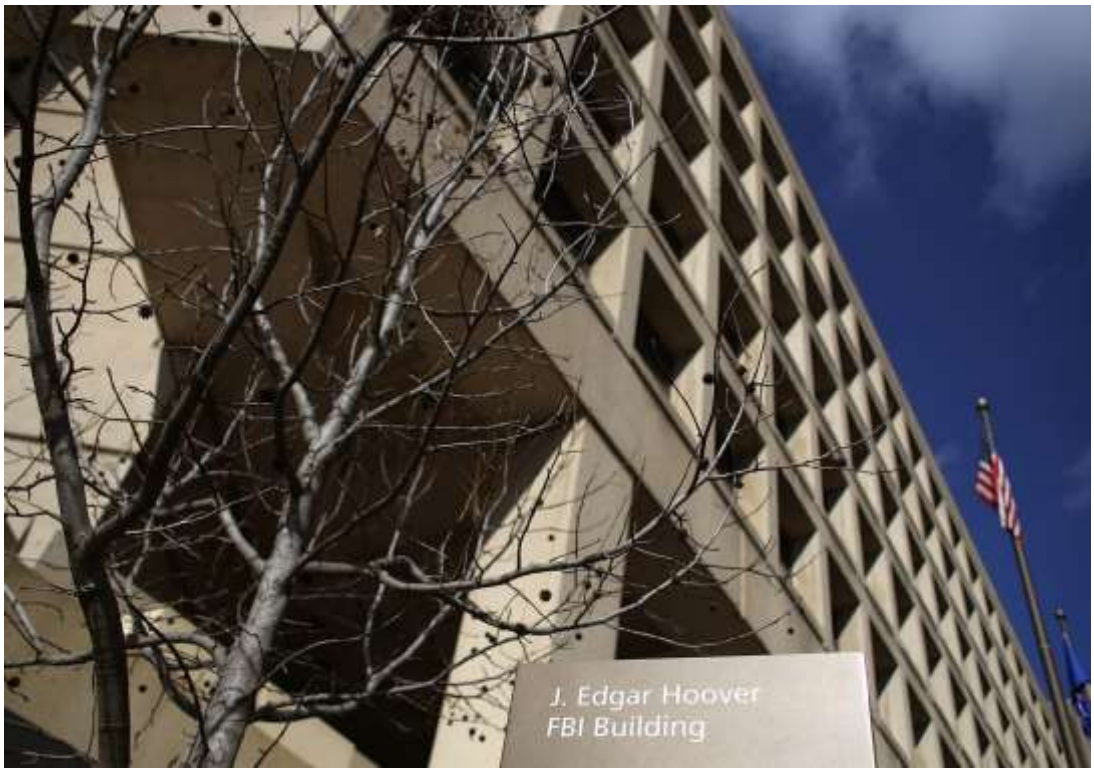
The Good, Bad, and Ugly of the Inspector General Report

Great news! The FBI wasn't corrupt; it was incompetent.

Dec 10



It's now a fact of online life that wild charges and counter-charges make it truly difficult not just to discern the truth, but also to discern the proportionate response to the truth. We stampede to the extremes and tend to ignore news that doesn't advance or refute those extremes. Or, to put it another way, is there room to say, "This is bad, but it's not as bad as it could have been"?

I'm talking, of course, about the Justice Department inspector general Michael Horowitz's report on the inception of the FBI's Crossfire Hurricane investigation of the Trump campaign and on the FISA warrants obtained against former Trump campaign official Carter Page.

We'll talk today about the good, bad, and ugly of the report—along with some lessons learned. And I'll also address a question that burst across right-wing Twitter this weekend: Should we ban porn? Today's **French Press**:

1. The FBI cleared the lowest possible bar.
2. The great porn debate of 2019.

Great news! The FBI wasn't corrupt; it was incompetent.

The first three years of the Trump era have featured two lengthy investigations that sought to answer two previously unthinkable questions. First, did a Republican presidential campaign actively conspire with a hostile foreign power in the quest to win an election? Second, did the nation's leading law enforcement agency engineer a bad-faith, politicized criminal investigation of that Republican candidate in the effort to depose him if he won?

According to the Mueller Report, the answer to the first question is, "No, but his team did *try* to obtain the help of Russians and Russian assets." And now, according to the Horowitz report, the answer is "No, but the investigation process was so flawed that we need to audit the entire FBI FISA process."

Feel better?

The good news for the FBI and the country was simple. Horowitz found that the FBI "had an authorized purpose when it opened Crossfire Hurricane," and he also "did not find documentary or testimonial evidence that political bias or improper motivation influenced" the decision to open either Crossfire Hurricane or the FBI's four individual investigations of Carter Page, George Papadopoulos, Michael Flynn, and Paul Manafort.

Can we put to bed forever the "deep state coup" theory we've heard countless times on conservative airwaves? Not so fast. Immediately after Horowitz issued his report, John Durham issued this statement:

 **Ryan J. Reilly**@ryanjreilly

NEW: John Durham says they "do not agree with some of the report's conclusions as to predication and how the FBI case was opened."

Department of Justice

U.S. Attorney's Office

District of Connecticut

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FOR IMMEDIATE RELEASE — Monday, December 9, 2019

Statement of U.S. Attorney John H. Durham

"I have the utmost respect for the mission of the Office of Inspector General and the comprehensive work that went into the report prepared by Mr. Horowitz and his staff. However, our investigation is not limited to developing information from within component parts of the Justice Department. Our investigation has included developing information from other persons and entities, both in the U.S. and outside of the U.S. Based on the evidence collected to date, and while our investigation is ongoing, last month we advised the Inspector General that we do not agree with some of the report's conclusions as to predication and how the FBI case was opened."

December 9th 2019

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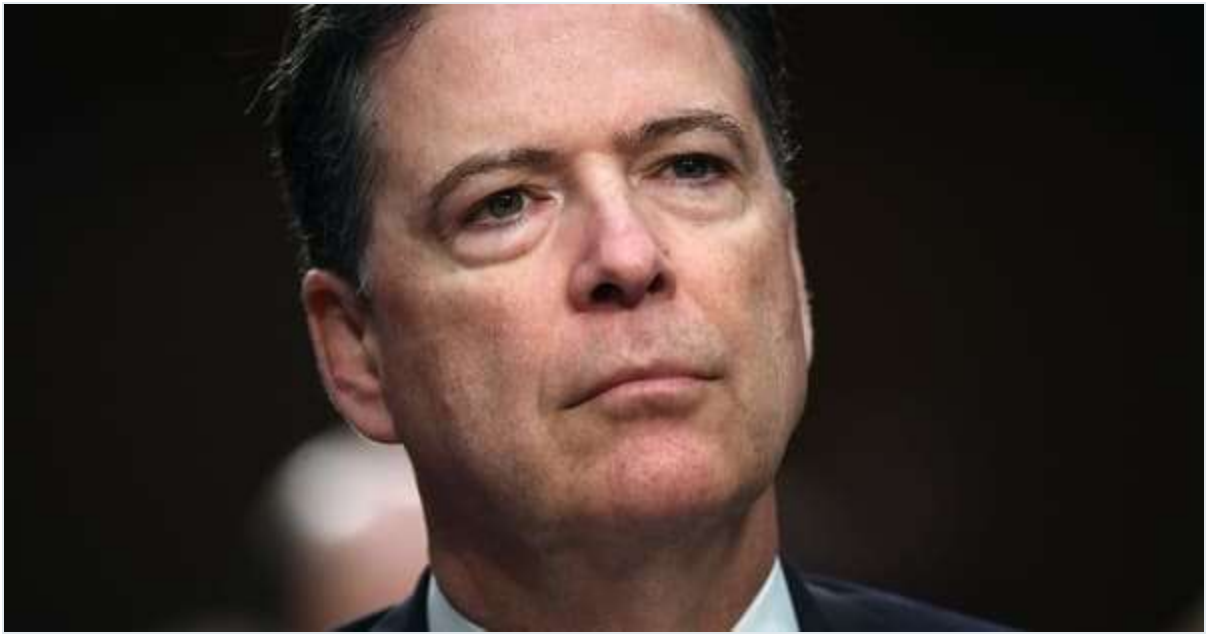
Attorney General Bill Barr, you may recall, tasked Durham with investigating the origins of the Russia investigation. We await his report, but for now the available evidence suggests that the FBI wasn't guilty of the worst charges against it. There was no "treason." There was no attempted "coup."

So, is James Comey's take below the right way to frame the report?

 **James Comey**@Comey

So it was all lies. No treason. No spying on the campaign. No tapping Trumps wires. It was just good people trying to protect America.



Opinion | James Comey: The truth is finally out. The FBI fulfilled its mission. Now those who attacked the FBI for two years should admit they were wrong.washingtonpost.com
December 9th 2019

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Definitely not. Horowitz's report makes for depressing reading. It chronicles ethics violations and error after error after error in one of the most high-profile investigations in modern American history. The Carter Page FISA process was dreadful. The so-called Steele dossier was the foundation of the FISA warrant request, and we know the Steele dossier was chock-full of bizarre rumors and outright falsehoods.

Moreover, as the inspector general notes, in its initial warrant request, the FBI "overstated the significance of Steele's past reporting to the FBI," did not include information that cast doubt on the credibility of one of Steele's sub-sources, and did not include information from Page and Papadopoulos contradicting many of the claims made in the dossier.

Then, during the next three warrant renewals, the process got worse. The FBI made "10 additional significant errors," and an FBI lawyer even edited a document to mislead the FISA court.

For page after page after page, the inspector general chronicles these FBI errors. It also chronicles a staggering ethical breach, as DoJ attorney Bruce Ohr communicated with

Steele after the FBI terminated its relationship with Steele. And he did so as his wife worked as an independent contractor with Fusion GPS, the firm that hired Steele to generate the malignant dossier as opposition research for Hillary Clinton's campaign.

The inspector general was not amused. He recommended that Ohr's supervisors and the DoJ's Office of Professional Responsibility should review the IG's findings and take action that they "deem appropriate."

But what makes all this misconduct so especially ugly and troubling is the fact that it occurred in the midst of one of a profoundly sensitive and high-profile investigation. If the FBI treats the FISA process like this when the eyes of the nation are sure to be fixed upon it, how does it treat the FISA process when the proceedings remain entirely behind closed doors? The Cato Institute's Julian Sanchez, who specializes in civil liberties and privacy, is correct:

Julian Sanchez@normative

The question we ought to be asking is: If there were this many significant errors in applications everyone understood to be incredibly sensitive, and they were *not* the function of some special vendetta against Trump, what would we find if we kicked the tires on a "normal" FISA?

December 10th 2019

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And the inspector general had the same thought. He's launching a broad audit of the FISA process itself:

> [G]iven the extensive compliance failures we identified in this review, we believe that additional OIG oversight work is required to assess the FBI's compliance with Department and FBI FISA-related policies that seek to protect the civil liberties of U.S. persons. Accordingly, we have today initiated an OIG audit that will further examine the FBI's compliance with the Woods Procedures in FISA applications that target U.S. persons in both counterintelligence and counterterrorism investigations.

Can we learn any lessons from this debacle? For one, I have renewed gratitude for Rod Rosenstein's decision to appoint a special counsel. The FBI was floundering. By putting the

investigation in Mueller's hands, Rosenstein was able to establish a credible process that was largely free of the taint of the FBI's misdeeds.

In fact, Carter Page was ultimately an afterthought in the Mueller report. He was a minor figure in the campaign. The truly troubling conduct came through much more senior people: Manafort, Donald Trump Jr., Michael Cohen, and Trump's longtime friend and informal adviser, Roger Stone.

It's also time to consider FISA reform. Americans should be alarmed at the FBI's errors, and we have no grounds to merely trust that law enforcement agencies will consistently safeguard civil liberties. Yes, there are many, many good people in the FBI who do their jobs with excellence. But the inspector general report demonstrates that this is not always the case. Greater legal restriction is necessary.

Finally, can America's primary voters *please* choose better nominees? During the 2016 campaign season, both Hillary Clinton and the Donald Trump campaign were under valid, lawful FBI investigations. This placed the FBI in a terrible bind (though that does not excuse its missteps) and guaranteed a toxic beginning to a new presidency no matter who won. Character matters, and voters should impose character tests on candidates.

Should social conservatives try to ban—or zone—online porn?

Over the weekend, right-leaning Twitter lit up with a battle between various strands of libertarians and conservatives over pornography—specifically whether conservatives should use political capital to try to ban or limit online access to hard-core porn.

The debate was launched after four GOP members of Congress sent a letter to Bill Barr requesting that he make "the prosecution of obscene pornography a criminal justice priority." After my former *National Review* colleague Alexandra DeSanctis reported on the letter, an intramural conservative food fight broke out—one that ultimately shed more heat than light, in large part because the debate was conducted as if American jurisprudence (and American politics) hasn't been wrestling with the problem of porn for decades.

Before the explosive growth of online porn, a series of Supreme Court decisions (and legislative actions) established a relatively stable set of offline rules and doctrines. First, true obscenity is

not protected by the First Amendment. And while obscenity is difficult to define, a definition does exist. In *Miller v. California*, the Supreme Court established a three-part test:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

While a considerable amount of online porn meets this definition, as a practical matter obscenity prosecutions have proved to be difficult, resource-intensive, and almost always subject to comprehensive First Amendment challenge. Thus, back when porn mainly existed in the offline world, communities responded with a different approach—zoning.

In the 1980s and 1990s, local governments responded to the proliferation of strip clubs, adult books stores, and adult movie theaters by moving them—by zoning them outside of areas frequented by children. Applying a "secondary effects" doctrine—permitting regulations based on the effects of adult businesses on the surrounding community, rather than the content of the speech—SCOTUS has approved regulations that both "crack" (requiring establishments to exist a certain distance apart) and "pack" (require establishments to cluster in a specific zone) adult businesses.

As a result, multiple American cities were able to clean up their downtowns. Many of us are old enough to remember when Times Square was a porn cesspool. I can remember when downtown Nashville—the buckle of the Bible Belt—was littered with peep shows and adult book stores. No longer. Indeed, improved zoning helped lay a foundation for a downtown renaissance in American cities from coast to coast.

So what does this have to do with online porn? Isn't the battle lost? After all, in 1997 the Supreme Court struck down sections of the Communications Decency Act that were designed to protect minors from "indecent" or "patently offensive" communications on the internet. Here's the syllabus summary of the core of the court's holding:

> The CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. Although the Government has an interest in protecting children from

> potentially harmful materials, see, *e. g., Ginsberg,* 390 U. S., at 639, the CDA pursues that interest by suppressing a large amount of speech that adults have a constitutional right to send and receive, see, *e. g., Sable,* 492 U. S., at 126. Its breadth is wholly unprecedented. The CDA's burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the Act's legitimate purposes. See, *e.* g., id., at 126. The Government has not proved otherwise. On the other hand, the District Court found that currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing material which the *parents* believe is inappropriate will soon be widely available. Moreover, the arguments in this Court referred to possible alternatives such as requiring that indecent material be "tagged" to facilitate parental control, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet differently from others. Particularly in the light of the absence of any detailed congressional findings, or even hearings addressing the CDA's special problems, the Court is persuaded that the CDA is not narrowly tailored.

In short, the court punted the issue back to parents, to tech companies to design better blocking software, and—critically—to the government to design better legislation. Parents have tried (and often failed) to control access to porn. Tech companies have had various degrees of success in designing blocking software. But is there constitutional room for better legislation?

Yes, there is. Justice Sandra Day O'Connor and Chief Justice William Rehnquist wrote separately to discuss the possibility of "cyberzoning." They explained that a zoning law is valid if "if (i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material." Thus, the question was whether the CDA as written could pass this test. They held that it could not:

> Although the prospects for the eventual zoning of the Internet appear promising, I agree with the Court that we must evaluate the constitutionality of the CDA as it applies to the Internet as it exists today. *Ante,* at 881. Given the present state of cyberspace, I agree with the Court that the "display" provision cannot pass muster. Until gateway technology is available throughout cyberspace, and it is not in 1997, a speaker cannot be reasonably assured that the speech he displays will reach only adults because it is impossible to confine speech to an

"adult zone." Thus, the only way for a speaker to avoid liability under the CDA is to refrain completely from using indecent speech.

The key question now, in 2019, is whether sufficient gateway technology and sufficient political will exists to "zone" indecency away from children. Writing in *First Things*, Terry Schilling proposed a number of zoning ideas (though some are likely unconstitutional) that could help wall-off adult content from children. It's worth revisiting the issue. There is no constitutional prospect or path for banning non-obscene pornography, but there is a constitutional path for limiting its access to minors.

One final note—pornography regulation is one area where you see a jurisprudential break between originalists (like me) and libertarians. I agree with the late Judge Robert Bork. Pornography was not encompassed in the Founders' conception of "the freedom of speech." And indeed the Supreme Court has permitted a degree of regulation of adult businesses that it doesn't permit in other contexts.

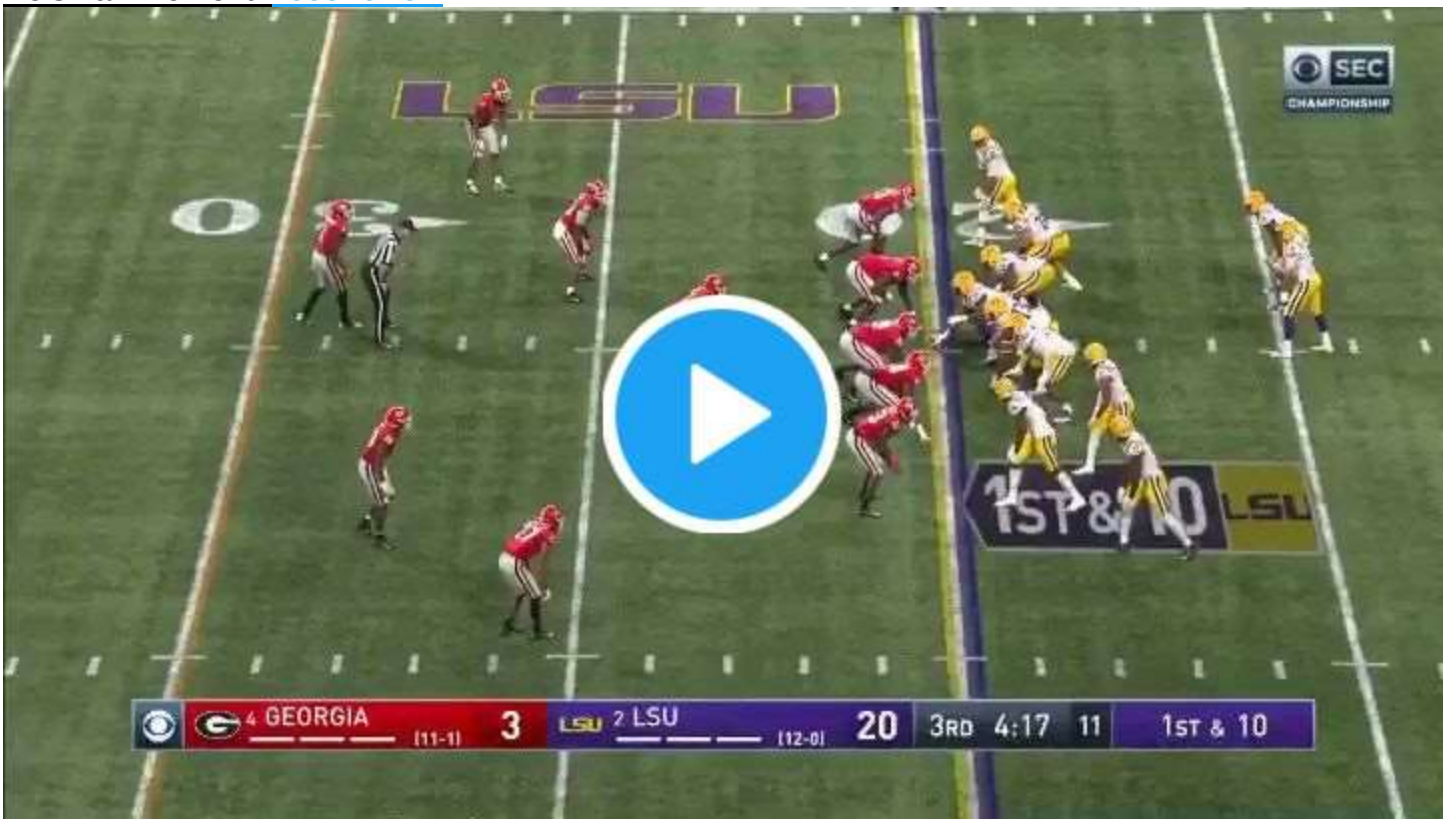
But to say that the First Amendment was not intended to protect pornography is not the same thing as arguing for a blanket porn ban. Not every law that's theoretically permissible is also prudent, and the state should exercise great caution before it creates new classes of criminals. Zoning has been proven to improve the physical world while also protecting the civil liberties of consenting adults. It may be able to improve the virtual world as well.

One final thing ...

No self-respecting newsletter by an SEC football fanatic would be complete without showcasing, even days later, Joe Burrow's Heisman moment. With one play, he showcased his astonishing talent and broke Georgia's spirit when the Bulldogs were hanging on by their fingernails. Magnificent:

Mr.CollegeFootball@Noah_Leadore

Heisman Moment. #JoeBurrow



December 8th 2019

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