

ANDY FINDS AN ACORN: THE SEARCHES OF CARTER PAGE'S DEVICES

I've long argued that Trump opponents should include Andrew McCarthy among the right wing Trump defenders they read. That's true, in part, because he at least feigns to be considering the public evidence (though I think he has long since gotten swept up in tribalism). Moreover, as a former prosecutor who worked on some high visibility national security cases, he knows how these things worked fifteen years ago.

His piece on the Adam Schiff memo is typical of his current work. Virtually every single point is easily refuted; most are laughable, such as when he claims the FBI's use of his 2013 interview to prosecute some spies means his March 2016 interview was truthful.

The memo does note that "the FBI also interviewed Page multiple times about his Russian intelligence contacts." Apparently, these interviews stretch back to 2013. The memo also lets slip that there was at least one more interview with Page in March 2016, before the counterintelligence investigation began. We must assume that Page was a truthful informant since his information was used in a prosecution against Russian spies and Page himself has never been accused of lying to the FBI.

McCarthy also adheres to the GOP propaganda line that "Democrats conveniently omit is that ... the Russian spies explicitly regarded him as an 'idiot' (and they had not even seen him on cable TV)," which I mocked in this piece at Vice.

The Republican response to the evidence that the Trump campaign named Page a foreign policy advisor around the same

time the FBI interviewed him over suspected ties with Russian spies is perhaps the most pathetic thing in here. Among other things, it complains that the Schiff memo doesn't mention that "a Russian intelligence officer called Page 'an idiot.'"

So the latest Memoghazi arguments might best be summarized this way: After Democrats convincingly argued Trump made a suspected Russian asset a key foreign policy advisor, Republicans insisted that doesn't matter because the suspected Russian asset was a moron.

On one point (a point I've been making), however, McCarthy is right.

The Schiff memo reveals, for the first time, that DOJ obtained a FISA order covering *both* electronic surveillance and "physical search." Not many people understand this, but DOJ uses physical search orders not just to authorize FBI agents to search through a person's home, but also to search through that person's electronic devices (and cloud providers' cloud storage). As I explained in my post on FISA and the Space-Time Continuum, using a physical search order allows the government to search far back in time.

Domestically, there are two kinds of collection: 1805, which is the collection of data in motion – an old fashioned wiretap, and 1824, which is called a "physical search" order. The government likes to hide the fact that the collection of data at rest is accomplished with an 1824 physical search order, not 1805. So an 1824 order might be used to search a closet, or it might be used to image someone's hard drive. Most often, 1805 and 1824 get combined, but not always (the FISC released a breakdown for these last year).

Of course (as the Gartenlaub case will show), if you image someone's hard drive, you're going to get data from well before the time they've been under a FISA order, quite possibly even from before you've owned your computer.

In Keith Gartenlaub's case, a physical search order was used to conduct a black bag search of his home, during which the FBI imaged and subsequently searched the saved hard drives from the last three computers Gartenlaub had used, going back a decade, which is how FBI found child porn that hadn't been accessed in a decade.

And, as McCarthy notes (though without explaining the electronic/physical distinction), in the case of Carter Page, *depending on what minimization procedures the FISC imposed*, a physical search order approved on October 21, 2016 might allow FBI to search his devices for communications he had between March and September 2016, when he was a member of the Trump campaign.

What Democrats fail to mention is that the surveillance enabled the FBI to intercept not only his forward-going communications but also any stored emails and texts he might have had. Clearly, they were hoping to find a motherlode of campaign communications. Remember, Page was merely the *vehicle* for surveillance; the *objective* was to probe *Trump* ties to Russia.

I've explained that the near-certainty that NSA obtained a 705(b) order on Page for when he traveled to Moscow, London, and the Emirates in December and January would make such backwards looking surveillance even more likely.

I'm not sure that amounts to using Page as a *vehicle* to surveil the Trump campaign. Depending

on how you count it, FISC modified somewhere between 112 and 310 applications in 2016, easily more than they ever had before (my guess is the big spike in numbers has to do with their consideration of the Riley SCOTUS precedent as they approve more orders accessing iPhones). Modifications are how minimization procedures show up in FISA counts, and imposing limits on what the government might access from Page's devices is the kind of thing I'd expect to see out of the FISC.

Still, McCarthy doesn't know that FBI used Page as a *vehicle*; the FBI could easily argue they were trying to protect Trump from the suspected spy the campaign's non-existent vetting had invited into its midst. And he couldn't know whether targeting Page allowed FBI to access campaign-related communications without knowing what kind of minimization procedures were imposed, if any.

A real oversight committee would make answering such a question a priority, because it's the kind of question that goes to the core of the impact of the Page order on Trump's campaign, but also because the question of how FISC orders permit FBI to access decades of information is a fairly important legal issue, not least in the Ninth Circuit in the Gartenlaub case.

Alas, HPSCI is not that real oversight committee, and so no one appears to be asking that question.