**

Amending FISA to again prohibit, or stringently limit, targeting US persons is a “foundational reform” Congress can make.

The abuse of “unmasking,” rampant during the 2016 election cycle, must be addressed. Congress should be notified as to the numbers of unmaskings. Criminal penalties should be imposed on those who improperly unmask American citizens.

The pernicious “reverse targeting” practice, acknowledged by Brennan, must be ended. The CIA and the NSA are forbidden to spy on Americans. If they accidentally pick up information on an American, while spying on foreigners, they pass it on to the FBI. If they set out to deliberately do it by focusing on a foreigner close to an American of interest, it is not truly “incidental” collection. Sanctions for this type of abuse should include criminal penalties.

Congress must look at itself as well. Being a political institution, Congress has approached oversight issues in a political manner. Recognizing these political realities does not mean they cannot do better. Congressional oversight procedures should forbid one-on-one briefings/meetings with congressional leaders or staff. To avoid memory lapses, all Gang of Eight meetings should be bipartisan and videotaped.

## **Conclusion**

An unintended consequence of the response to the September 11 attacks was the FBI being directed away from its roots in law enforcement and into the ambiguous world of intelligence. That cultural change begun under Mueller’s leadership set the stage for the disastrous directorship of Comey.

For years, when explaining the FBI to various groups, I and others would emphasize how blessed the United States – unlike other countries - was to have as its domestic security service a law enforcement agency, an organization rooted in the rule of law. This has now been turned on its head, the United States may now be cursed to have a domestic intelligence agency with police powers.

The first step in fixing a problem is recognizing the problem. The “few rotten apples” explanation for “what went wrong at the FBI” is a dodge. The culture must be fixed and to fix it one must acknowledge the problem.



Existing statutes, such as FISA, must be reformed to avoid the abuse of Americans' rights. And, please, no new laws against "domestic terrorism," which would present new perils to Americans' civil liberties.

We may never get the Bureau culture back to what I lived and loved in the pre-9/11 era. But the effort of reform is worth it, noble, and direly needed.