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Opinions

The Nunes memo revealed a damning omission

By Hugh Hewitt February 5 at 5:47 PM

Having reviewed hundreds and hundreds of Foreign Intelligence Surveillance Act warrant applications as the final stop between the FBI and the desks of Attorneys General William French Smith and Edwin Meese III, I read the Nunes memo as revealing one major fact that stands out above all other revelations: The FISA warrant for surveillance on Carter Page (and the three subsequent renewals of the warrant) omitted a material fact. While the FBI admitted that the information came from a politically motivated source, the bureau did not disclose that the source had been financed by Hillary Clinton's presidential campaign. That is a damning omission.

My job reviewing those warrants existed because prior to the establishment of a National Security Division at the Justice Department, a special assistant to the attorney general with the appropriate clearances had the job of making sure the attorney general did not sign off on a warrant application that got bounced back from the FISA court. Such a rejection had never happened before I got there, didn't happen while it was my job and has happened only a handful of times since. That record is in large part because of trust developed between the FISA courts and the FBI and Justice Department over decades, especially the respect accorded the counterintelligence professionals at the bureau. That trust has now been injured.

Upon publication of the Nunes memo, a retired federal judge emailed me: "There is not an officer of the court in the land who in the context of this particular application to the FISA court should not have identified the source of the information as having been the [Democratic National Committee] and the Clinton Campaign. If I had granted the application and then subsequently learned that the information was sourced to the DNC and the Campaign, I would have rescinded the authorization and issued a show-cause order to the Government to explain who and why this sourcing was not made known to the court. The fact (if it be that) that the Government told the court that it was a political source, but did not identify who, in this particular instance, is highly probative that the Government purposely misled the court."

The FISA court to which the application was made might well have issued the warrant even if it knew the provenance of the intelligence. We will never know. But the non-disclosure was a breach of trust, and it will have long-term consequences for the warrant application process.

That an omission of a material fact occurred in the warrant application does not indict former FBI director James B. Comey or any of the other reviewing or approving officials up to and including Deputy Attorney General Rod J. Rosenstein. Staffs exist to

prepare and review these applications, to search for just such a crucial omission or false assertion. As noted above, there are hundreds of these warrants flowing through the bureau up to the attorney general in any given year. The numbers have doubled or tripled these days in the age of metastasizing terrorism and cybercrime, in addition to our traditional enemies in the world of intelligence-gathering. To expect the nation's top cop or its top law enforcement officer to read and carefully review even the least important applications is to expect too much of overwhelmingly burdened key players.

But if the omission was specifically discussed and approved by a senior official, then there should be accountability. What was the preparing case officer thinking? What was anyone thinking who reviewed it and noticed the missing specificity? They should be thinking like a corporate lawyer reviewing a Securities and Exchange Commission filing on behalf of a publicly traded company. Material omissions or misstatements in those filings also go by the name of "fraud." Imagine a public company declaring an income stream is flowing, but not noting that it is coming from sketchy factories that may not be compliant with labor standards, reports of which have come to the attention of the company and which are being investigated. It's highly unlikely that investors or the SEC would be very forgiving of an initial public offering that left out facts as important as what was omitted from this warrant application.

"Trump torque" is pulling on everyone in the news business, in all directions. His critics are often overheated and refuse to admit accomplishments or unprofessional hits. His defenders almost scream best-case scenarios that are ludicrous and ignore his errors, missteps and misstatements. It's harder and harder to keep this torque from twisting every single story in one direction or another.

It shouldn't operate anywhere but especially not in the area of national security. The non-disclosure of a material fact in an application for a FISA warrant — its minimization, indeed one could argue its camouflaging — is a very big deal and its provenance should be thoroughly investigated. It threatens to undermine every warrant submitted to a FISA court.

It's not about President Trump, or shouldn't be. It's about when American courts approve surveillance of Americans. And that's every American's concern.

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Hugh Hewitt, a Post contributing columnist, hosts a nationally syndicated radio show and is author of “The Fourth Way: The Conservative Playbook for a Lasting GOP Majority.” Follow @hughhewitt