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Nunes' stunt aside, U.S. surveillance needs more scrutiny

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Of the many strange inversions the Trump era has produced, few are as jarring as the flip in Republican orthodoxy about the federal intelligence and law enforcement communities. “Law and order” conservatives who, a few years ago, treated skepticism about the Patriot Act as a blasphemous insult to the integrity of American intelligence professionals now routinely traffic in talk of “Deep State” conspiracies to abuse surveillance powers.

That was thrown into relief Wednesday, when the FBI traded brickbats with Rep. Devin Nunes, R-Calif., chair of the House Permanent Select Committee on Intelligence. In an unusually public rebuke, the FBI condemned the imminent release of a memo produced by HPSCI staff alleging misconduct by bureau officials. Mr. Nunes quickly returned fire, accusing the FBI — headed by Trump appointee Christopher A. Wray — of having “stonewalled Congress’ demands for information.” The memo may be released today.

Democrats, stepping into the role Republicans had shed, have sided with the intelligence community, invoking the need to protect classified sources and methods. And it’s not hard to see why: Nearly everything about Mr. Nunes’ reinvention as a champion of privacy and civil liberties reeks of disingenuousness.

There are legitimate concerns about the Foreign Intelligence Surveillance Court and the myriad means — not all requiring warrants — by which law enforcement gets access to private conversations involving U.S. citizens. But the fervor around the memo means these serious policy debates will follow so many others into the maw of Trump-driven partisanship, and the broader questions of how our national security state operates — questions more about legal and institutional design than the motives of individual FBI agents — will go unexamined.

Mr. Nunes, along with many of the allies who joined him in whipping up a public outcry to #ReleaseTheMemo, voted last month to reauthorize a controversial warrantless spying authority known as Section 702. Bipartisan efforts to add privacy safeguards for Americans’ communications were swatted down with confident assertions that there had been no recorded abuses of such surveillance — an assessment it seems odd to make at the same time as one is alleging a systematic effort by senior intelligence officials to deceive overseers and conceal egregious misconduct.

The overarching narrative that the Nunes memo apparently seeks to build — a story of rabid partisans within the Obama administration cooking up a bogus Russia investigation to use as a weapon against Trump — is almost certainly nonsense. Among many, many other glaring defects, it requires the inexplicable complicity of far too many people, many of them Republicans appointed by Mr. Trump, within both the FBI and the National Security Division of the Justice Department, as well as the credulous acquiescence of the FISA court, whose bench is wholly populated by judges placed there by the Bush-appointed Supreme Court Chief Justice John G. Roberts Jr.

On the narrower question of whether the wiretap order targeting Mr. Page had a solid basis, the memo is unlikely to provide the public with much clarity, either. The memo's core contentions are reportedly that FBI officials relied too heavily on a now-infamous dossier compiled by former British intelligence officer Christopher Steele without adequately corroborating its claims and failed to disclose to the FISA court that Steele's research had been underwritten by Democrats in the market for political opposition research. Even if all that were true, however, it's impossible to know how badly it would undermine the case presented to the court.

Typically, FISA applications are fairly substantial documents, with supporting affidavits running dozens of pages, minutely fact-checked by government attorneys after making it through a labyrinth of internal approvals within the FBI. It matters, then, whether Steele's dossier constituted the heart of the case presented to the FISA court or was more like supplementary material. But the underlying application remains classified, and the other supporting evidence likely cannot be made public: The FBI cannot defend itself by pointing to the Kremlin mole or the electronic intercept or the hacked laptop that bolstered the application without providing Russian intelligence with a map to its own vulnerabilities — or, at worst, a hit list.

Yet for all that, the memo could still have stumbled into something of merit.

If FBI agents were less than fully candid with the FISA court, that's worth criticizing even if candor would not have changed the outcome. If they failed to do due diligence on claims in Steele's dossier, that's a problem even if the dossier was a relatively minor piece of the puzzle. Those are problems not because they reveal a grand conspiracy, but because finding slipshod work in this application — targeting a prominent, politically connected American in an investigation certain to receive extraordinary scrutiny — should make us wonder what would turn up if the thousands of more mundane FISA warrants issued each year were subject to a similarly painstaking external review. Which, of course, they never are: No FISA application has ever been made public, and vanishingly few targets of FISA surveillance ever even learn of the spying.

Moreover, whether it has anything to do with the headline-grabbing Russia investigation, something odd is clearly afoot with the FISA court.

Until 2015, the highest number of wiretap application rejections in a single year was five. In 2016, there were 34 — or twice as many as the court had turned down in its entire history before then. The court also saw fit to “modify” a striking 310 applications before approving surveillance. The previous record, set in 2015, was 94. Nor is this unusual burst of resistance a

side-effect of an unusual number of applications: The number submitted in 2016 — 1,457 — is a bit below the average for the period following 2001.

For some reason, there has been a dramatic increase in the number of applications judges found deficient in some way.

If Republicans were not so set on scripting a conspiracy thriller to stir the blood of cable news audiences, they might broaden the scope of their concern and ask whether whatever issues they've uncovered are not evidence of a secret vendetta against Mr. Trump and his employees, but symptoms of some more general degradation of the FISA review process — and perhaps other less strictly regulated authorities.

It seems unlikely that the conflict over the Nunes memo will, in the end, amount to much more than a proxy war over the legitimacy of Robert Mueller III's probe of the Trump campaign.

But in a better world, it would be an opportunity to exercise better oversight.

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