



HPSCI Memorandum Sparks Debate over FISA Application Requirements

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The recent disclosure by the House Permanent Select Committee on Intelligence (HPSCI) of a declassified [memorandum](#) written by HPSCI majority staff has sparked a renewed conversation about the government’s longstanding authority to conduct electronic surveillance on U.S. citizens pursuant to the [Foreign Intelligence Surveillance Act of 1978 \(FISA\)](#), as amended.

FISA was [designed to provide](#) a statutory process to oversee the use of electronic surveillance for foreign intelligence purposes that mirrored the warrant process required for electronic surveillance in criminal investigations. Under FISA, the government must generally apply for and receive an [order](#) from the specialized [Foreign Intelligence Surveillance Court \(FISC\)](#) authorizing electronic surveillance. An order may be issued based on the court’s finding that probable cause exists to believe that the target of surveillance is [an agent of a foreign power](#). Because of the national security information used in such applications, both the submissions to and orders from the FISC are generally classified.

The HPSCI majority memorandum alleges that the Federal Bureau of Investigation (FBI) applied for an order authorizing surveillance of Carter Page, “[a U.S. citizen who served as volunteer advisor to the Trump presidential campaign](#),” using information gathered by a source without including adequate information indicating the source had an anti-Trump bias in the FISA application. The application for surveillance was approved by the FISC and renewed three separate times. On Monday, February 5, 2018, the HPSCI [voted](#) to release a second memorandum [reportedly](#) drafted by HPSCI ranking-member Adam Schiff rebutting the claims made in the first memorandum. This second memorandum is currently being considered for declassification by the President, who has [requested](#) certain redactions based on suggestions from the Department of Justice.

A central factual question that appears to be disputed by the competing memoranda is the degree to which information potentially undermining the FISA application’s reliability was omitted from the application. Although CRS is not in a position to answer that factual question, this Sidebar endeavors to explain the legal requirements regarding the government’s obligation to include countervailing information in FISA applications.

The FISA statute itself does not expressly address whether information regarding informants’ bias or reliability must be included in an application to the FISC. Instead, the statute [requires](#) the application to demonstrate, to the FISC’s satisfaction, that probable cause exists to believe that the target is an agent of a

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foreign power or a foreign power, and that each of the facilities at which surveillance will be directed is being used, or is about to be used, by an agent of a foreign power or a foreign power. Declassified FISC decisions regarding the requirements of probable cause in the FISA context are not plentiful, and none appear to speak directly to the issue of when information regarding an informant's bias is required. Nor do these FISC decisions provide a clear, generally applicable framework for assessing the circumstances when an informant's bias would render the information unreliable.

However, the broader body of case law discussing criminal warrants does broach the subject of how omissions in warrant applications can undermine probable cause. It may be debated how similar the application of the Fourth Amendment in the foreign intelligence context is to its application in the context of criminal law enforcement. But the FISA statute uses the term "probable cause" to describe the threshold needed to support a FISA order. And, a committee report for one of the competing bills that ultimately was enacted as FISA described the intended role of FISA judges to be "the same as that of judges under existing law enforcement warrant procedures." Accordingly, it may be helpful to look to Fourth Amendment jurisprudence in the criminal context to help understand what information regarding informants' bias is required to establish probable cause in FISA applications.

Historically, in the domestic criminal law context, probable cause required courts to engage in a two-pronged test analysis of information provided by informants that was included in an application for an arrest or search warrant. First, the application had to inform the court of reasons to believe that the informant was believed to be credible or reliable. Second, the application must provide the court with information establishing the informant's "basis of knowledge" regarding the facts asserted.

However, in its 1983 decision in *Illinois v. Gates*, the Supreme Court eliminated this "rigid" two-pronged test in favor of a more "fluid" examination of the "totality of the circumstances." As an example, the Court hypothesized that under the latter analysis, "even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case."

Although no specific statements regarding an informant's credibility may be categorically required in warrant applications following *Gates*, the Supreme Court has also held that a finding of probable cause may be rendered invalid if it is discovered that such finding was based on an application that included a false statement, knowingly and intentionally, or with reckless disregard for the truth. Courts of appeals applying this standard have further held that the omission of facts which "would have vitiated probable cause" or information that is "clearly critical to a finding of probable cause" gives rise to an inference of recklessness. But the failure to include information demonstrating that the informant has an ulterior motive for providing the information is not always "fatal to the validity of a warrant." For example, in *United States v. Wold*, the U.S. Court of Appeals for the Eighth Circuit held that the failure to disclose the fact that an informant's claims, which formed the basis for an application for a search warrant, were made as part of a leniency deal and had been paid for by the police was not misrepresentation rendering the issued warrant invalid. The court held that the warrant was adequately supported in part because the informant's statements had been separately corroborated by other information in the application. Furthermore, the court found that "the warrant application as a whole was supported by probable cause even if all the additions and deletions for which the [defendants] argue were made."

When determining whether the omission of a piece of information is of sufficient severity to undermine a finding of probable cause, courts still rely on the same "totality of the circumstances" analysis described in *Illinois v. Gates*. In other words, if an application that would have included the omitted information would still support a finding of probable cause, then the omission of such information does not require invalidation of the underlying warrant. Without access to the entire application underlying the Carter Page surveillance orders, it is not possible to evaluate the degree to which the omission of information relating to the informant's alleged bias was relevant to the FISC judge's finding of probable cause under the "totality of the circumstances" test described above.

Lastly, readers who have been following FISA news may recall that the “programmatic surveillance” authorized under [Section 702](#) of FISA was recently [reauthorized](#) until December 31, 2023. Section 702 does not require the FISC to make individual determinations of probable cause before *acquiring* the communications of non-U.S. person targets and the HPSCI majority memorandum clearly [states](#) that the Carter Page order was *not* sought under Section 702. However, recent amendments to Section 702 require, in certain circumstances, the FBI to seek [an order supported by probable cause](#) when querying information acquired under Section 702 using a query term associated with an identifiable U.S. person in the course of a predicated criminal investigation that is unrelated to national security. Therefore, concerns about the presentation or omission of information provided to the FISC in proceedings to establish probable cause may still be relevant to Congress when exercising oversight of executive activities under Section 702.

Note: An earlier version of this post omitted a description of the types of investigations in which the FBI is required to obtain a court order before querying Section 702 information.

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