IN DEFENSE OF SUSPECTED RUSSIAN AGENT CARTER PAGE, MICHAEL MUKASEY JUST GAVE DEFENSE ATTORNEYS A BIG GIFT

In my post laying out the damage the Nunes memo might have caused, I predicted that defense attorneys would use the release of the memo — and the language Don McGahn used to claim its release served a public interest — to support their arguments that defendants should get to review the underlying application for a FISA warrant.

> 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.
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> 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.
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> 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.
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> 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.

Former Attorney General Michael Mukasey, fresh off trying to broker the release of sanctions violator Reza Zarrab, just gave defense attorneys another big gift.

In a WSJ op-ed that ignores all the holes in the Nunes memo and pretends two guilty pleas about lies about negotiations with Russians have nothing to do with an investigation into "collusion" with Russians, he says that Carter Page's FISA application should be made public so we can figure out whether DOJ misled the FISA Court.

> I believe that at a minimum, the public should get access to a carefully redacted copy of the FISA application and renewals, so we can see whether officials behaved unlawfully by misleading a court;

Remember: when defendants who've gotten FISA notice ask to see their own applications to see whether "officials behaved unlawfully by misleading a court," one thing the government has to do to keep the application secret is submit a declaration from the Attorney General saying that FISA applications are so sensitive they can never be shared with defendants. In the declaration Eric Holder submitted in the Gartenlaub case, for example, he claimed,

> Based on the facts and considerations

> set forth below, I hereby claim that it would harm the national security of the United States to disclose or hold an adversary hearing with respect to the FISA Materials.
>
> [snip]
>
> I certify that the unauthorized disclosure of the FISA Materials that are classified at the "TOP SECRET" level could reasonably be expected to cause exceptionally grave damage to the national security of the United States. I further certify that the unauthorized disclosure of the FISA materials that are classified at the "SECRET" level could be expected to cause serious damage to the national security of the United States. The FISA Materials contain sensitive and classified information concerning United States intelligence sources and methods and other information related to efforts of the United States to conduct national security investigations, including the manner and means by which those investigations are conducted. As a result, the unauthorized disclosure of the information could harm the national security interests of the United States.

I'm sure Holder was using boilerplate that Mukasey himself used, when he submitted similar declarations to courts.

Remember, Gartenlaub is awaiting a ruling from the Ninth Circuit on whether he should be able to access his FISA application to see whether officials misled the FISA Court. The government has been claiming over and over that accessing his FISA application to do so would be too dangerous.

And yet, here we have one of the most hawkish Attorneys General in recent history telling the world that *even the public release of FISA*

applications to do just that would be useful.