

KEITH GARTENLAUB JUST NOTIFIED THE NINTH CIRCUIT THAT TRUMP AND BOTH PARTIES NOW SUPPORT RELEASING FISA APPLICATIONS

During the entire period that the country has been obsessing about DOJ's application to spy on Carter Page, who had been a legitimate counterintelligence concern going back to 2013 with renewed concern in early 2016, Keith Gartenlaub has been awaiting ruling in his challenge to his own targeting under FISA.

Only, with Gartenlaub, there is real reason to worry about the propriety – and the preconceptions about Gartenlaub's Chinese-American wife – of the FISA application. Moreover, given the way FBI moved back and forth from FISA to criminal to FISA warrants, it seems like the government used FISA as a means to conduct a fishing expedition into Gartenlaub's hard drives.

As I've been saying for a while, Devin Nunes' stunt (and the aftermath) may lead judges to be less credulous of the government's forty year run of claiming that releasing a FISA application would badly damage national security.

At least, that's what Gartenlaub's lawyer John Cline argues in a letter to the Ninth Circuit.

Throughout this litigation, the government has maintained that disclosure of the underlying FISA application, even with redactions, would cause grave damage to national security. The district court accepted the

government's argument, as has every court since FISA was enacted (with the exception of one district court, which was later reversed).

On February 2, 2018, the President—head of the same Executive Branch that is prosecuting appellant Gartenlaub—declassified and approved release of a House Permanent Select Committee on Intelligence (“HPSCI”) majority memorandum (attached as Exhibit A) that summarizes portions of a FISA application targeting an American citizen. According to the cover letter from the Counsel to the President, the President declassified the memorandum because “the public interest in disclosure outweighs any need to protect the information.” The Speaker of the House of Representatives observed that release of the HPSCI memorandum “provide[s] greater transparency” concerning FISA and helps “ensure the FISA system works as intended and Americans’ rights are properly safeguarded.” Al Weaver, Paul Ryan: Nunes memo lays out a ‘specific, legitimate’ worry about surveillance, Washington Examiner, Feb. 2, 2018.

On February 24, 2018, HPSCI released a redacted, declassified version of a minority memorandum (attached as Exhibit B), which challenges certain assertions made in the majority memorandum. The minority memorandum, like the majority memorandum, summarizes portions of the underlying FISA application.

The declassification of the HPSCI memoranda demonstrates that it is possible to discuss publicly the merits of a FISA application without damaging national security. In addition, the declassification of the memoranda highlights the absurdity of the

government's assertion, in this and other cases involving motions to suppress FISA surveillance, that any disclosure of a FISA application, even to cleared defense counsel under the protections of CIPA, would harm national security. If the HPSCI memoranda can be disclosed without harming national security, as the Executive Branch has determined, at least comparable disclosure of the Gartenlaub FISA application can be made to cleared defense counsel under CIPA without causing such harm.

The one good thing that might come out of this stunt is that defendants against whom the spying case is weak, as it appears to have been with Gartenlaub, might begin to get to review their FISA applications to see whether FBI acted improperly in obtaining a warrant.

Perhaps, with this notice to the Ninth Circuit, Gartenlaub will be the first defendant in forty years to get a real glimpse into the FISA process.