

DEVIN NUNES MAY BE A BUFFOON AND A HACK, BUT I DON'T THINK HE'S A CRIMINAL

I believe that Devin Nunes is a buffoon and a political hack. I believe he needs to be removed from his position as Chair of the House Intelligence Committee – not just because he has been running interference for Trump, betraying his Article I duties, but also because he doesn't understand the programs he oversees.

But I don't believe he's a criminal.

I say that in disagreement with Bart Gellman, who made just such an argument regarding the revelations in this NYT story here. Gellman argued, in part, that Nunes' sources (about which I hope to say more later) violated nondisclosure laws by sharing reports outside of normal channels with Nunes.

Secrecy regulations, including SF312, the Classified Information Nondisclosure Agreement, do not permit [Michael] Ellis and [Ezra] Cohen-Watnick to distribute sensitive compartmented information through a back channel to Nunes. This is true, and their conduct no less an offense, even though Nunes holds clearances sufficient to receive the information through proper channels. The offense, which in some cases can be prosecuted as a felony, would apply even if the White House officials showed Nunes only "tearsheet" summaries of the surveillance reports. Based on what Nunes has said in public, they appear to have showed him the more sensitive verbatim transcripts. Those are always classified as TS/SI (special intelligence) or TS/COMINT (communications intelligence), which

means that they could reveal sources and methods if disclosed. That is the first apparent breach of secrecy rules. The second, of course, is the impromptu Nunes news conference. There is no unclassified way to speak in public about the identity of a target or an “incidentally collected” communicant in a surveillance operation.

To be clear, I think Ellis and Cohen-Watnick may have violated access rules on searches. But I don’t think Nunes violated any laws in accessing that intelligence (I think he probably violated the intent of classification rules on intercepts, but by providing no details about who he saw referenced in these reports, he’ll get away with it.)

That’s because minimization procedures pertaining to FISA materials specifically envision access to information – sometimes even raw data – for oversight purposes. The 2015 702 Minimization Procedures for NSA, for example, state,

Nothing in these procedures shall restrict NSA’s performance of lawful oversight of its personnel or systems, or lawful oversight function of the Department of Justice’s National Security Division, Office of the Director of National Intelligence, or the applicable Offices of the Inspectors General. Similarly, nothing in these procedures shall prohibit the retention, processing, or dissemination of information reasonably necessary to comply with specific constitutional, judicial, or legislative mandates.

At times, minimization procedures have been even more explicit. Starting in 2014, for example, the Section 215 phone dragnet minimization procedures explicitly permitted the sharing of query results “to facilitate lawful oversight

functions.”

Notwithstanding the above requirements, NSA may share results from intelligence analysis queries of the BR metadata, including U.S. person identifying information, with Executive Branch personnel (1) in order to enable them to determine whether the information contains exculpatory or impeachment information or is otherwise discoverable in legal proceedings or (2) to facilitate their lawful oversight functions. Notwithstanding the above requirements, NSA may share the results from intelligence analysis queries of the BR metadata, including United States person information, with Legislative Branch personnel to facilitate lawful oversight functions.

The FISC even excluded such sharing from reporting requirements, so Congress could be doing a lot of this and it would never show up in annual reporting.

In other words, at least for FISA-governed data, the court has permitted the sharing of information – and remember, these are supposed to be finished intelligence reports, not raw data or queries – for people in an oversight role. The 702 procedures leave a lot of room for interpretation, too, about what might be a “constitutional” mandate, the kind of language that White Houses of both parties have been prone to abuse.

If these reports were collected under 12333, the new sharing rules explicitly prohibit the sharing of intelligence for political purposes.

Any IC element that obtains access to raw SIGINT under these Procedures will:

[snip]

Political process in the United States.
Not engage in any intelligence activity

authorized by these Procedures, including disseminations to the White House, for the purpose of affecting the political process in the United States. The IC element will comply with the guidance applicable to NSA regarding the application of this prohibition. Questions about whether a particular activity falls within this prohibition will be resolved in consultation with the element's legal counsel and the General Counsel of the Office of the Director of National Intelligence (ODNI) (and the DoD's Office of the General Counsel in the case of a DoD IC element).

Even if this covered what happened, NSC lawyer John Eisenberg was in the loop on this caper, so they effectively did consult with the element's legal counsel. Moreover, we know that Presidents can pixie dust executive orders at will.

Nunes, at least, pretends he was functioning in an oversight role in raising questions about whether SIGINT had been properly minimized. He appears to have no clue about the authorities he's talking about, he appears to have misrepresented what the problem is, and he clearly was doing all this with an eye towards making political accusations against Obama.

But nevertheless, he claims to believe he was functioning in an oversight role.

Which is part of the problem! I've long pointed to how unrestricted this language is. It invites abuse. It should be tightened going forward (though neither the Trump Administration nor Congress has incentive to do that at this point).

If you're bothered by Devin Nunes' information operation – and I am – then you should be calling to tighten up the language governing how intelligence can be shared for oversight and other “constitutional” purposes. Because they

appear to envision something like this
happening.