

UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT

IN RE UNKNOWN FOREIGN
INTELLIGENCE SURVEILLANCE
COURT ORDERS

AMICUS CURIAE LANDMARK LEGAL FOUNDATION MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR EN BANC ORDER DIRECTING INVESTIGATION

Amicus Curiae Landmark Legal Foundation (Landmark) respectfully moves this court to exercise its authority pursuant to 50 U.S.C. Section 1803(a)(2)(A) to consider “exceptional matters” en banc, and its inherent authority under the Constitution of the United States, and issue all orders necessary to protect the administration of justice, including an order to direct a full investigation into the leaking of surveillance activity conducted in accordance with the rulings of this court. Landmark does not seek to join any matter before this Court, but respectfully appears as a friend of the Court.¹

I. INTRODUCTION

A flurry of recent published reports citing numerous anonymous federal intelligence and law enforcement officials has disclosed an enormous amount of classified information, apparently gathered pursuant to orders issued by this Federal Intelligence Surveillance Act (FISA) Court. The nature, timing, and volume of classified information released indicate a systematic effort to exploit the orders of this Court for political purposes. Landmark respectfully urges the Court to exercise its inherent power to protect the administration of justice and the integrity of the FISA process and direct the federal government to conduct a thorough

¹ Landmark is a national public interest law firm committed to preserving the principles of limited government and separation of powers and defending individual rights and responsibilities.

investigation into these leaks, which include felony violations of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. Section 1809 and pursuant to 18 U.S.C. Section 798.

Landmark submits that officials within the Executive Branch have abused the judicial process, placing the integrity of this Court and the constitutional rights of individuals at risk. The Court should exercise its inherent jurisdiction and order the federal government to investigate fully, and the FBI to explain fully, the following questions:

1. Have this Court's order or orders been used by intelligence and law enforcement entities of the federal government as a subterfuge to surveil private citizens and at least one United States Senator for political purposes?
2. Did government officials seek one or more national security surveillance warrants from this Court as a pretext to conduct an investigation for the purpose of affecting an ongoing national presidential campaign and subsequent transition of an incoming president?
3. When applying to this Court for one or more warrants in this matter, did the FBI inform this Court that it had apparently paid some of the expenses of a former British spy who prepared the dossier reportedly relied on, in whole or part, in its application to convince this Court to issue a warrant, and that it had apparently negotiated to make further payments to the former British spy, which efforts were ultimately unsuccessful?
4. When applying to this Court for one or more warrants in this matter, did the FBI inform this Court that the dossier it reportedly presented in pursuit of one or more warrants had originally been prepared by the former British spy for a Washington

research firm conducting opposition research against the Republican nominee for president, candidate Donald Trump?

Landmark respectfully suggests that the Court, sitting *en banc*, should direct the government to complete its investigation and report its findings to the Court within 90 days. The Court should also consider whether it is appropriate to issue an order to all relevant federal law enforcement and intelligence agencies to show cause as to why they should not be held in contempt for failing to protect the secrecy of classified information obtained pursuant to orders of this Court. The Court should then consider whether additional remedial actions, including further investigations, referrals to appropriate ethics authorities, or even referrals for criminal prosecution, are appropriate. The Court may also deem it appropriate to question under oath attorneys and affiants responsible for securing the FISA warrant revealed by leaks to the media chronicled herein. Testimony may also be heard by those responsible for gathering, analyzing, and disseminating information as a result of the relevant warrants.

Landmark respectfully encourages this Court to use the full arsenal of legal powers available to it to resolve this matter.

II. BACKGROUND

In 2016, the FBI investigated the possibility of a Russian role in the American presidential campaign. They scrutinized Donald Trump's advisors for connections to Russian financial figures and to the hacking of the DNC's computers. Ultimately, however, they found no direct link between Mr. Trump and the Russian government. Eric Lichtblau and Steven Lee Myers, "Investigating Donald Trump, F.B.I. Sees No Clear Link to Russia," *The New York Times* Oct. 31, 2016, <https://nyti.ms/2dWIfBL> (April 18, 2017). Rather than closing the investigation,

the FBI apparently took the highly unusual step of converting the matter into a national security investigation. Andrew C. McCarthy, “FISA and the Trump Team,” *National Review*, Jan. 11, 2017, <http://www.nationalreview.com/article/443768/obama-fisa-trump-wiretap> (April 18, 2017). After reportedly being denied a warrant in June, 2016, which supposedly had named presidential candidate Donald Trump, the FBI sought and was granted “a FISA court warrant in October, giving counter-intelligence permission to examine the activities of ‘U.S. persons’ in Donald Trump’s campaign with ties to Russia.” Louise Mensch, “Exclusive: FBI ‘Granted FISA Warrant’ Covering Trump Camp’s Ties To Russia,” *Heat Street*, November 7, 2016, <https://heatst.com/world/exclusive-fbi-granted-fisa-warrant-covering-trump-camps-ties-to-russia/> (April 18, 2017).

In addition, according to *The New York Times*, in the closing days of the Obama administration, steps were taken to expand the NSA’s authority to distribute certain intelligence information to several other federal departments and agencies:

In its final days, the Obama administration . . . expanded the power of the National Security Agency to share globally intercepted personal communications with the government’s 16 other intelligence agencies before applying privacy protections.

The new rules significantly relax longstanding limits on what the N.S.A. may do with the information gathered by its most powerful surveillance operations, which are largely unregulated by American wiretapping laws. These include collecting satellite transmissions, phone calls and emails that cross network switches abroad, and messages between people abroad that cross domestic network switches.

The change means that far more officials will be searching through raw data.

Charlie Savage, “N.S.A. Gets More Latitude to Share Intercepted Communications,” *The New York Times*, Jan. 12, 2017, <https://nyti.ms/2jAhQbh> (April 18, 2017). The expanded policy was approved in December and became effective January 3, 2017, two weeks before the inauguration of the next president. *Procedures for the Availability or Dissemination of Raw Signals*

Intelligence Information by the National Security Agency Under Section 2.3 of Executive Order 12333 (Raw SIGINT Availability Procedures), p. 23.

Against this backdrop, *The New York Times*, *The Washington Post*, *McClatchy*, *Heat Street*, the BBC, and other national and international media outlets have published a series of articles relating to intelligence surveillance conducted in accordance with orders issued by the FISA Court. Details leaked to reporters include the name of a private U.S. citizen subject to a surveillance warrant, namely Carter Page, and speculation about the targeting of former Trump campaign manager, Paul Manafort, and Trump surrogate, Roger Stone, and certain information gathered pursuant to one or more warrants. Moreover, information gathered on President Donald Trump's former National Security Advisor, Michael Flynn, said to have been gathered "incidental" to the surveillance of the Russian ambassador, and whose identity was "unmasked" by government officials, was unlawfully leaked to the media.

Each leak is potentially criminal and certainly unethical. They also undermine the public's faith in the credibility of the FISA process. These leaks appear to be part of a systematic, political effort designed to undermine an incoming presidential administration.

Landmark respectfully urges this Court to exercise immediately its authority to direct the federal government to investigate the sources of these pervasive leaks. The following is a partial list of articles published since the new SIGINT rules took effect with a sampling of the leaks:

1. Paul Wood, "Trump 'compromising' claims: How and why did we get here?" *BBC News*, Jan. 12, 2017, <http://www.bbc.com/news/world-us-canada-38589427> (April 18, 2017).

- “A former CIA officer told me that . . . Mr. Trump [turned down lucrative Kremlin-offered “sweetheart deals”]. . . . But a joint intelligence and law enforcement taskforce has been looking at allegations that the Kremlin paid money to his campaign through his associates.”
- “On 15 October, the US secret intelligence court issued a warrant to investigate two Russian banks. *This news was given to me by several sources and corroborated by someone I will identify only as a senior member of the US intelligence community.* He would never volunteer anything – giving up classified information would be illegal – but he would confirm or deny what I had heard from other sources.” (Emphasis added.)
- “The taskforce included six agencies or departments of government. Dealing with the domestic, U.S., side of the inquiry, were the FBI, the Department of the Treasury, and the Department of Justice. For the foreign intelligence aspects of the investigation, there were another three agencies: the CIA, the Office of the Director of National Intelligence and the National Security Agency, responsible electronic spying.”
- “Lawyers from the National Security Division in the Department of Justice then drew up [a FISA warrant] application. . . . Their first application, in June, was rejected outright by the judge. They returned with a more narrowly drawn order in July and were rejected again. Finally, before a new judge, the order was granted, on 15 October, three weeks before election day.”

- “A lawyer – outside the Department of Justice but familiar with the case – told me that three of Mr. Trump’s associates were the subject of the inquiry. ‘But it’s clear this is about Trump,’ he said.”
2. Peter Stone and Greg Gordon, “FBI, 5 other agencies probe possible covert Kremlin aid to Trump,” *McClatchy*, Jan. 18, 2017, <http://www.mcclatchydc.com/news/politics-government/article127231799.html> (April 18, 2017).
- “The FBI and five other law enforcement and intelligence agencies have collaborated for months in an investigation into whether money from the Kremlin covertly aided President-elect Donald Trump, *two people familiar with the matter said.*” (Emphasis added.)
 - The agencies involved in the inquiry are the FBI, the CIA, the National Security Agency, the Justice Department, the Treasury Department’s Financial Crimes Enforcement Network and representatives of the director of national intelligence, *the sources said.*” (Emphasis added.)
 - “Investigators are examining how money may have moved from the Kremlin to covertly help Trump win, the two sources said. One of the allegations involves whether a system for routinely paying thousands of Russian-American pensioners may have been used to pay some email hackers in the United States or to supply money to intermediaries who would then pay the hackers, *the two sources said.*” (Emphasis added.)
 - “The informal, inter-agency working group began to explore possible Russian interference last spring, long before the FBI received information from a former

British spy hired to develop politically damaging and unverified research about Trump, according to the sources, who spoke on the condition of anonymity because of the sensitive nature of the inquiry.”

- “The working group is scrutinizing the activities of a few Americans who were affiliated with Trump’s campaign or his business empire and of multiple individuals from Russia and other former Soviet nations who had similar connections, the sources said.”
- “The BBC reported that the FBI had obtained a warrant on Oct. 15 from the highly secretive Foreign Intelligence Surveillance Court allowing investigators access to bank records and other documents about potential payments and money transfers related to Russia. *One of McClatchy’s sources confirmed the report.*” (Emphasis added.)

3. Michael S. Schmidt, Matthew Rosenberg, Adam Goldman and Matt Apuzzo, “Intercepted Russian Communications Part of Inquiry Into Trump Associates,” *The New York Times*, Jan. 19, 2017, <https://nyti.ms/2k6mKgl> (April 18, 2017).

- “Phone records and intercepted calls show that members of Donald J. Trump’s 2016 presidential campaign and other Trump associates had repeated contacts with senior Russian intelligence officials in the year before the election, according to four current and former American officials.”
- “American law enforcement and intelligence agencies are examining intercepted communications and financial transactions as part of a broad investigation into possible links between Russian officials and associates of President-elect Donald

J. Trump, including his former campaign chairman Paul Manafort, current and former senior American officials said.”

- “The intelligence agencies then sought to learn whether the Trump campaign was colluding with the Russians on the hacking or other efforts to influence the election.”
- “The officials interviewed in recent weeks said that, so far, they had seen no evidence of such cooperation. But the intercepts alarmed American intelligence and law enforcement agencies in part because of the amount of contact that was occurring while Mr. Trump was speaking glowingly about the Russian president, Vladimir V. Putin.”
- “The officials said the intercepted communications were not limited to Trump campaign officials, and also included members of the government outside of the intelligence services, they said.”
- “All of the current and former officials spoke on the condition of anonymity because the continuing investigation is classified.”
- “The intercepted calls are different from the wiretapped conversations last year between Michael T. Flynn, Mr. Trump’s former national security advisor, and Sergey I. Kislyak, Russia’s ambassador to the United States. In those calls, which led to Mr. Flynn’s resignation on Monday night, the two men discussed sanctions that the Obama administration imposed on Russia in December.”
- “The National Security Agency, which monitors the communications of foreign intelligence services, initially captured the calls between Mr. Trump’s associates and the Russians as part of routine foreign surveillance. After that, the F.B.I.

asked the N.S.A. to collect as much information as possible about the Russian operatives on the phone calls, and to search through troves of previous intercepted communications that had not been analyzed.”

- “The F.B.I. has closely examined at least three other people close to Mr. Trump, although it is unclear if their calls were intercepted. They are Carter Page, a businessman and former foreign policy adviser to the campaign; Roger Stone, a longtime Republican operative; and Mr. Flynn.”
- “As part of the inquiry, the F.B.I. is also trying to assess the credibility of the information contained in a dossier that was given to the bureau last year by a former British operative. The dossier contained a raft of allegations of a broad conspiracy between Mr. Trump, his associates and the Russian government. It also included unsubstantiated claims that the Russians had embarrassing videos that could be used to blackmail Mr. Trump.”

4. Matthew Rosenberg, Adam Goldman and Michael S. Schmidt, “Obama Administration Rushed to Preserve Intelligence of Russian Election Hacking,” March 1, 2017, *The New York Times*, <https://nyti.ms/2lB7cSL> (April 18, 2017).

- “In the Obama administration’s last days, some White House officials scrambled to spread information about Russian efforts to undermine the presidential election – and about possible contacts between associates of President-elect Donald J. Trump and Russians – across the government. Former American officials say they had two aims: to ensure that such meddling isn’t duplicated in future American or European elections, *and to leave a clear trail of intelligence for government investigators.*” (Emphasis added.)

- “Separately, American intelligence agencies had intercepted communications of Russian officials, some of them within the Kremlin, discussing contacts with Trump associates.”
- “The disclosures about the contacts came as new questions were raised about Attorney General Jeff Session’s ties to the Russians. According to a former senior American official, he met with the Russian ambassador, Sergey I. Kislyak, twice in the past year. The details of the meetings were not clear, but the contact appeared to contradict testimony Mr. Sessions provided Congress during his confirmation hearing in January when he said he ‘did not have communications with the Russians.’”
- “*At the Obama White House*, Mr. Trump’s statements stoked fears among some that intelligence could be covered up or destroyed – or its sources exposed – once power changed hands. What followed was a push to preserve the intelligence that underscored the deep anxiety with which the White and American intelligence agencies had come to view the threat from Moscow.” (Emphasis added.)
- “*Former senior Obama administration officials* said that none of the efforts were directed by Mr. Obama.” (Emphasis added.)
- “As Inauguration Day approached, Obama White House officials grew convinced that the intelligence was damning and that they needed to ensure that as many people as possible inside government could see it, even if people without security clearances could not.”
- “More than a half-dozen current and former officials described various aspects of the effort to preserve and distribute the intelligence, and some said they were

speaking to draw attention to the material and ensure proper investigation by Congress. All spoke on the condition of anonymity because they were discussing classified information, nearly all of which remains secret, making an independent public assessment of the competing Obama and Trump administration claims impossible.”

- “On Wednesday, a Justice Department official confirmed that Mr. Sessions had two conversations with Ambassador Kislyak last year, when he was still a senator, despite testifying at his Jan. 10 confirmation hearing that he had no contact with the Russians.”
- “However, Justice officials acknowledged that Mr. Sessions had spoken with Mr. Kislyak twice: once, among a group of ambassadors who approached him at a Heritage Foundation event during the Republican National Convention in Cleveland in July and, separately, in an office meeting on Sept. 8. The contacts were first reported by the Washington Post.”
- “As WikiLeaks was pushing out emails stolen from the Democratic National Committee through online publication, American intelligence began picking up conversations in which Russian officials were discussing contacts with Trump associates, and European allies were starting to pass along information about people close to Mr. Trump meeting with Russians in the Netherlands, Britain and other countries.”
- “But what was going on in the meetings was unclear to the officials, and the intercepted communications did little to clarify matters – the Russians, it appeared, were arguing about how far to go in interfering in the presidential

election. What intensified the alarm at the Obama White House was a campaign of cyberattacks on state electoral systems in September, which led the administration to deliver a public accusation against the Russians in October.”

5. Adam Entous, Ellen Nakashima and Greg Miller, “Sessions met with Russian envoy twice last year, encounters he later did not disclose,” *The Washington Post*, March 1, 2017, https://www.washingtonpost.com/world/national-security/sessions-spoke-twice-with-russian-ambassador-during-trumps-presidential-campaign-justice-officials-say/2017/03/01/77205eda-feac-11e6-99b4-9e613afeb09f_story.html?utm_term=.6a76a243b950 (April 18, 2017).
 - “Then-Sen. Jeff Sessions (R.-Ala.) spoke twice last year with Russia’s ambassador to the United States, Justice Department officials said, encounters he did not disclose when asked about possible contacts between members of President Trump’s campaign and representatives of Moscow during Sessions’s confirmation hearing to become attorney general.”
 - “One of the meetings was a private conversation between Sessions and Russian Ambassador Sergey Kislyak that took place in September in the senator’s office, at the height of what U.S. intelligence officials say was a Russian cyber campaign to upend the U.S. presidential race.”
6. Ellen Nakashima, Devlin Barrett and Adam Entous, “FBI obtained FISA warrant to monitor Trump adviser Carter Page,” *The Washington Post*, April 11, 2017, https://www.washingtonpost.com/world/national-security/fbi-obtained-fisa-warrant-to-monitor-former-trump-adviser-carter-page/2017/04/11/620192ea-1e0e-11e7-ad74-3a742a6e93a7_story.html?utm_term=.37786cd20fe7 (April 18, 2017).

- “The FBI obtained a secret court order last summer to monitor the communications of an adviser to presidential candidate Donald Trump, part of an investigation into possible links between Russia and the campaign, law enforcement and other U.S. officials said.”
- “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.”
- “This is the clearest evidence so far that the FBI had reason to believe during the 2016 presidential campaign that a Trump campaign adviser was in touch with Russian agents. Such contacts are now at the center of an investigation into whether the campaign coordinated with the Russian government to swing the election in Trump’s favor.”
- “The counterintelligence investigation into Russian efforts to influence U.S. elections began in July, officials have said. Most such investigations don’t result in criminal charges. *The officials spoke about the court order on the condition of anonymity because they were not authorized to discuss details of a counterintelligence probe.*” (Emphasis added.)
- “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.”

- “Among other things, the application cited contacts that he had with a Russian intelligence operative in New York City in 2013, officials said. Those contacts had earlier surfaced in a federal espionage case brought by the Justice Department against the intelligence operative and two other Russian agents. In addition, the application said Page had other contacts with Russian operatives that have not been publicly disclosed, officials said.”
- “The application also showed that the FBI and the Justice Department’s national security division have been seeking since July to determine how broad a network of accomplices Russia enlisted in attempting to influence the 2016 presidential elections, the officials said. Since the 90-day warrant was first issued, it has been renewed more than once by the FISA court, the officials said.”

III. REQUEST FOR ORDER DIRECTING INVESTIGATION

According to media reports, during the last year of the prior administration, law enforcement and intelligence officials sought, and eventually obtained, authorization from this Court to eavesdrop on then or former Trump campaign officials; continued monitoring the individuals even when no evidence of wrongdoing was said to have been found; then relaxed the NSA rules to allow evidence to be shared widely within the government; and rushed to collect and then distribute intelligence information collected to numerous federal agencies, increasing the likelihood that certain information, including the identities and conversations of private U.S. citizens, might be leaked to the media. In the case of Michael Flynn, that did, in fact, occur, as his name was “unmasked” and provided to the media.

It is impossible for Amicus Curiae to know the breadth and extent of the FISA Court's order or orders. Consequently, it is not possible for Landmark to know what of the leaked classified information detailed herein is subject to this Court's order or orders and jurisdiction. But this Court knows its orders and is uniquely situated to take action to determine whether or not its orders have been and are being abused.

Courts Have a Broad Array of Inherent Powers to Exercise in Defense of the Administration of Justice

The Supreme Court has recognized that federal courts have implied powers since 1812. *U.S. v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). In *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1990), the Supreme Court described inherent powers as those “necessary to the exercise of all others” and “necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Id.* at 43. Inherent powers are used at all stages of litigation and for various purposes. They are used in both pretrial case management and during the conduct of trials. They are used to improve the fact-finding process, as in the appointment of auditors and amicus curiae. Finally, they are used to craft punishment to sanction parties. Joseph J. Anclien, *The Broader the Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. Ann. Surv. Am. L. 37, 44-48 (2008).

The court's power to sanction is broad and is not limited to the attorneys appearing before it. This power also extends to misconduct outside the immediate confines of the courtroom.

Inherent sanctions, like Rule 11 sanctions, may be imposed against any person responsible for wrongdoing, regardless of whether that person is a litigant or an attorney. Sanctionable wrongdoing includes prelitigation misconduct as well as abuses of process that occur beyond the courtroom, such as the willful disobedience of an otherwise valid court order, so long as the court affords a violator due process before imposing sanctions.

Thomas E. Baker, *The Inherent Power to Impose Sanctions: How a Federal Judge Is Like an 800-Pound Gorilla*, 14 Rev. Litig. 195, 201 (Winter 1994).

Landmark respectfully urges this Court to exercise its full inherent and statutory authority to defend the integrity of the justice system by taking the remedial steps proposed herein.

IV. CONCLUSION

This is an extremely important matter. Fundamental constitutional rights and civil liberty protections are threatened if unlawful and unethical tactics are used in an abuse of significant governmental power, i.e., the surveillance of private citizens. Whether this Court's good faith order or orders were abused by Executive Branch officials for bad faith purposes requires thorough investigation and, if appropriate, the strongest sanctions available to the Court.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP AND SECURITY CLEARANCE STATUS

Pursuant to the United States Foreign Intelligence Surveillance Court's Rules of Procedure 7(h)(1), 7(i), and 63, Movants respectfully submit the following information regarding the bar membership and security clearance of the undersigned counsel.

Richard P. Hutchison is a member in good standing of the following federal courts: the Supreme Court of the United States; the United States Court of Appeals for the Fourth, Eighth, Ninth, Tenth, Eleventh, and District of Columbia; and the United States District Court for the Western District of Missouri. He is licensed to practice law by the Supreme Court of Missouri.

Mr. Hutchison does not hold a security clearance. Because Amicus Curiae's motion and memorandum do not contain classified information and Amicus does not seek to join any proceeding pending before this Court, Movant respectfully requests that the undersigned counsel may participate in proceedings on the motion without access to classified information or security clearances. FISC R.P. 63 (requiring counsel only to have "appropriate security clearances").

Respectfully submitted,

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