NBC NEWS

# Trump's criticism of the Carter Page FISA warrant is wrong. But that doesn't mean the FISA process is right

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July 24, 2018

The Foreign Intelligence Surveillance Act of 1978 — FISA — is back in the news this week. Over the weekend, The New York Times released a redacted version of the original application and reauthorization applications that were submitted to the FISA Court in October 2016 in order to obtain a warrant to conduct surveillance of Carter Page, a one-time foreign policy advisor to then-candidate Donald Trump. The Page warrant has become one of the focal points of ongoing claims by Trump and his supporters that President Barack Obama's administration "spied on" the Trump campaign, and that special counsel Robert Mueller's investigation is a "witch hunt."

The theory is that the warrant itself was obtained under false pretexts, and so all that followed is fruit of the poisonous tree. (The warrant was also front and center in the sensational, dueling memos issued earlier this year by Republicans and Democrats on the House Intelligence Committee.)

As FISA experts from across the political spectrum have generally (albeit not unanimously) concluded, the newly disclosed materials go a long way toward undermining Trump's objections by suggesting that the warrant was indeed properly sought and obtained (and, as importantly, repeatedly reauthorized).

Among other things, and contrary to the claims by House Intelligence Committee Chairman Devin Nunes, the government did indeed apprise the FISA Court of the provenance of the "Steele dossier" (and former spy Christopher Steele's possible bias); it offered additional evidence to support its conclusion that the key claims in the dossier were at least "credible;" and there appears to have been at least some other evidence besides the dossier offered in support of the government's claim that there was "probable cause" to believe that Page was acting as an agent of a foreign power.

The question at hand here is not whether Page is an agent of a foreign power, or whether he committed any crime. Rather, the question is whether the government could offer enough

evidence to warrant proving further. If one is truly being objective, it is difficult to read even the redacted materials released over the weekend and conclude that the answer is "no."

A number of critics have nevertheless suggested that the materials prove an "abuse" of FISA. On the contrary, what they show is the FISA process working exactly the way it is supposed to. The harder question is whether we can live with the way FISA is supposed to work.

Rewind to 1978: On the heels of a series of major intelligence scandals, most of which involved government agencies lawlessly spying on American citizens within the United States, Congress adopted a series of reforms as part of what has been described as a "grand bargain" among the political branches. For the first time, intelligence gathering activities were brought under express congressional and judicial oversight — through the establishment of the congressional intelligence committees and the FISA Court. In exchange, Congress agreed that nearly all of the congressional and judicial oversight would be conducted in secret — with elected representatives serving as our proxies, even on matters about which we would never be fully (or even somewhat) aware.

Substantively, FISA's key innovation was to create a warrant-like procedure for surveillance conducted within the United States for intelligence, rather than law enforcement, purposes. But whereas search warrants in criminal cases require probable cause for criminal activity, the FISA standard is crucially different: The government must still show probable cause, but only that the target is acting on behalf of, or as an agent of, a "foreign power."

To prevent the government from taking advantage of FISA's lower standard as a way of circumventing the ordinary warrant requirement in criminal cases, a FISA warrant can only be issued if the "primary purpose" of the search is the gathering of foreign intelligence surveillance — not evidence to be used in criminal law enforcement. Thus, the core of "original" 1978 FISA (known as "Title I" by practitioners) was about creating a criminal-like warrant standard for foreign intelligence surveillance here in the United States, albeit one with strict limits on when and how it could be used.

Three major statutory changes after September 11, 2001 have dramatically expanded the scope of FISA (and the role of the FISA Court), however. First, responding to concerns that the primary purpose requirement was partly responsible for the intelligence failures leading up to the September 11 attack, the USA Patriot Act weakened the requirement that foreign intelligence surveillance gathering be the primary purpose of a FISA warrant. Now, it need only be a "significant purpose." As a result, it is far easier for the government today to obtain a FISA warrant as part of an ordinary criminal investigation than it was before 9/11.

Second, and also through the Patriot Act, Congress authorized the FISA Court to issue subpoena-like production orders to third parties for "business records" if the records were "relevant" to an ongoing national security investigation. This included records largely (or entirely) concerning Americans with no connection to a foreign power. And third, in the FISA Amendments Act of 2008, Congress authorized "programmatic" collection of foreign intelligence information that transited U.S. communications infrastructure, so long as the collection was targeted at non-citizens reasonably believed to be outside the United States (and who therefore lack Fourth

Amendment protection). Thus, Congress both weakened the limits on when warrants could be obtained and departed from the warrant requirement in two crucial respects.

The full (and controversial) implications of these changes only came to light thanks to the controversial 2013 disclosures by Edward Snowden, which included details about the bulk phone records program instituted under the "business records" provision of the Patriot Act, as well as the "PRISM" and "upstream" surveillance programs carried out under the FISA Amendments Act.

What became clear, thanks to Snowden, was that the 1970s-era "grand bargain" between the three branches to ensure meaningful accountability for foreign intelligence surveillance had broken down. Not only had Congress dramatically expanded the scope of FISA beyond that which had initially been contemplated back in 1978, but neither the congressional intelligence committees nor the FISA Court had demonstrated themselves to be suited to the task of meaningfully checking these expansions.

One of the many flash points of these failures was a 2013 hearing before the House Intelligence Committee, at which then-Chairman Mike Rogers suggested that Americans' right to privacy can't be violated so long as they don't find out about the violation. Needless to say, that didn't go over well.

Yet even though the Snowden disclosures produced sustained and substantial calls for reform, the results on Capitol Hill were decidedly modest. With regard to the phone records program, Congress cut it back to some degree in the USA Freedom Act of 2015. But that bill has been widely criticized by privacy and civil liberties groups for eschewing numerous proposed reforms that would have made it easier for the FISA Court and the intelligence committees to hold the government accountable.

And just last December, Congress, including all of the president's most vocal defenders, overwhelmingly voted to reauthorize the expiring FISA Amendments Act of 2008 with no meaningful reforms. This happened despite widespread concerns that in the process of surveilling non-citizens overseas, the government is "incidentally" collecting millions of communications from Americans — and all without a warrant.

Set against this backdrop, the Carter Page FISA warrant is the least of the problems with FISA. There is no indication that the government used FISA as a pretext to avoid the more stringent requirements for a criminal warrant in his case (since, among other things, Page hasn't been charged with any crime, and since there is an indisputable factual basis, thanks largely to his own public statements, for concern about his foreign connections). And the probable cause standard, which four different FISA judges (each of whom was appointed by a Republican president) found to be met in his case, is otherwise the same standard Congress enacted in 1978.

But perhaps the best evidence that the Page warrant wasn't abusive is that few, if any, of those criticizing it are also suggesting that FISA needs to be reformed more broadly. After all, as the CATO Institute's Julian Sanchez has observed, these same legislators and commentators "have long supported more expansive intelligence surveillance powers and worked furiously to defeat

legislative efforts to impose stricter privacy safeguards." The problem in Page's case isn't that FISA was abused; it is that the use of FISA as it was intended can be exploited for political purposes entirely because FISA's most abusive features are so poorly understood.