

The Nunes Memo and FISC Rule 13

“OMISSION OF MATERIAL FACT”

by [Joseph DeMaio](#), ©2018

UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT Washington, D.C.	
RULES OF PROCEDURE <i>Effective November 1, 2010</i>	
Rule	Page
Title I. Scope of Rules; Amendment	
1. Scope of Rules	1
2. Amendment	1
Title II. National Security Information	
3. National Security Information	1

(Feb. 4, 2018) — Where to start..., where to start? With the “release” of the so-called “Nunes Memo” last Friday – seemingly confirming that the only collusion involved in the 2016 presidential campaign was that going on between and among the holdover Obama regime Justice Department and FBI, the Democratic National Committee, the Hillary Clinton for President Committee and the law firm Perkins Coie, LLP – a veritable cornucopia of unanswered questions spills out onto the nation’s table. What a feast..., and just in time for the Super Bowl.

Let us start with the actual text of the memo, found [here](#). The memo speaks for itself, although the Democrats and the national media (save, of course, for Fox News..., with the possible exception of Shepard Smith and Juan Williams) are frantically and feverishly floundering to concoct their “own” memo(s) to counter the thermonuclear information both disclosed and now, confirmed, by the Nunes Memo.

Reduced to its essence, the Nunes Memo lays out the case – compellingly – that high-level Obama-regime holdover administrators and officials in the FBI and Justice Department, so contemptuous of Donald Trump and horrified by the potential for a Trump presidency, secured from the Foreign Intelligence Surveillance Court (“FISC”) an “order” allowing them to surveil an American citizen who was a member of the Trump for President campaign while the campaign for the presidency *was still ongoing*.

The problem, of course, is that the “case” made by the FBI and Justice Department “applicant” for the warrant was based on “salacious and unverified” information (also colloquially known as “gossip,” “rumor” and “fiction”). This document is the so-called “Steele Russian Trump Dossier.”

Of far greater importance, however, is the fact (yet to be proven incorrect) that the FBI/DOJ warrant application form submitted to the FISC failed to disclose that a critical and even indispensable component of the factual basis purporting to establish “probable cause” for the issuance of the warrant in the first place was a document – the dossier – which had been bought and paid for by the Democratic National Committee and the Hillary Clinton Campaign and which was authored by a person who hated – not merely disliked – candidate Donald Trump.

The “author” of the dossier, one Christopher Steele, was not only viscerally opposed to candidate Trump, he was “desperate that Donald Trump not get elected....” All of this was known to the FBI and the DOJ when the application for the surveillance warrant was originally submitted to the FISC and thereafter “renewed” multiple times.

The Democrats – and, of course, one of the Democrats’ most devoted propaganda arms, The [Washington Post](#) – have initially responded that the memo is “one-sided” and leaves out important, contextual and “material” facts. Time will tell if the Democrats’ counter-memo, now in the works, or the next WaPo editorial opinion will supply and eliminate those “material” omissions.

Speaking of “material omissions,” it is important to distinguish between, on the one hand, “lying” to the FISC in a warrant application and, on the other hand, omitting “material” information. The Democrats, the FBI and the DOJ all claim that the FISC application contained “enough” relevant facts to substantiate the contents of the application, including the dossier.

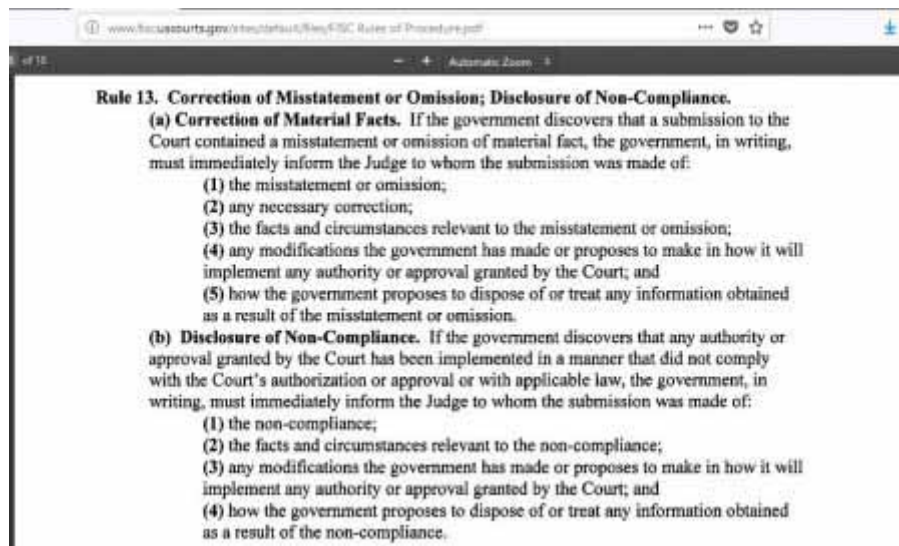
Thus, so goes their argument, the facts that the dossier (1) was prepared by an avowed enemy of candidate Trump as part of an effort to cripple his chances of being elected; (2) was financed to the tune of \$160,000.00 paid by the Democratic National Committee and the Hillary Clinton Campaign, and funneled through the FusionGPS firm to Steele through the same law firm where former Obama White House Counsel Robert Bauer now works, Perkins Coie, LLP; and (3) would be characterized by former FBI chief James Comey well after the warrant was sought, issued and repeatedly renewed as being “salacious and unverified,” at all relevant times known to the FBI and DOJ.... were each and all “immaterial” to the circumstances required to be disclosed in the FISC application. Seriously?

A blind Martian – but not, apparently, the Democrats or The Washington Post – could see that this is absurd. Of *course* these are important, relevant and material facts, the omission of which from the warrant application painted a manifestly distorted picture of what the background reality was. As now-departed Associate Supreme Court Justice Antonin Scalia would observe, any contention that these were “immaterial” facts is “pure

applesauce.” There are other, more colorful terms describing the argument, but those are left to educated *P&E* readers’ imaginations.

The facts omitted from the application were not only *highly* material, they were *dispositive*. Had they been disclosed at the outset, the likelihood is that the application would have been summarily denied, the attorneys reprimanded by the FISC Judge for even seeking the warrant, and then shown the door out onto the street. The Nunes Memo addresses this “omission” issue by positing that in seeking a FISC surveillance warrant, the government (here, the FBI and the DOJ) has an obligation to produce to the FISC “all material and relevant facts.” Here, the FBI and DOJ not only failed to meet that obligation, they actively succeeded in subverting and circumventing it.

In this regard, even if one deems the FISC warrant application to have supplied what the FBI and DOJ claim to be “enough” information, the backdrop of the entire conspiracy to torpedo the Trump candidacy proves – beyond a *shadow* of a reasonable doubt – that these omissions of material facts were consciously designed and taken into consideration by the FBI and DOJ as part of the misleading warrant application to the FISC. President Trump characterizes these acts as shameful; there is another descriptor: criminal.



Moreover, let us wait and see whether the Democrats’ counter-memo addresses – and tries to explain away – the provisions of Rule 13 of the [FISC Rules of Procedure](#). That rule requires that if or when the government discovers that any submission to the FISC (*e.g.*, an application for a surveillance warrant):

“contained a misstatement *or omission of material fact*, the government, in writing, must *immediately* inform the Judge to whom the submission was made of (1) the misstatement *or omission*; (2) any necessary correction; (3) the facts and circumstances relevant to the misstatement *or omission*; (4) any modifications the government has made or proposes to make in how it will implement any authority or approval granted by the Court; and (5)

how the government proposes to dispose of or treat any information obtained as a result of the misstatement *or omission*.” (Emphasis added).

While it is not generally known, the FBI and/or the DOJ (and other authorized FISC surveillance warrant “applicants”) have a somewhat less-than-perfect track record of seeking such warrants where misstatements or omissions of material facts were present. In fact, in a case entitled *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 281 F. Supp. 2d 611, 620 (USFISC 2002), the court noted that, in 2002, the government came forward and confessed misstatements or omissions of material facts in over 70 FISC-issued warrants.

Although the holding in that case (*i.e.*, that the government needed to prove that the primary purpose of the surveillance warrant was *not* to support a criminal prosecution) was abrogated due to a change in the law (*i.e.*, the 2001 “Patriot Act”: *see In re Sealed Case*, 310 F.3d 717 (USFISCR 2002)), the bottom line here is that the government is under a duty to present to the FISC in an application for a surveillance warrant *all* relevant and material facts having a bearing on whether there is probable cause to grant the warrant.

If an application for a FISC surveillance warrant contains misstatements of fact or omissions of material facts, the Fourth Amendment rights against unreasonable searches and seizures of the warrant’s “target” (here, Mr. Carter Page, a member of the Trump presidential campaign) are violated. *See Franks v. Delaware*, 438 U.S. 154 (1978); *United States v. Yusuf*, 461 F.3d 374 (3d Cir. 2006). Stated otherwise, when the application is materially misleading, whether through misstatements of fact or omissions of material facts, a violation of the law has taken place. And when it is done intentionally – with knowledge that the facts being omitted are material rather than immaterial and done in concert with more than one individual – that is the definition of a conspiracy. And yes, Virginia, that is a felony.

Has the FBI and/or the DOJ made the Rule 13 disclosures to the FISC? If so, when? If not, why not? It will be interesting to see if any of the individuals identified in the Nunes Memo are called upon to again testify before Mr. Nunes’ committee to answer these questions.

Accordingly, whenever you hear the FBI or the DOJ – through their holdover apparatchiks from the Obama regime and their sympathizers – claim that the release of the Nunes Memo threatened to disclose national security secrets or would compromise the intelligence community’s “sources and methods” for the gathering of intelligence, ask yourself this: on the facts presented by the Nunes Memo alone, is not the only intelligence-gathering “method” being “compromised” here that of the ability to intentionally mislead the Foreign Intelligence Surveillance Court through the omission of material facts? Then take a look at the motto of *The Washington Post*: “Democracy Dies in Darkness.” Ironic..., no?