

# **THE HARM RELEASING THE NUNES MEMO CAUSED**

I did two pieces elsewhere on the Devin Nunes memo yesterday. At Vice, I tracked all the holes in the memo; subsequent reporting showed that I hit virtually all the big ones that Adam Schiff hit in his response memo: the memo misrepresented what FBI told FISC about the political nature of Christopher Steele's, it misrepresents Andrew McCabe's testimony, and the memo misrepresented why George Papadopoulos was mentioned in the application. At HuffPo, I described how on the twin FISA events of the last few weeks – 702 reauthorization and the Nunes memo – both Nunes and Paul Ryan were on the wrong side of the principles of rule of law and civil liberties.

Since the memo has proven to be such a dud, a lot of people are now questioning DOJ's and Democrats' claims that releasing the memo would harm national security. I want to lay out three ways (DOJ surely believes) it may well do that.

## **Tells Carter Page and any co-conspirators precisely when FISA surveillance started**

The memo tells Carter Page – and any co-conspirators both within the Trump camp and overseas – precisely when the surveillance on Page started and what it consists of.

FBI obtained an electronic surveillance warrant against Page on October 21, 2016, and obtained 3 reauthorizations (so roughly January 19, April 19, and July 18). While Page's interlocutors overseas were likely wiretapped, if possible, associates in the Trump camp can now assume any

conversations they had with him before October 21 were not recorded and remain unavailable to Robert Mueller.

Mind you, we know the memo *doesn't* reveal the full extent of surveillance directed against Carter Page, because it gives no details on the 2014 FISA wiretap reportedly used against him. That leaves open the possibility that he was surveilled using other means. I think the GOP would have included had FISC approved a physical search FISA warrant against Page, because that would include the possibility of obtaining stored communications from during the campaign. But I would also bet a lot of money that whatever Attorney General was in charge during periods when Page traveled overseas approved a 705(b) order on him, permitting surveillance to continue while he was overseas. I'll have more to say on this in upcoming days.

Note, it is also possible that the surveillance against Page continues.

## **Tells subjects of the investigation the status of the investigation and FBI's ability to validate the Steele memo**

The memo provides other details about the investigation, too.

On October 21, per a quotation from FBI Assistant Director Bill Priestap, the investigation into Russian ties with the Trump camp was in its "infancy." Again, this will let Russians and Trump associates know that anything they managed to destroy before that date may well be unavailable to Mueller.

Later in October, the source report on Steele reported that the dossier had been "only

minimally corroborated.” If any of the events in the dossier are real, then the Russians (especially) will have a sense of how unsuccessful the FBI had been in finding the evidence to corroborate those events. If the dossier is, as I’ve suggested, disinformation, the Russians would know that their disinformation was wasting FBI Agent time at least for months.

## **Tells Australians and every other foreign partner shared intelligence may be officially declassified**

The memo mentions the Papadopoulos tip and confirms that’s what triggered the investigation; it also confirms that nothing shared prior to then had triggered an investigation. While the description here doesn’t attribute that intelligence to the Australians, we know that’s where it came from. Now Australia and every other country will know that intelligence they share, including intelligence that makes it look like Five Eyes officials are reporting on the citizens of other Five Eyes countries, may be released by Devin Nunes for political gain. This will add to the many reasons why our friends will hesitate before sharing intelligence with us.

## **Makes it more likely defendants will get FISA review**

In the 40 year history of FISA, no defendant who got notice that FISA data was being used against them in prosecution has been able to review the application used against them. Because Nunes released this information so frivolously,

because White House Counsel Don McGahn, in his cover memo, suggested this was a time when “public interest in disclosure of [FISA materials] outweighs any need to protect the information, the memo lowers the bar for release of FISA-related information going forward.

I assume Carter Page, if he is charged, will successfully be able to win review of his FISA application (and think that would be entirely appropriate); that may mean he doesn’t get charged or, if he does, Mueller has to bend over backwards to avoid using FISA material.

But I also assume – and hope – that this disclosure ends the 40 year drought on the release of information, which the original drafters of FISA envisioned would be appropriate in certain circumstances. I think this the one salutary benefit of this memo; it makes it more likely that FISA will work the way it is supposed to going forward.

I even think it possible that the release of this information may affect the response to Keith Gartenlaub’s pending appeal in the Ninth Circuit. His is a case that merits FISA review, and whereas the court might have hesitated to give him that in the past, it would be far easier for them to do so here.

In other words, the release of this memo likely helped those Mueller is trying to investigate, provided another reason for our foreign partners to hesitate before sharing intelligence with us, and makes it more likely some defendants will get to review their FISA application going forward. I can see how DOJ would consider all of that harmful to national security.

Update: On Twitter some folks added that this makes people distrust FBI, making it less likely they’ll share information with the Bureau. In my opinion actually sharing interview reports with HPSCI already did that (though that Chris Wray was forced to do so wouldn’t be as widely known). I also think the sheer shittiness of the dossier minimizes the impact of that somewhat.

But I think it's a fair point.