



On “Releasing The Memo”

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In the rapidly escalating war between the GOP and the FBI, a number of House Republicans appear to believe they’ve discovered their own atomic bomb: A memorandum produced by the staff of Intelligence Committee chair Devin Nunes. The memo, according to several Republican members who’ve read it, purports to document scandalous political abuse of surveillance powers, part of a wider conspiracy against Donald Trump within the Bureau. In a phrase widely echoed on Trump-friendly media, Rep. Steve King (R-Iowa) has suggested that the conduct revealed in the memo amounts to a scandal “worse than Watergate.” On Monday evening—yielding to a social media campaign they themselves launched—House Republicans voted to #ReleaseTheMemo, disregarding a warning from the Justice Department that doing so would be “extraordinarily reckless.”

We already have a rough idea of what the memo is likely to say: It reportedly finds particular fault with the Foreign Intelligence Surveillance Act order the Bureau obtained to wiretap former Trump campaign advisor Carter Page, and above all its purported reliance on the now-infamous Steele Dossier. Named for Christopher Steele—the former MI6 officer who compiled it at the behest of commercial intelligence firm Fusion GPS—the dossier originated as opposition research into Trump’s ties to the Russian government, funded by the Democratic National Committee and the Clinton campaign. CNN reported back in April that the memo was “used to bolster” the Bureau’s case for a warrant on Page before the FISA court, leading many Trump boosters to conclude that the whole of the Russia investigation is little more than the extension of a Democratic hit job, employing underhanded tactics borrowed from J. Edgar Hoover’s COINTELPRO playbook.

There is abundant reason to regard all this as, at the very least, a misreading of the facts, and likely a disingenuous one as well. But it’s worth pausing for a moment to consider what follows if we take it at face value. On the worst version of the story, high-ranking FBI and Justice Department officials, in service of a sweeping conspiracy to elect Hillary Clinton—exactly how is left somewhat vague—laundered a hodgepodge of unverified hearsay produced by Democratic operatives to dupe the FISA Court into authorizing electronic surveillance of an American citizen who had been working for the Trump campaign. The appropriate response to this scandalous conduct is typically said to be a purge of the “Deep State” conspirators from the

ranks of the intelligence community. But surely if this story were true, its implications would be far more radical.

Consider: In 2016 the FISA court issued 1,559 targeted FISA warrants. Nearly 20 percent of the targets of those warrants—336 individuals or corporate entities—were United States citizens or legal residents. It is vanishingly rare for the court to deny a warrant application outright, though many are sent back to be refined or bolstered with additional evidence before their ultimate approval. Those whose communications are collected almost never learn of it, because intelligence surveillance is not typically meant to gather evidence for use in court. Absent the adversarial crucible to which criminal wiretap orders are ultimately subjected, practical responsibility for ensuring FISA's broad powers are used appropriately rests almost entirely with the Justice Department lawyers who prepare applications and the FISC judges who review them. And if any warrant application has ever received especially exacting scrutiny from the Court, surely it should have been this one: an application whose target was not just an American citizen, but a recent advisor to an ongoing presidential campaign. If the Court had nevertheless been beguiled into authorizing such surveillance on the basis of a few pages of uncorroborated gossip, it becomes hard to see why the public should feel confident that *any* FISA orders are appropriately vetted. Moreover, the Bureau wields many extraordinarily intrusive surveillance tools that would not even require a potential malefactor to risk seeking to dupe a FISA judge, such as National Security Letters, or section 702, whose massive database of the fruits of surveillance on more than 100,000 foreign targets can be queried for information on Americans without court approval.

Conspicuously, however, many of the representatives who've most vocally touted the supposedly explosive contents of the Nunes memo do not appear to believe the systemic abuse of intelligence authorities they're alleging demands a rethinking of any of those authorities. As national security blogger Marcy Wheeler notes, the same Steve King who thought the Nunes memo documented abuses "worse than Watergate" not only voted to extend section 702 for another 6 years, but voted against an amendment that would have imposed a warrant requirement on queries of the 702 database pertaining to Americans. So did Nunes himself, as well as Reps. Matt Gaetz and Ron DeSantis.

This should seem incongruous on its face. One need not believe that there are ongoing partisan conspiracies within the FBI and Justice Department to support more stringent civil liberties safeguards on the broad spying authorities the intelligence community has accumulated over the past two decades. But it is very hard to understand how one could believe such a conspiracy exists—indeed, continues to be covered up by sitting officials—yet reject even the idea of pausing to debate such safeguards before renewing precisely the sorts of powers one claims have been abused.

The 702 votes aren't the only incongruity: Nunes and his allies haven't in *any* respect behaved as you might expect from members of Congress who have uncovered serious intelligence abuses. They've resisted sharing their findings with their own colleagues on the Senate Intelligence Committee, nor did they hasten to send copies to the Trump appointees now heading the Justice Department and the FBI itself, though one is said to have finally arrived this weekend. Nor, for

that matter, have they been demanding publication of the underlying applications upon which the memo is based—which, if they truly contain little more than invocations of the Steele dossier, could be published with only minor redactions to establish their case beyond reasonable dispute. In short, rather than taking any of the steps you might suppose a majority party would pursue, either in terms of revisiting policy or seeking internal review by the executive branch agencies involved, House Republicans have focused on whipping up public demands for the release of their own accusations. All of this is, to put it mildly, rather odd.

It makes somewhat more sense, however, if it is viewed primarily as a public relations campaign with the aim of impugning the integrity of the FBI and, by association, the Mueller investigation.

Let's take as given that the FBI did indeed make reference to Steele's findings in seeking its wiretap on Page. Whether this constitutes any kind of scandal depends almost entirely on what *other* evidence was part of the supporting documentation. If the Bureau simply presented Steele's unverified reporting as fact, then however credible they might find him personally, that would certainly be a disturbingly thin basis on which to conduct electronic surveillance of an American citizen. But there would be no reason to regard it as inappropriate if the dossier had merely been one of several sources used to corroborate and complement each other. That a historically credible researcher had initially been hired with a political motive might justify taking his findings with an added grain of salt, but it would be no reason to disregard them entirely if they appeared to jibe with information gleaned via other channels.

There are plenty of indirect reasons to think this is likely the case. For one, we now know that not only did the FISA Court reauthorize surveillance at least once after the initial order lapsed—which they ought not have done unless the initial wiretap yielded something to justify its continuation—but that Trump-appointed Deputy Attorney General Rod Rosenstein personally approved another renewal application before it was sent to the FISC. It is very difficult to imagine him doing so—especially given the ire that decision appears to have inspired at the White House—if the application consisted of little more than excerpts from Steele's dossier. Furthermore, we know definitively that Page was targeted for recruitment by Russian intelligence as early as 2013, and was warned of the attempt by the FBI at the time. If scrutiny of communications metadata, or the fruits of surveillance directly targeting Russian operatives, showed a pattern of significant continuing contact with such operatives after that point, it might go a fair part of the way toward demonstrating that Page satisfied one of FISA's statutory definitions of an “agent of a foreign power,” which can apply to an American citizen who “knowingly aids or abets any person” who is engaged in “clandestine intelligence gathering.”

The problem for the FBI, and thus the PR value of the Nunes memo, lies in the fact that the defense one would expect the Bureau to offer—that the Steele dossier was cited as only one of several sources establishing the same facts—cannot responsibly be elaborated with any real specificity. If some conclusions were based on technical access to the communications of Russian intelligence officials, any detail about those would risk allowing Russia to identify the targets and change their communication practices. If the Bureau relied on human assets, any information which provided a clue to their identities might well put their lives at risk.

In effect, the Bureau would be restricted to tersely asserting the existence of other sources, but unable to back the claim up in a way that would allow the public to assess their relative importance, let alone satisfy skeptics. Yet the memo's status as a "secret" that had to be dragged into the light is likely to give its claims far greater weight—and greater media exposure—than if Nunes had simply asserted as much directly, without the dramatic buildup.

A question worth asking at this point is: To what end? The most obvious answer is that it serves to call the integrity of those conducting the Russia investigation into question, thus casting doubt on any embarrassing findings they might eventually make public. But with the conclusion of that investigation months away, at the least, it seems doubtful how much a media furor now will cushion any such blows—especially if those ultimate findings aren't themselves critically dependent on Steele's.

The more troubling possibility is that it would serve to provide political cover for Republican legislators to sit silent—or applaud—if Trump were to begin "cleaning house" at Justice or the FBI, or even target Mueller himself. To serve this purpose, the memo wouldn't need to withstand sustained scrutiny; it would only need to create enough of a penumbra of doubt to justify congressional inaction for the duration of the purge. In the latter case, the threat of the Bureau refuting the Nunes memo is rendered conveniently moot by the absence of anyone remaining with motivation to do so.

I hope this second hypothesis is wrong. But with the memo now set for release, it's worth keeping an eye out for officials following FBI deputy director Andrew McCabe out the door.

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