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We Don't Need Democrats' Memo To Know The FBI And DOJ Need House-Cleaning

No matter what additional facts Democrats disclose, the FBI and DOJ's conduct is inexcusable and worthy of censure. Here's why.

Margot Cleveland

By Margot Cleveland
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The memo is incomplete and misleading. That was one of Democrats' leading narratives following Friday's release by the House Intelligence Committee of a four-page memo detailing abuse by the Federal Bureau of Investigation (FBI) and Department of Justice (DOJ) of the Foreign Intelligence Surveillance Act (FISA) process.

Media outlets lapped up this theme, ignored the substance of the memo, and instead informed the public that because the memo presented only a one-sided summary of the facts, judgment of the DOJ and FBI's conduct must await Democrats' response memo. A weekend *New York Times* op-ed by University of Southern California law professor Orin S. Kerr sought to cement these talking points in the public's conscience.

> "Even assuming the memo's claims are true — which we can't determine from the document itself — it still does not establish an "abuse" of the foreign intelligence laws," he wrote. "The memo gives us too little information to make a conclusion about whether the government abused the surveillance laws. It's a partial view when we need a panorama to know what happened."

This narrative is wrong: No matter what additional facts Democrats disclose, the FBI and DOJ's conduct is inexcusable and worthy of censure. Here's why.

Secrecy of FISA Proceedings Demands Government Candor

While the public generally understands that FISA proceedings take place before a secret court, few recognize the significance of the government's application for a surveillance order. In determining whether to issue an order authorizing federal agents to conduct electronic surveillance of an American citizen, the FISA court must rely exclusively on the information the government provides.

That information is filed "under seal," meaning only the FISA court can review the documents, and the application is "*ex parte,*" meaning the court hears only the government's position. The target is not informed of the proceedings nor given an opportunity to respond.

> Then, based on the *ex parte* filings, the FISA judge must determine whether, among other things, there is probable cause to believe that "the target of the electronic surveillance is . . . an agent of a foreign power." But there is no "neat set of legal rules" for determining whether probable cause exists. Rather, to evaluate whether probable cause exists in any given case, the judge must "make a practical, common-sense decision" based on "all of the circumstances set forth in the affidavit."

The FISA court probable cause analysis will necessarily be flawed if the DOJ omits significant facts from the affidavit—such as those detailed in the House memo's analysis of the flawed FISA warrant targeting Carter Page, a volunteer foreign-policy adviser for the Trump campaign. Former assistant U.S. attorney and *National Review* contributing editor Andrew McCarthy crisply summarized the series of omission detailed in the memo, writing:

> The memo states that the Obama administration concealed from the court that the dossier was commissioned and paid for by the political campaign of Donald Trump's Democratic opponent, Hillary Clinton. Nor was the court informed that the dossier's author, former British spy Christopher Steele, told a senior Justice Department official that he was "desperate" to prevent Trump from being elected president. Moreover, despite presenting dossier information as probable cause on four separate occasions — for the initial FISA warrant in October 2016, and

> three times in the ensuing months — the FBI failed to verify the dossier's explosive allegations and failed to inform the court that its efforts to corroborate the allegations had been unavailing.

No one is claiming these facts, or other facts the memo summarizes, are false. Not the Democrats. Not the FBI. Not the DOJ. And not the press. Rather, critics charge that the memo is misleading because it fails to include additional details that provide context to the FISA proceedings.

But that is beside the point: No matter what additional facts the DOJ included in its FISA application, it excluded several material facts. The FISA court cannot possibly fulfill its proper oversight function if the federal government fails to fully inform the judge of all material facts.

The DOJ and FBI Omitted Crucial Facts

The Democrats and the media seem to think it is impossible to know whether the omitted facts are "material" without knowing the other facts included in the FISA application targeting Page. Not so. Case law in the context of criminal search warrant applications or applications for wiretaps make clear that the credibility of a confidential informant is critical to the probable cause determination, and failing to provide known information that goes directly to the credibility of an informant—such as Steele—constitutes a material omission.

Likewise, in the criminal context, if the police attempt to corroborate an informant's assertion but fail, the lack of corroboration is material and must be included in a warrant application.

The facts omitted in the FISA application for a surveillance order for Page were similarly material, regardless of any additional facts Democrats may later disclose. But frankly, the question of materiality itself is beside the point. Page has not been charged criminally. No court is asking whether the evidence obtained pursuant to the FISA warrant should be excluded at trial. That is where the question of materiality matters.

What should matter—to Democrats and Republicans alike—is whether the FISA process can be trusted. Thus, even if the evidence excluded from the FISA application could be considered "immaterial"—something frankly implausible—Congress and the public should still care. It is a question of oversight and trust, not of admissibility.

This Is a Major Abuse of Civil Liberties

Civil libertarians should care as well. In this case, Page (and the rest of America) learned of the facts the FBI and DOJ hid from the FISA court, but the typical surveillance target will *never* know what evidence the government withheld in seeking a surveillance order.

Under FISA, if the government prosecutes an individual based on evidence derived from FISA surveillance or searches, the target may seek to suppress the evidence, arguing that it was unlawfully acquired. However, neither the target nor his attorney can review the application, or the evidence used to obtain the FISA court order. In other words, as one federal judge put it, a defense attorney "must endeavor to establish the falsity of statements that the law does not allow him to see."

Under FISA, only judges may review the FISA application and disclosure is allowed *only* where "necessary to make an accurate determination of the legality of the surveillance." Guess what? My research reveals not a single case in which the court allowed a defendant or his attorney to review the FISA materials to argue that the evidence should be suppressed because the surveillance was illegal.

In contrast, in the typical criminal case, the due process clause of the U.S. Constitution and its Fourth Amendment provide defendants and their attorneys access to search warrant applications and supporting affidavits, and the attorneys may also question the law enforcement personnel involved in filing a search warrant application. But "FISA attempts to protect the rights of individuals not through mandatory disclosure but through in-depth oversight of FISA surveillance by all three branches of government," and courts have rejected due process and Fourth Amendment challenges to the FISA scheme.

That leaves the courts to review the material and determine whether anything suggests "the government relied on false or misleading information in its FISA certifications." The only other way a target of a FISA surveillance order would

know of a misrepresentation in the application would be if the government came forward and confessed error. That happened in September 2000, when "the government came forward to confess error in some 75 FISA applications related to major terrorist attacks directed against the United States. The errors related to misstatements and omissions of material facts, including . . .omissions of material facts from FBI FISA affidavits relating to a prior relationship between the FBI and a FISA target, and the interview of a FISA target by an assistant U.S. attorney."

In that case, the FISA court "held a special meeting to consider the troubling number of inaccurate FBI affidavits in so many FISA applications," and barred one FBI agent from filing affidavits with the court. The problem continued, though, with the government reporting "similar misstatements in another series of FISA applications," which led the FBI to adopt detailed procedures for reviewing draft affidavits to be filed with the FISA court.

The current FBI leadership, however, seems more concerned that its agents' misconduct was exposed than that its agents excluded material information from the FISA applications. It seems another special meeting by the FISA court is warranted.

What The FBI/FISA Memo Really Tells Us About Our Government



by Tyler Durden

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Authored by Ron Paul via The Ron Paul Institute for Peace & Prosperity,

The release of the House Intelligence Committee's memo on the FBI's abuse of the FISA process set off a partisan firestorm.

The Democrats warned us beforehand that declassifying the memo would be the end the world as we know it. It was reckless to allow Americans to see this classified material, they said. Agents in the field could be harmed, sources and methods would be compromised, they claimed.

Republicans who had seen the memo claimed that it was far worse than Watergate. They said that mass firings would begin immediately after it became public. They said that the criminality of US government agencies exposed by the memo would shock Americans.

Then it was released and the world did not end. FBI agents have thus far not been fired. Seeing "classified" material did not terrify us, but rather it demonstrated clearly that information is kept from us by claiming it is "classified."

In the end, both sides got it wrong. Here's what the memo really shows us:

> **First, the memo demonstrates that there is a "deep state" that does not want things like elections to threaten its existence.** Candidate Trump's repeated promises to get along with Russia and to re-assess NATO so many years after the end of the Cold War were threatening to a Washington that depends on creating enemies to sustain the fear needed to justify a trillion dollar yearly military budget.
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> Imagine if candidate Trump had kept his campaign promises when he became President. Without the "Russia threat" and without the "China threat" and without the need to dump billions into NATO, we might actually have reaped a "peace dividend" more than a quarter century after the end of the Cold War. That would have starved the war-promoting military-industrial complex and its network of pro-war "think tanks" that populate the Washington Beltway area.
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> **Second, the memo shows us that neither Republicans nor Democrats really care that much about surveillance abuse**

when average Americans are the victims. It is clear that the FISA abuse detailed in the memo was well known to Republicans like House Intelligence Committee Chairman Devin Nunes before the memo was actually released. It was likely also well known by Democrats in the House. But both parties suppressed this evidence of FBI abuse of the FISA process until after the FISA Amendments Act could be re-authorized. They didn't want Americans to know how corrupt the surveillance system really is and how the US has become far too much like East Germany. That might cause more Americans to call up their Representatives and demand that the FISA mass surveillance amendment be allowed to sunset.

Ironically, Chairman Nunes was the biggest cheerleader for the extension of the FISA Amendments even as he knew how terribly the FISA process had been abused!

Finally, hawks on both sides of the aisle in Congress used "Russia-gate" as an excuse to build animosity toward Russia among average Americans. They knew from the classified information that there was no basis for their claims that the Trump Administration was put into office with Moscow's assistance, but they played along because it served their real goal of keeping the US on war footing and keeping the gravy train rolling.

But don't worry: the neocons in both parties will soon find another excuse to keep us terrified and ready to flush away a trillion dollars a year on military spending and continue our arguments and new "Cold War" with Russia.

In the meantime, be skeptical of both parties. With few exceptions they are ***not protecting liberty but promoting its opposite.***

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