

**UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.**

IN RE ORDERS AND RECORDS OF THIS
COURT RELATED TO THE
SURVEILLANCE OF CARTER PAGE

No. Misc. 18-_____

**MOTION OF ADAM GOLDMAN, CHARLIE SAVAGE, AND
THE NEW YORK TIMES COMPANY FOR PUBLICATION OF COURT RECORDS**

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TABLE OF CONTENTS

PRELIMINARY STATEMENT1

JURISDICTION6

ARGUMENT.....7

 I. THIS COURT MAY CONSIDER MOVANTS’ REQUEST FOR PUBLICATION.....7

 II. THERE IS NO LONGER ANY REASON FOR THE PAGE WARRANT ORDERS
 AND APPLICATION MATERIALS TO BE WITHHELD IN THEIR ENTIRETY AND
 DISCLOSURE WOULD SERVE THE PUBLIC INTEREST8

CONCLUSION..... 11

PRELIMINARY STATEMENT

Pursuant to Rule 62 of this Court's Rules of Procedure, reporters Adam Goldman and Charlie Savage and The New York Times Company ("Movants") move the Foreign Intelligence Surveillance Court ("FISC") to order publication of all of its orders authorizing surveillance of Carter Page, a United States citizen, together with the application materials and renewal application materials upon which those orders were issued.

On February 2, 2018, President Trump declassified a memorandum authored under the direction of Rep. Devin Nunes, Chair of the House Permanent Select Committee on Intelligence ("HPSCI") concerning the surveillance of Mr. Page, who had served briefly as a foreign affairs advisor to the Trump Campaign in 2016. The Nunes Memorandum disclosed the existence of multiple orders issued by this Court authorizing surveillance of Mr. Page after his departure from the Trump campaign, and purported to detail the facts upon which those orders were issued. Following the presidential declassification, it was promptly released to the public by HPSCI.

Even before release of the Nunes Memorandum, speculation about the surveillance of Carter Page had been at the center of heated national debates over potential abuses of the government's surveillance authority under the Foreign Intelligence Surveillance Act, as well as the provenance and propriety of an ongoing investigation by Special Counsel Robert Mueller into potential collusion between the Trump Campaign and the government of Russia during the 2016 Presidential Election. The now-public Nunes Memorandum was prepared solely by Republican members of the HPSCI. Its release over the strenuous objections of the Democratic members of that Committee, the Department of Justice and the Federal Bureau of Investigation has fueled a further intense debate over the validity of the memorandum's depiction of the factual basis and motivation for the surveillance of Mr. Page.

Given the overwhelming public interest in assessing the accuracy of the Nunes Memorandum and knowing the actual basis for the Page surveillance orders, Movants respectfully request this Court to direct the publication of its orders authorizing the surveillance of Mr. Page and the application materials upon which they were issued, with only such limited redactions as may be essential to preserve information that remains properly classified notwithstanding the declassification and dissemination of the Nunes Memorandum.

BACKGROUND

A. Electronic Surveillance Under the Foreign Intelligence Surveillance Act

The Foreign Intelligence Surveillance Act (“FISA”) requires the government to obtain a warrant from the FISC before it may conduct domestic electronic surveillance to acquire foreign intelligence information. 50 U.S.C. § 1802.¹ To obtain a warrant, the government must submit a warrant application to the FISC. *Id.* § 1804(a). The application must include a sworn statement by a federal officer of the facts and circumstances relied upon to justify the government’s belief that the target of surveillance is a foreign power or an agent of a foreign power. *Id.* § 1804(a)(3).

Upon receiving a warrant application, a FISC judge can enter an order approving surveillance only if the judge finds that there is probable cause to believe that the target of the electronic surveillance is a foreign power or an agent of a foreign power. *Id.* § 1805(a)(2). The order may only authorize surveillance for up to ninety days. *Id.* § 1805(d)(1). If the government wishes to continue surveillance beyond ninety days, it must file an application for an extension that meets the same requirements as the initial warrant application and obtain a renewal order from the FISC. *Id.* § 1805(d)(2).

¹ FISA provides three narrow exceptions to the warrant requirement for electronic surveillance, none of which are relevant here. *See* 50 U.S.C. §§ 1802(a), 1805(f), 1811.

Typically, the public never learns of the existence or contents of a specific FISA warrant or any related materials. Warrant applications are made *ex parte*; FISC orders authorizing surveillance are entered *ex parte*; and the entire record of FISC proceedings, including warrant applications and related orders, are classified and maintained under security measures. *See id.* §§ 1803(c), 1805(a). It is highly unusual for the public to learn of the existence of a specific FISA warrant as has occurred here.

B. Declassification of the Existence of the Carter Page FISA Warrant and the Contents of the Initial Warrant Application and Renewal Applications

On January 29, 2018, the House Permanent Select Committee on Intelligence voted to disclose a memorandum (the “Nunes Memo”) revealing the existence of a FISA warrant for the electronic surveillance of Carter Page, who served as a foreign policy advisor to the Trump Campaign until September 2016.² Under Rule X of the House of Representatives, the President had five days to object to the Nunes Memo’s disclosure. Instead, President Trump declassified the Nunes Memo on February 2, 2018. Langford Decl. Ex. A.

The Nunes Memo reveals that on October 21, 2016, the Department of Justice (“DOJ”) and Federal Bureau of Intelligence (“FBI”) “sought and received a FISA probable cause order . . . authorizing electronic surveillance on Carter Page from the FISC.” *Id.* at 3. The FBI and DOJ subsequently applied for and received three FISA renewals from the FISC, extending the surveillance of Page. *Id.*

² *See* Nicholas Fandos, *House Republicans Vote to Release Secret Memo On Russia Inquiry*, N.Y. Times (Jan. 29, 2018), <https://www.nytimes.com/2018/01/29/us/politics/release-the-memo-vote-house-intelligence-republicans.html>; Charlie Savage & Sharon LaFraniere, *Republicans Claim Surveillance Power Abuses in Russia Inquiry*, N.Y. Times (Jan. 19, 2018), <https://www.nytimes.com/2018/01/19/us/politics/republicans-surveillance-trump-russia-inquiry.html>.

The Nunes Memo discloses that the initial warrant application and two renewal applications were signed by then-Director James Comey on behalf of the FBI; a final renewal application was signed by Deputy Director Andrew McCabe. *Id.* For the DOJ, former-Deputy Attorney General Sally Yates, former-Acting Deputy Attorney General Dana Boente, and Deputy Attorney General Rod Rosenstein each signed one or more of the FISA warrant applications. *Id.*

The Nunes Memo further discloses some of the content of the applications, as well as certain purported omissions it identifies:

- “[t]he ‘dossier’ compiled by Christopher Steele . . . on behalf of the Democratic National Committee (DNC) and the Hillary Clinton campaign formed an essential part of the Carter Page FISA application”;³
- “[n]either the initial application in October 2016, nor any of the renewals, disclose or reference the role of the DNC, Clinton Campaign, or any party/campaign in funding Steele’s efforts”;
- “[t]he initial FISA application notes [Christopher] Steele was working for a named U.S. Person, but does not name Fusion GPS and principal Glenn Simpson”;
- “[t]he [initial] application does not mention Steele was ultimately working on behalf of—and paid by—the Clinton campaign, or that the FBI had separately authorized payment to Steele for the same information”;
- “[t]he Carter Page FISA application . . . cited extensively a September 23, 2016, *Yahoo News* article by Michael Isikoff, which focuses on Page’s July 2016 trip to Moscow”;
- “[t]he Page FISA application . . . assesses that Steele did not directly provide information to *Yahoo News*”;
- none of the Page FISA applications reference that, in September 2016, Steele reportedly told then-Associate Deputy Attorney General Bruce Ohr that he “was desperate that Donald Trump not get elected and was passionate about him not being president”;

³ Notably, the Steele dossier is publically available: <https://www.documentcloud.org/documents/3259984-Trump-Intelligence-Allegations.html>.

- none of the applications reference Ohr’s relationship with Steele and Fusion GPS, including that Ohr’s wife was employed by Fusion GPS;
- “the FISA application relied on Steele’s past record of credible reporting on other unrelated matters,” but did not disclose Steele’s reported “anti-Trump financial and ideological motivations”; and
- “[t]he Page FISA application . . . mentions information regarding fellow Trump campaign advisor George Papadopoulos.”

Id. at 4–6.

C. Reaction to Disclosure of the Nunes Memo

The Nunes Memo’s release has precipitated a national debate on FISA, the role of the FISC, and the potential for the government to abuse its surveillance authority.⁴ It has also further fueled the debate over the propriety of Special Counsel Robert Mueller’s investigation into collusion between the Trump Campaign and Russia during the 2016 Presidential Election.⁵

Publication of the Nunes Memo has additionally sparked an intense debate over the accuracy of its characterization of the Page warrant applications. Notably, Democrats on the HPSCI have authored a 10-page memorandum responding to the Nunes Memo, which remains

⁴ See, e.g., Charlie Savage, *How to Get a Wiretap to Spy on Americans, and Why That Matters Now*, N.Y. Times (Jan. 29, 2018), <https://www.nytimes.com/2018/01/29/us/politics/fisa-surveillance-applications-how-they-work.html>; James Freeman, Opinion, *Obama and the FISA Court: Both of Their Reputations Cannot Survive the Collusion Investigation*, Wall St. J. (Feb. 2, 2018), <https://www.wsj.com/articles/obama-and-the-fisa-court-1517608555>; Jim Geraghty, *The FBI’s Least Defensible Decision, As Revealed in the Nunes Memo*, Nat’l Rev. (Feb. 2, 2018), <http://www.nationalreview.com/corner/456054/fbis-least-defensible-decision-revealed-nunes-memo>.

⁵ See, e.g., Byron Tau & Rebecca Ballhaus, *Memo’s Release Escalates Clash Over Russia Probe; Trump Says It ‘Totally Vindicates’ Him*, Wall St. J. (Feb. 3, 2018), <https://www.wsj.com/articles/house-releases-gop-surveillance-memo-1517592392>; Matthew Nussbaum, *How the Nunes Memo Became The Latest Political Football in the Russia Investigation*, Politico (Feb. 1, 2018), <https://www.politico.com/story/2018/02/01/nunes-memo-fbi-russia-investigation-383172>; Noah Bookbinder et al., *Nunes Memo Aims at Russia probe, Backfires on Trump and GOP*, USA Today (Feb. 3, 2018), <https://www.usatoday.com/story/opinion/2018/02/03/nunes-memo-aims-russia-probe-backfires-trump-and-gop-bookbinder-eisen-fredrickson-column/303240002/>.

classified.⁶ The Democrats’ memorandum reportedly rebuts the Nunes Memo’s contention that the FISC was not told of Steele’s political motivations.⁷ In addition, sources report that the FBI did tell this Court that the information it received from Steele was politically motivated, though the agency did not say it was financed by Democrats.⁸ The Justice Department reportedly made “ample disclosure of relevant, material facts” to the Court that revealed “the research was being paid for by a political entity,” according to an unnamed official familiar with the matter.⁹ None of the accusations in the Nunes Memo nor the denials by knowledgeable sources can be confirmed without access to the records of this Court whose release is now requested by Movants.

JURISDICTION

As an inferior federal court established by Congress under Article III, this Court possesses inherent powers, including “supervisory power over its own records and files.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978); *accord Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (“It has long been understood that [c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution.” (quotation marks omitted)).¹⁰

⁶ Nicholas Fandos, Adam Goldman & Charlie Savage, *House Republicans Release Secret Memo Accusing Russia Investigators of Bias*, N.Y. Times (Feb. 2, 2018), <https://www.nytimes.com/2018/02/02/us/politics/trump-fbi-memo.html>.

⁷ *Id.*

⁸ *Id.*

⁹ Ellen Nakashima, *Justice Department Told Court of Source’s Political Influence in Request to Wiretap Ex-Trump Campaign Aide, Officials Say*, Wash. Post. (Feb. 2, 2018), https://www.washingtonpost.com/world/national-security/justice-dept-told-court-of-sources-political-bias-in-request-to-wiretap-ex-trump-campaign-aide-officials-say/2018/02/02/caecfa86-0852-11e8-8777-2a059f168dd2_story.html.

In addition, FISA specifically grants this Court power to “establish such rules and procedures, and take such actions, as are reasonably necessary to administer their responsibilities” under the statute. 50 U.S.C. § 1803(g)(1). Pursuant to that authority, this Court has issued Rules of Procedure permitting FISC judges to direct the publication of FISC orders, opinions, and “related record[s]” “*sua sponte* or on a motion by a party.” FISC Rule of Procedure 62.

ARGUMENT

I. THIS COURT MAY CONSIDER MOVANTS’ REQUEST FOR PUBLICATION

FISC Rule of Procedure 62 permits this Court to publish any of its orders and related records. The Court has discretion to direct publication of its records *sua sponte* or on motion by a party:

Rule 62. Release of Court Records.

(a) Publication of Opinions. The Judge who authored an order, opinion, or other decision may *sua sponte* or on motion by a party request that it be published. Upon such request, the Presiding Judge, after consulting with other Judges of the Court, may direct that an order, opinion or other decision be published. Before publication, the Court may, as appropriate, direct the Executive Branch to review the order, opinion, or other decision and redact it as necessary to ensure that properly classified information is appropriately protected pursuant to Executive Order 13526 (or its successor).

(b) Other Records. Except when an order, opinion, or other decision is published or provided to a party upon issuance, the Clerk may not release it, or other related record, without a Court order. Such records must be released in conformance with the security measures referenced in Rule 3.

FISC Rule of Procedure 62(a)-(b).

¹⁰ For this reason, the FISC therefore has “jurisdiction in the first instance to adjudicate a claim of right to the court’s very own records and files.” *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 487 (FISC 2007).

As this Court has explained, a decision to order publication under FISC Rule 62 lies within the discretion of the Court. *In re Opinions and Orders of This Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. 13-08 (Foreign Intel. Surv. Ct. Nov. 9, 2017) (en banc); *In re Orders of this Court Interpreting Sec. 215 of the Patriot Act*, No. MISC. 13-02, 2013 WL 5460064, at *5 (Foreign Intel. Surv. Ct. Sept. 13, 2013). “[I]t would serve no discernible purpose for the Court, by rule, to be precluded from considering reasoned arguments in favor of publication of certain opinions made by claimants with Article III standing to seek their publication.” *In re Orders of this Court Interpreting Sec. 215 of the Patriot Act*, 2013 WL 5460064, at *5.¹¹

Entertaining a request for discretionary publication under Rule 62 is particularly appropriate where the government “declassifi[es] and release[s a] significant amount of information about the context and legal underpinnings of [a] FISC order,” and there is “a high level of public and legislative interest” in the order and related materials. *Id.* That “unusual combination of events, among other things, means that non-parties to the [FISC] proceedings have sufficient information to make reasonably concrete, rather than abstract, arguments in favor of publication.” *Id.*

II. THERE IS NO LONGER ANY REASON FOR THE PAGE WARRANT ORDERS AND APPLICATION MATERIALS TO BE WITHHELD IN THEIR ENTIRETY AND DISCLOSURE WOULD SERVE THE PUBLIC INTEREST

Following publication of the Nunes Memo, there is no longer any reason for the Court to keep its orders related to the surveillance of Carter Page and the related application materials sealed in their entirety. This Court has recognized that the need for complete secrecy of FISC

¹¹ Although Movants do not assert a claim of right in this motion, Movants would have Article III standing to do so. *See In re Opinions and Orders of This Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. 13-08 (Foreign Intel. Surv. Ct. Nov. 9, 2017) (en banc).

records gives way when details about those records are made public. In *In re Orders of this Court Interpreting Sec. 215 of the Patriot Act*, Judge Saylor directed the government to conduct a declassification review of FISC opinions evaluating the meaning, scope, and constitutionality of Section 215 of the Patriot Act after a June 2013 opinion construing Section 215 was leaked to the public and the government subsequently disclosed additional information about how Section 215 was implemented. 2013 WL 5460064, at *7–8.

Here, as detailed above, the public now knows (1) that the DOJ and FBI applied for a warrant from this Court for authorization to electronically surveil Page beginning on October 21, 2016, as well the purported grounds on which the government sought the warrant; (2) this Court granted the DOJ and FBI’s application on October 21, 2016; (3) the DOJ and FBI thrice requested extensions from this Court to continue surveilling Carter Page; and (4) this Court thrice authorized continued surveillance of Carter Page. *See supra* pp. 4–5. There is no longer any reason why this Court need maintain the entirety of its Page orders and the related warrant application materials in secret. Given the extent of information about those orders and applications made public by the President and the HPSCI, release of the orders and materials with appropriate redactions should now be feasible. *See In re Orders of this Court Interpreting Sec. 215 of the Patriot Act*, 2013 WL 5460064, at *8.

Moreover, continued classification of the entirety of this Court’s orders and the warrant application materials is no longer proper in light of President Trump’s declassification of the Nunes Memo. Under the current classification regime, information may only be classified when, at a minimum, its “unauthorized disclosure . . . reasonably could be expected to cause damage to the national security.” Exec. Order 13,526, 75 Fed. Reg. 707, § 1.2(a)(3). When previously classified information is officially acknowledged and released, continued classification is

improper, as further disclosure cannot reasonably be expected to cause additional damage to the national security. *Cf. Wolf v. C.I.A.*, 473 F.3d 370, 378 (D.C. Cir. 2007). Here, neither information in this Court’s records revealing the existence of the Page orders and warrant applications nor the information in the warrant applications detailed in the Nunes Memo are properly classified following the Nunes Memo’s release.

In addition, disclosure of the FISC orders and warrant application materials would serve the public interest. When public debate erupted over the scope of Section 215 of the PATRIOT Act after the leak of a June 2013 FISC opinion construing that provision, this Court wisely recognized that the public interest would be served by publishing this Court’s opinions on the scope of Section 215. *See In re Orders of this Court Interpreting Sec. 215 of the Patriot Act*, 2013 WL 5460064, at *7. Specifically, it recognized that publication “would contribute to an informed debate,” would assist federal legislators in representing their constituents and discharging their legislative responsibilities, and “assure citizens of the integrity of this Court’s proceedings.” *Id.*

Here, too, publication of the Page orders and application materials serves each of those interests. Publication would contribute to an informed debate about the propriety of the government’s FISA application, including whether the government abused its surveillance authority. It would also enable the public to meaningfully evaluate and participate in the ongoing Congressional debate. Majority members of the House Intelligence Committee offer one characterization of the warrant applications, while minority members have offered a competing characterization. Without the underlying application materials, the public is prevented from assessing the relative merits of each position, and will be unable to assess the merits of any additional actions taken by the Committee.

Publication would also assist federal legislators by enabling them to “represent[] their constituents and discharge[e] their legislative responsibilities.” *In re Orders of this Court Interpreting Sec. 215 of the Patriot Act*, 2013 WL 5460064, at *7; cf. Br. of Amici Curiae U.S. Representatives Amash et al., *In re Orders of this Court Interpreting Sec. 215 of the Patriot Act*, 2013 WL 5460064 (June 28, 2013) (explaining that open debate and the ability to inform the public freely and without restriction is critical to our democratic system and maintaining confidence in the government), available at <http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Brief-1.pdf>.

Finally, publication would assure citizens of the integrity of this Court’s proceedings. As noted above, there are currently conflicting reports about whether the government revealed Christopher Steele’s political motivations in its warrant applications. *See supra* pp. 5–6 & nn. 7–9. Disclosure of the warrant application materials would inform the public about whether the government deliberately concealed information favorable to Page in its warrant applications.

CONCLUSION

For the foregoing reasons, Movants respectfully requests that this Court direct the publication of its orders authorizing the electronic surveillance of Carter Page, as well as the government’s initial warrant application and subsequent renewal applications, with only those limited redactions necessary to maintain the secrecy of non-public information, the disclosure of which could still reasonably be expected to harm the national security notwithstanding the Nunes Memo’s publication.

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¹² This motion has been prepared in part by a clinic associated with the Abrams Institute for Freedom of Expression and the Information Society Project at Yale Law School, but does not purport to present the school's institutional views, if any.

CERTIFICATE OF SERVICE

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