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

IN RE: MATTERS BEFORE THE FOREIGN INTELLIGENCE SURVEILLANCE COURT RELATING TO CARTER PAGE AND DECLASSIFIED BY ORDER OF THE PRESIDENT ON FEBRUARY 2, 2018

No. _____

MOTION OF BENJAMIN WITTES AND SUSAN HENNESSEY FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* ASKING THE COURT TO MAKE PUBLIC THE DISPOSITION OF ANY PROCEEDINGS CONCERNING THE JUSTICE DEPARTMENT'S CONDUCT BEFORE THIS COURT

Justin Florence (D.C. Bar No. 988953)
Anne Tindall (D.C. Bar No. 494607)
PROTECT DEMOCRACY PROJECT, INC.
2020 Pennsylvania Avenue, NW, Suite #163
Washington, DC 20006
Telephone: (202) 599-0466
Facsimile: (929) 777-8428
Email: Justin.Florence@protectdemocracy.org
Email: Anne.Tindall@protectdemocracy.org

Benjamin Berwick (M.A. Bar No. 679207)
PROTECT DEMOCRACY PROJECT, INC.
10 Ware Street
Cambridge, MA 02138
Telephone: (909) 326-2911
Facsimile: (929) 777-8428
Email: Ben.Berwick@protectdemocracy.org

Counsel for *Amici Curiae*

February 7, 2018

Pursuant to Foreign Intelligence Surveillance Court ("FISC") Rules of Procedure 6 and 7, *Amici* respectfully move this Court for leave to submit a brief of *Amici Curiae* in support of no party, asking this Court to make public the disposition of any proceedings concerning the Justice Department's conduct before this Court. A copy of the proposed brief is attached, along with the certifications required by FISC R.P. 63.

INTEREST OF *AMICI*

Benjamin Wittes is a Senior Fellow in Governance Studies at the Brookings Institution and editor in chief of *Lawfare*. He is the author of several books and is co-chair of the Hoover Institution's Working Group on National Security, Technology, and Law. He is a longtime student of the FISA process and of this Court.

Susan Hennessey is the Executive Editor of *Lawfare* and General Counsel of the *Lawfare* Institute. She is a Brookings Fellow in National Security Law. Prior to joining Brookings, Ms. Hennessey was an attorney in the Office of General Counsel of the National Security Agency. She is a graduate of Harvard Law School and the University of California, Los Angeles.

Amici seek to file this brief as true friends of the Court and not on behalf of any party. *Amici* care deeply about both the substantive integrity of the Foreign Intelligence Surveillance Act ("FISA") process and maintaining its appearance of integrity before the public. As set forth in the attached brief, last week the President declassified and the U.S. House Permanent Select Committee on Intelligence released a memorandum calling into question the Department of Justice's candor in submitting a FISA application and several renewal applications to this Court. The President and Members of Congress have since cited this memorandum as evidence of a biased and politically motivated investigation on a matter of the utmost national importance.

Amici believe that this Court, to the extent it has a relevant proceeding before it, has a unique opportunity—and, also, responsibility—to shed light on matters of enormous public interest bearing on the integrity of prior proceedings before this Court. *Amici* seek to submit this brief to ask the Court, to whatever extent it can do so in a fashion consistent with its judicial role, to provide the public with clarity about this matter. The Court can accomplish this without release of any additional classified information beyond that already disclosed by the President and the House Committee.

Respectfully submitted,

/s/ Justin Florence
Justin Florence (D.C. Bar No. 988953)
Anne Tindall (D.C. Bar No. 494607)
PROTECT DEMOCRACY PROJECT, INC.
2020 Pennsylvania Avenue, NW, Suite #163
Washington, DC 20006
Telephone: (202) 599-0466
Facsimile: (929) 777-8428
Email: Justin.Florence@protectdemocracy.org
Email: Anne.Tindall@protectdemocracy.org

Benjamin L. Berwick (M.A. Bar No. 679207)
PROTECT DEMOCRACY PROJECT, INC.
10 Ware Street
Cambridge, MA 02138
Telephone: (909) 326-2911
Facsimile: (929) 777-8428
Email: Ben.Berwick@protectdemocracy.org

Counsel for *Amici Curiae*

Dated: February 7, 2018

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

IN RE: MATTERS BEFORE THE FOREIGN INTELLIGENCE SURVEILLANCE COURT RELATING TO CARTER PAGE AND DECLASSIFIED BY ORDER OF THE PRESIDENT ON FEBRUARY 2, 2018

No. _____

BRIEF OF AMICI CURIAE BENJAMIN WITTES AND SUSAN HENNESSEY ASKING THE COURT TO MAKE PUBLIC THE DISPOSITION OF ANY PROCEEDINGS CONCERNING THE JUSTICE DEPARTMENT'S CONDUCT BEFORE THIS COURT

Justin Florence (D.C. Bar No. 988953)
Anne Tindall (D.C. Bar No. 494607)
PROTECT DEMOCRACY PROJECT, INC.
2020 Pennsylvania Avenue, NW, Suite #163
Washington, DC 20006
Telephone: (202) 599-0466
Facsimile: (929) 777-8428
Email: Justin.Florence@protectdemocracy.org
Email: Anne.Tindall@protectdemocracy.org

Benjamin Berwick (M.A. Bar No. 679207)
PROTECT DEMOCRACY PROJECT, INC.
10 Ware Street
Cambridge, MA 02138
Telephone: (909) 326-2911
Facsimile: (929) 777-8428
Email: Ben.Berwick@protectdemocracy.org

Counsel for *Amici Curiae*

February 7, 2018

TABLE OF CONTENTS

Pages

INTEREST OF *AMICI*

Benjamin Wittes is a Senior Fellow in Governance Studies at the Brookings Institution and editor in chief of *Lawfare*. He is the author of several books and is co-chair of the Hoover Institution's Working Group on National Security, Technology, and Law. He is a longtime student of the FISA process and of this Court.

Susan Hennessey is the Executive Editor of *Lawfare* and General Counsel of the *Lawfare* Institute. She is a Brookings Fellow in National Security Law. Prior to joining Brookings, Ms. Hennessey was an attorney in the Office of General Counsel of the National Security Agency. She is a graduate of Harvard Law School and the University of California, Los Angeles.

Amici file this brief as true friends of the Court and not on behalf of any party. *Amici* care deeply about both the substantive integrity of the FISA process and maintaining its appearance of integrity before the public. As set forth below, last week the President declassified and the U.S. House Permanent Select Committee on Intelligence released a memorandum calling into question the Department of Justice's candor in submitting a FISA application and several renewal applications to this Court. The President and Members of Congress have since cited this memorandum as evidence of a biased and politically motivated investigation on a matter of the utmost national importance.

Amici believe that this Court, to the extent it has a relevant proceeding before it, has a unique opportunity—and, also, responsibility—to shed light on matters of enormous public interest bearing on the integrity of prior proceedings before this Court. *Amici* submit this brief to ask the Court, to whatever extent it can do so in a fashion consistent with its judicial role, to provide the public with clarity about this matter. The Court can accomplish this without release

of any additional classified information beyond that already disclosed by the President and the House Committee.

INTRODUCTION AND SUMMARY

On February 2, 2018, Congressman Devin Nunes, Chairman of the House Permanent Select Committee on Intelligence ("HPSCI" or "the Committee"), released to the public a memorandum ("the Nunes Memo" or "the memo") calling into question the candor of the Justice Department in an application submitted to and approved by this Court.[1] The release of the memo followed the President's decision to declassify the memo. The President and some Members of Congress have cited the claims in the Nunes Memo as demonstrating that the Justice Department and FBI are politically biased and have abused the FISA process. Those claims have undermined the public's trust in the proceedings before this Court.

This Court, like other Article III tribunals, has inherent authority to take action to protect the integrity of proceedings before it. Accordingly, in light of the claims levelled in the Nunes Memo, this Court may be engaged in some sort of proceeding to review whether the Justice Department committed misconduct in this matter by withholding pertinent information from the Court. *Amici* respectfully ask the Court to make public the disposition of any such proceeding. If the Court concludes that the Justice Department acted with political bias or violated rules of professional responsibility in this matter, the Court should inform the public of that and of any appropriate remedial action. Of equal importance, if the Court does not believe it was misled, then the Court should inform the public of that to correct the appearance of impropriety. Just as the public has a right to know whether the Justice Department has abused the FISA process, it

[1] Memorandum from HPSCI Majority Staff to HPSCI Majority Members, "Foreign Surveillance Act Abuses at the Department of Justice and Federal Bureau of Investigation," (Jan. 18, 2018), https://intelligence house.gov/uploadedfiles/memo_and_white_house_letter.pdf (last visited Feb. 7, 2018). The Nunes Memo does not contain page numbers.

has an equally compelling right to know whether the intelligence oversight process has potentially been abused by the people's representatives in Congress and by the President. And finally, to the extent that no proceeding exists to review the Department of Justice's conduct in this matter, *Amici* ask the Court to publicly clarify that point as well.

Amici appreciate that this Court's proceedings are typically and necessarily conducted in a classified setting and closed off to the public. *Amici* respect the need for secrecy in this Court's day-to-day work. In this case, however, the President and the House Committee have already disclosed the target of a surveillance order approved by this Court. Given these disclosures, this Court can, simply by making public an unclassified account of its own handling of the matter, provide the public the clarity required to preserve confidence in FISA proceedings without revealing any additional classified information.

BACKGROUND

On February 2, 2018, in a letter signed by White House Counsel Donald McGahn, President Trump declassified the contents of the Nunes Memo, drafted by the Republican HPSCI staff; HPSCI released the memo to the public that day. The purpose of the Nunes Memo, as stated by its authors, was to share with the Committee's members—and, following its release, with the American people—matters concerning "the legitimacy and legality of certain Department of Justice and FBI interactions" with this Court, and the Committee staff's findings regarding a "troubling breakdown of legal processes established to protect the American people from abuses related to the FISA process."[2]

The Nunes Memo's findings address the surveillance, approved by this Court, of Carter Page, an adviser to President Trump's 2016 election campaign. The memo asserts that this

[2] Nunes Memo at 1. (Although the Nunes Memo does not contain page numbers, the above-quoted passage appears on the first page of the memo, which immediately follows White House Counsel McGahn's letter.)

process was fatally tainted by executive branch officials' alleged failure to alert the Court of certain information about one source for the underlying intelligence regarding Mr. Page.[3] In a statement accompanying the memo's release, Chairman Nunes declared that the "Committee has discovered serious violations of the public trust" made by Department of Justice and FBI officials who "abus[ed] their authority for political purposes."[4] Many government officials have reacted with alarm to what the Nunes Memo describes as purposeful misleading of this Court by the Justice Department and FBI. President Trump tweeted shortly after the memo's release that the "top Leadership and Investigators of the FBI and the Justice Department have politicized the sacred investigative process in favor of Democrats and against Republicans."[5] Vice President Mike Pence expressed "serious concerns about the integrity of the decisions that were made at the highest level of the Department of Justice and the FBI."[6] Speaker of the House Paul Ryan shared his fear that the FISA system had been undermined by the executive branch's failure to "provid[e] a complete presentation of the facts and circumstances underlying its warrant applications."[7]

Some went further, seeing in the Nunes Memo evidence of criminality. Representative Todd Rokita found the "violation of the public trust" sufficient to warrant "further investigation to determine possible criminal charges against specific individuals."[8] Representative Paul Gosar

---

[3] *See* Nunes Memo at 2-3. (Although the Nunes Memo does not contain page numbers, the above-quoted passage appears on the second and third pages of the memo, which follows White House Counsel McGahn's letter.)
[4] Press Release, U.S. HPSCI, Nunes Statement on Release of HPSCI Memo (Feb. 2, 2018) [hereinafter "Nunes Statement"], https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=856 (last visited Feb. 6, 2018).
[5] Donald J. Trump (@realDonaldTrump), Twitter (Feb. 2, 2018, 3:33 am), https://twitter.com/realDonaldTrump/status/959389424806191104.
[6] Kathryn Watson, *Nunes Memo Released, After GOP Declassifies It*, CBS News (Feb. 2, 2018), https://www.cbsnews.com/news/nunes-memo-declassified-today-gop-despite-fbi-warnings- grave-concern-live-updates/ (last visited Feb. 6, 2018).
[7] Press Release, Speaker Ryan Press Office, Ryan Statement on Declassified FISA Memo (Feb. 2, 2018), https://www.speaker.gov/press-release/ryan-statement-declassified-fisa-memo (last visited Feb. 6, 2018).
[8] Rep. Todd Rokita (@ToddRokita), Twitter (Feb. 2, 2018, 11:10 AM), https://twitter.com/ToddRokita/status/959504433930489856.

saw "clear and convincing evidence of treason."[9] Commentator Sean Hannity led his Fox News broadcast the night of the memo's release with his assessment that the "FBI misled and purposely deceived a federal court while using an unverified, completely phony, opposition research, bought and paid for by Hillary Clinton to spy on an opposition campaign during a presidential election, all to help one candidate out, all to mislead the American people."[10] These actions, he said, meant that the investigation into Russian election interference currently being conducted by the Office of Special Counsel "does need to be shut down and the people responsible…many need to go to jail."[11]

The fallout from the Nunes Memo's release has generated concern not merely that surveillance of Mr. Page was obtained improperly, or even illegally, but that the entire FISA process is suspect. Chairman Nunes suggested as much in releasing the memo, stating that the Committee's goal was to "shine a light on this alarming series of events so we can make reforms that allow the American people to have full faith and confidence in their governing institutions." *See* Nunes Statement. Representative Ted Poe responded to the memo by tweeting: "The American people are the best judge of what is occurring behind closed, secret, dark rooms of government surveillance,"[12] adding that "[t]he memo factually outlines government abuse to obtain a secret warrant to spy on an American citizen"[13] and "Congress must reform FISA."[14] President Trump issued a series of tweets quoting from an op-ed stating that in manipulating the

[9] Rep. Paul Gosar (@RepGosar), Twitter (Feb. 2, 2018, 11:29 AM), https://twitter.com/RepGosar/status/959508977095602176.
[10] *Hannity: Mueller Probe Was Based on a House of Cards That's Now Crashing Down*, Fox News (Feb. 2, 2018), http://insider.foxnews.com/2018/02/02/sean-hannity-monologue-fisa-surveillance-memo-release-ending-mueller-russia-probe (last visited Feb. 7, 2018).
[11] *Id.*
[12] Rep. Ted Poe (@JudgeTedPoe), Twitter (Feb. 2, 2018, 10:56 AM), https://twitter.com/JudgeTedPoe/status/959500875139092483.
[13] Rep. Ted Poe (@JudgeTedPoe), Twitter (Feb. 2, 2018, 10:56 AM), https://twitter.com/JudgeTedPoe/status/959500876086988800.
[14] Rep. Ted Poe (@JudgeTedPoe), Twitter (Feb. 2, 2018, 10:56 AM), https://twitter.com/JudgeTedPoe/status/959500876821024768.

FISA system, "the FBI became…a tool of anti-Trump political actors. This is unacceptable in a democracy and ought to alarm anyone who wants the FBI to be a nonpartisan enforcer of the law."[15]

ARGUMENT

This Court has ample authority grounded in the FISA statute and the powers afforded Article III courts to assess the allegations levelled against the Justice Department and FBI in the Nunes Memo and to make public its findings. This Court may already be engaged in some process to review this matter. It should make the results of those proceedings public in order to maintain the public's confidence in this particular surveillance matter and the FISA process more generally. "By necessity, this Court conducts much of its work in secrecy. But it does so within a judicial system wedded to transparency and deeply rooted in the ideal that 'justice must satisfy the appearance of justice.'" *In re Opinions & Orders of this Court Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08, 2017 WL 5983865, at *1 (FISA Ct. Nov. 9, 2017) (quoting *Levine v. United States*, 362 U.S. 610, 616 (1960)). Pursuant to this Court's commitment to the ideals of both justice and the appearance of justice, it should inform the public promptly whether or not it is satisfied with the Justice Department's conduct before it in this matter.

I. This Court Has Inherent Authority to Protect the Integrity of Proceedings Before It by Addressing the Allegations Levelled Against the Justice Department Contained in the Nunes Memo.

The Foreign Intelligence Surveillance Court (FISC) "is an inferior federal court established by Congress under Article III." *In re Motion for Release of Court Records*, No.

[15] Donald J. Trump (@realDonaldTrump), Twitter (Feb. 3, 2018, 4:40 PM), https://twitter.com/realDonaldTrump/status/959949725028974592; Donald J. Trump (@realDonaldTrump), Twitter (Feb. 3, 2018, 4:53 PM), https://twitter.com/realDonaldTrump/status/959952974826098688.

Misc. 07-01, 526 F. Supp. 2d 484, 486 (FISA Ct. Dec. 11, 2007) (citing *In re Sealed Case*, 310 F.3d 717, 731-32 (FISA Ct. Rev. Nov. 18, 2002)); *see also United States v. Cavanagh*, 807 F.2d 787, 791 (9th Cir. 1987) (Kennedy, J.); *ACLU v. Clapper*, 785 F.3d 787, 828 (2d Cir. 2015). FISA expressly recognizes "the inherent authority of the court…to determine or enforce compliance with an order or a rule" of the court. 50 U.S.C. § 1803(h); *see also* 28 U.S.C. § 1651 ("[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"). Further, pursuant to the Rules of this Court, "[e]ach Judge may exercise the authority vested by the Act and such other authority as is consistent with Article III of the Constitution and other statutes and laws of the United States, to the extent not inconsistent with the Act." FISC R.P. 5(a). Like all Article III courts, this Court has the inherent power to manage its proceedings. FISA provides for the exercise of this power and this Court's decisions have specifically recognized it. *See* 50 U.S.C. §1803(h); *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 486-487.

Article III courts have well-established inherent authority to act to "protect the integrity of their proceedings." *See, e.g.*, *Giles v. California*, 554 U.S. 353, 374 (2008) (internal quotations omitted). This inherent authority includes "the power to control admission to [the court's] bar and to discipline attorneys who appear before it." *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43 (1991). Further, "the inherent power also allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court," and to "conduct an independent investigation in order to determine whether it has been the victim of fraud." *Id.* As Justice Scalia has explained, "[s]ome elements of [courts'] inherent authority are so essential to '[t]he judicial Power,' U.S. Const., Art. III, § 1, that they are indefeasible, among which is a court's ability to enter orders protecting the integrity of its proceedings." *Id.* at 58 (Scalia, J.,

dissenting); *see also Universal Oil Prods. Co. v. Root Refining Co*., 328 U.S. 575, 580 (1946) ("The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question."); *Shepherd v. Am. Broad. Cos*. *Inc.*, 62 F.3d 1469, 1475 (D.C. Cir. 1995) ("The inherent power encompasses the power to sanction attorney or party misconduct."); *Peer v. Lewis*, 606 F.3d 1306, 1316 (11th Cir. 2010) ("[A]ttorneys are the filter upon which courts rely to maintain the integrity of, and trust in, our judicial process."); *In re Engle Cases*, 2017 WL 4675652, at *54 (M.D. Fla. Oct. 18, 2017) ("A court may sanction an attorney pursuant to its 'inherent power' to police behavior that undermines the judiciary's ability to achieve the just, orderly, and expeditious disposition of cases." (quoting *Chambers*, 501 U.S. at 43)).[16]

Courts' supervisory power also includes the authority to issue opinions absolving attorneys of allegations of misconduct or declining to impose sanctions, and they do so with some regularity. *See, e.g.*, *HD Brous & Co, Inc. v. Mrzyglocki*, No. 03 Civ. 8385(CSH), 2004 WL 1367451, at *1 (S.D.N.Y. June 16, 2004) ("[T]he February 26 Order raised a number of concerns regarding signed papers filed with and oral representations to the Court in connection with the petition. These concerns caused the Court to issue, *sua sponte*, an Order to Show Cause for potential sanctions against counsel for petitioner pursuant to [Rule 11].… For reasons set forth below, the Court declines to initiate sanctions against counsel."); *United States v. Prestonwood Props., Inc.*, No. 3–99–CV–0495–R, 1999 WL 766022, at *1 (N.D. Tex. Sep. 24, 1999) (Kaplan, M.J.) (raising question of misconduct *sua sponte*, holding a hearing, finding a Rule 11 violation, and declining to impose sanctions); *Pannonia Farms, Inc. v. Re/Max Int'l, Inc.*, 407 F. Supp. 2d 41, 46 (D.D.C. 2005) ("[W]hile the plaintiff's refusal to withdraw its

[16] The Supreme Court has held that courts have the power to consider "whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate" even when the court lacks jurisdiction over the underlying matter or the case is no longer pending before the court. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990); *see also Willy v. Coastal Corp.*, 503 U.S. 131, 138 (1992).

complaint may constitute sanctionable conduct, the Court declines to impose Rule 11 sanctions *sua sponte*."); *Karla Otto, Inc. v. Rivoli Creation, S.A.S.*, No. 13 Civ. 0483(JGK), 2014 WL 6910546, at *1 (S.D.N.Y. 2014) (finding no basis for sanctions).

Courts also routinely consider and resolve allegations that wiretap orders were procured with false affidavits submitted by federal law enforcement officials. And, as a matter of course, courts publish these opinions, including in circumstances where it determines that there has been no attorney misconduct. *See, e.g.*, *United States v. Harrington*, 204 F. App'x 784, 788 (11th Cir. 2006); *United States v. Olderbak*, 961 F.2d 756, 760 (8th Cir. 1992); *United States v. Rivera*, Case No. 11–CR–196–J, 2012 WL 12920198, at *4 (D. Wyo. May 15, 2012); *United States v. Gotti*, 399 F. Supp. 2d 214, 225–27 (S.D.N.Y. 2005); *United States v. Casas*, CRIMINAL NO. 00-00184 HG-01, 2006 WL 8426777, at *2 (D. Haw. July 25, 2006); *United States v. Ruiz*, Criminal No. 07–219(3) (JNE/AJB), 2008 WL 1805569, at *8 (D. Minn. Apr. 18, 2008). As these cases and others make clear, it is an essential part of the judicial role to assess allegations of Justice Department misconduct in obtaining court-approved surveillance—and to explain the court's findings in publicly released opinions.

In addition, it would be consistent with various provisions of FISA for this Court to opine on the government's conduct before it in this matter. The FISA statute provides for declassifying orders in the public interest. *See* 50 U.S.C. § 1872. FISC Rule 62(a) also provides a procedure for publishing court orders pursuant to measures that safeguard classified information. *See* FISC R.P. 62(a) ("The Judge who authored an order, opinion, or other decision may *sua sponte* or on motion by a party request that it be published."). Moreover, when the government seeks to use evidence obtained pursuant to a FISA warrant against a party in a public adversarial proceeding, FISA provides a mechanism for the trial court to conduct *ex parte*, *in camera* review of claims

that the warrant was improperly obtained and to issue a public order reflecting its conclusions. *See* 50 U.S.C. § 1806(f); *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 462 (D.C. Cir. 1991).

Neither the FISA nor this Court's Rules create any barrier to addressing this matter in public and—as described in the following section—there is every reason to do so. The President and the Committee have already declassified the fact that this Court issued particular surveillance orders and disclosed both the target of that surveillance and a source of information that helped establish the probable cause to support it, and they have done so in a manner that may undermine the Court's integrity and certainly questions the conduct of both the Justice Department and the FBI. Making public any order concerning the Justice Department's conduct in this matter—in light of the assertions in the Nunes Memo—would not require the Court to disclose additional classified materials, and would be well within the Court's powers.[17]

II. In Order to Protect the Public's Confidence in the Integrity of FISA Proceedings, This Court Should Inform the Public Whether It Has Concerns About—or, Alternatively, Is Satisfied With—the Justice Department's Conduct in This Matter.

A. *The American public requires confidence in the integrity of the FISA process for the now-declassified Carter Page surveillance order.*

The Nunes Memo and accompanying commentary from the White House and Members of Congress have cast doubt on the integrity of the FISA process and the public's ability to trust in the candor and independence of the Department of Justice and FBI in proceedings before this Court. The authors of the Nunes Memo, and many officials who supported its release, have alleged that executive branch officials weaponized the FISA process to target a political opponent and trampled the civil liberties of an American citizen along the way. In their view, these allegations amount to political espionage of a type not seen since Watergate and abuse of

[17] *See* Sophia Brill, *Can the FISC Clean Up the Nunes Memo Mess?*, Lawfare (Feb. 6, 2018), https://www.lawfareblog.com/can-fisc-clean-nunes-memos-mess (last visited Feb. 6, 2018).

the FISA system so significant as to shake the public's confidence in this critical feature of our national security architecture.

In addition, misleading the Court about the facts relevant to a FISA application could involve a violation of the relevant government attorneys' ethical obligations. In an *ex parte* proceeding, such as those before this Court, the American Bar Association's Model Rules of Professional Conduct require a lawyer to "inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." Model Rules of Prof'l Conduct R. 3.3(d). And this Court's own Rules require the executive branch to affirmatively and "immediately" alert the Court should it identify any "misstatement or omission of material fact" in any submission. *See* FISC R.P. 13(a). The claims asserted in the Nunes Memo could amount to violations of both of these rules warranting public reprimand from the Court. If the Court has ongoing proceedings in which it concludes that the Nunes Memo's claims are accurate, the Court should confirm its findings of this abuse publicly and make public any order for remedial action, so that the public can be assured that the Court and the government have begun the essential work of restoring the integrity of and public faith in this process.

It may also be the case, however, that the Nunes Memo does not accurately characterize the proceedings before this Court. For instance, the Nunes Memo itself recognizes that the FBI opened its investigation into Russian interference in the 2016 election *prior to* receiving information from the source allegedly tainted by connections to Mr. Trump's political opponents, *see* Nunes Memo; the FBI was aware of meetings between Mr. Page and Russian officials prior to receiving information from that source;[18] Mr. Page publicly represented himself as "an

[18] *See* Ellen Nakashima, Devlin Barrett and Adam Entous, *FBI Obtained FISA Warrant to Monitor Trump Adviser Carter Page*, Wash. Post (Apr. 11, 2017), https://www.washingtonpost.com/world/national-security/fbi-obtained-

informal advisor to the staff of the Kremlin" long before the source approached the FBI about connections between the Trump campaign and Russia;[19] and reporting since the Nunes Memo's release suggests the Department of Justice may in fact have alerted the Court to the political origins of some of the material in its FISA application.[20]

If this Court has ongoing proceedings in which it concludes that it is satisfied that the allegations in the Nunes Memo are unfounded—and the Department of Justice and FBI presented material facts to the Court sufficient for its approval of a surveillance order related to Mr. Page, as well as extensions of that order—the public should be made aware of that as well. Public confirmation by this Court of its disposition of any matters arising from the Nunes Memo would help lift the cloud placed over the FISA process by the Nunes Memo and by subsequent statements of the President and Members of Congress. What is more, if the Nunes Memo is not a fair representation of the facts, its declassification and release would reflect political abuse of the intelligence oversight process by the Committee and the President. The public has a right to know if its elected officials are putting out false or misleading information to undermine a process designed to keep Americans safe in order to impede an ongoing investigation and settle political scores.

In short, it appears likely that someone is abusing the intelligence apparatus and the FISA process overseen by this Court for illegitimate political ends. The Committee may be correct

---

fisa-warrant-to-monitor-former-trump-adviser-carter-page/2017/04/11/620192ea-1e0e-11e7-ad74-3a742a6e93a7_story.html?utm_term=.2d573c77e646 (last visited Feb. 6, 2018).

[19] *See* Massimo Calabresi and Alana Abramson, *Carter Page Touted Kremlin Contacts in 2013 Letter*, Time (Feb. 4, 2018), http://time.com/5132126/carter-page-russia-2013-letter/ (last visited Feb. 6, 2018).

[20] *See* Ellen Nakashima, *Justice Dept. 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?utm_term=.40e72e321a25 (last visited Feb. 6, 2018); *see also* Kyle Cheney, *Republicans Concede Key 'Footnote' in Carter Page Warrant*, Politico (Feb. 6, 2018), https://www.politico.com/story/2018/02/05/fbi-footnote-carter-page-warrant-390795 (last visited Feb. 6, 2018).

that Department of Justice and FBI leadership misled this Court about the true nature of the intelligence it had gathered on Mr. Page in order to secure surveillance of an operative on a disfavored political campaign. On the other hand, the Committee's version of the facts may be untrue and release of these untruths by the Committee and the President may be designed to sow distrust of the FISA process for political purposes. Whether DOJ and FBI exploited the FISA process to punish political rivals, or HPSCI and the President exploited oversight of the FISA process to protect the President's campaign from scrutiny for its connections to a Russian assault on democratic institutions, the public has a right to know how this Court handles matters arising out of the Nunes Memo.

B. *Public trust in the Justice Department's candor before this Court is essential to the continued effectiveness of the FISA statute and this Court.*

The effect of the Nunes Memo on the public's confidence in the integrity of the FISA process extends beyond just the surveillance order involving Carter Page. If the public believes that FISA warrants are obtained by the Department of Justice to carry out political spying—and that this Court is not capable of providing neutral and effective oversight of government surveillance—it will increase calls to end or curtail authorities to conduct surveillance under FISA, which could undermine the ability of the government to protect our national security. While it is important for the public and Congress to debate the security and civil liberties implications of FISA, as it has regularly done, that debate must be based on accurate facts, not misinformation.

This matter presents an important occasion for transparency as to the propriety of the government's actions in seeking surveillance warrants and this Court's handling of allegations of misconduct when they arise. By necessity, most of this Court's proceedings are carried out in secret. In order for this sort of secrecy over surveillance to survive in a democracy, the public

must maintain high confidence in the Department of Justice, including the FBI, and this Court must be assured that the process operates with integrity and free of political bias. Speaker Ryan pointed to this challenge in his statement on the Nunes Memo's release, noting that the "FISA system…is a unique system with broad discretion and a real impact on Americans' civil liberties."[21] "Unlike most judicial proceedings," the Speaker explained, "the FISA system depends not on an adversarial process, but instead on the government providing a complete presentation of the facts and circumstances underlying its warrant applications….Amid all the political rancor, we must be able to work together to ensure the FISA system works as intended and Americans' rights are properly safeguarded."[22] Release of the Nunes Memo has assertedly shaken the confidence of many Members of Congress, and of the President, in the broader FISA system. In turn, commentary from these government officials now has significant potential to undermine the American public's confidence that the FISA system functions to keep the public safe from both foreign adversaries and politically motivated government spies.

Here, because the President has already declassified information connected with the surveillance of Mr. Page, the Court has a rare opportunity, to the extent it has proceedings before it on the subject, to assure public confidence in its prior proceedings. By doing so, the Court can contribute to restoration of public faith in our counter-intelligence program or expose serious violations of protocol and the public trust by the Justice Department and FBI. This public accounting is critical to the Court's and the FISA regime's continuing effectiveness.

[21] Press Release, Speaker Ryan Press Office, Ryan Statement on Declassified FISA Memo (Feb. 2, 2018), https://www.speaker.gov/press-release/ryan-statement-declassified-fisa-memo (last visited Feb. 6, 2018).
[22] *Id.*

C. *This Court has available mechanisms to provide the public with needed information about the Justice Department's conduct in these proceedings.*

Finally, this Court has available ample mechanisms to provide the public with clarity on this matter. *Amici* defer to the Court to select the most appropriate means to do so, without releasing classified information beyond that which already has been declassified by the President and the House Committee.

First, as described above, this Court has inherent authority to review the conduct of the parties before it and to release an opinion setting forth its conclusions. In light of the claims set forth in the Nunes Memo, this Court may be engaged in a proceeding, formal or otherwise, to review the Justice Department's conduct in this matter. This Court should make public any order disposing of that proceeding, pursuant to FISC R.P. 62(a). In the alternative, to the extent that this Court has determined that there is no need to open a proceeding concerning the Justice Department's conduct, the Court can issue a simple notice, through a docket entry or otherwise, to clarify for the public that no such proceeding exists.

Second, this Court has previously engaged in correspondence with relevant Congressional Committees in response to questions raised by those Committees.[23] And it has made those letters publicly available. Consistent with that practice, this Court could issue a letter to the Members of HPSCI addressing the claims made in the Nunes Memo. *See* FISC R.P. 62(c).

Third, in the context of either of the above options and in consultation with the Justice Department, this Court could also make public relevant and redacted excerpts of the underlying FISA applications, orders, or other materials in this matter. *See* FISC R.P. 62(b). As described

[23] *See, e.g.*, Letter from the Honorable Reggie B. Walton, Presiding Judge, FISC, to Sen. Patrick J. Leahy, Chairman, U.S. Senate Committee on the Judiciary (July 29, 2013); Letter from the Honorable Reggie B. Walton, Presiding Judge, FISC, to Sen. Charles Grassley, Ranking Member, U.S. Senate Committee on the Judiciary (Oct. 11, 2013); Letter from the Honorable Rosemary M. Collyer, Presiding Judge, FISC, to Sen. Ron Wyden, U.S. Senate (Aug. 23, 2017). These letters and other correspondence between the FISC and Members of Congress are available at: http://www.fisc.uscourts.gov/correspondence.

above, the President and HPSCI have already declassified and made public critical and sensitive material from this matter, largely limiting the need for secrecy with respect to those aspects of the underlying surveillance. The Court could provide clarity for the public by releasing underlying records without disclosing any further classified information alongside the issuance of a public opinion or correspondence with Congress. *Amici* reiterate, however, that they are not seeking release of additional classified information.

* * * * *

To the extent it has proceedings related to the Nunes Memo before it, this Court has all the authority it needs to inform the public about the Justice Department's conduct in this matter, in order to remove any appearance of impropriety. This Court is also uniquely situated to ensure public confidence in the country's foreign intelligence surveillance proceedings. This Court was created by an Act of Congress and entrusted with considering government applications for FISA warrants. The members of this Court are Article III Judges, appointed by the President and confirmed by the Senate. They have been designated to serve on this Court by the Chief Justice of the United States. They do not have a stake in the political fortunes of any elected official or political party. The American public needs this Court to lift the confusion and division created by the Nunes Memo and to restore confidence in the propriety of foreign intelligence surveillance proceedings.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court inform the public whether it is satisfied with the candor of the Department of Justice in this matter.

Respectfully submitted,

/s/ Justin Florence
Justin Florence (D.C. Bar No. 988953)
Anne Tindall (D.C. Bar No. 494607)
PROTECT DEMOCRACY PROJECT, INC.
2020 Pennsylvania Avenue, NW, Suite #163
Washington, DC 20006
Telephone: (202) 599-0466
Facsimile: (929) 777-8428
Email: Justin.Florence@protectdemocracy.org
Email: Anne.Tindall@protectdemocracy.org

Benjamin L. Berwick (M.A. Bar No. 679207)
PROTECT DEMOCRACY PROJECT, INC.
10 Ware Street
Cambridge, MA 02138
Telephone: (909) 326-2911
Facsimile: (929) 777-8428
Email: Ben.Berwick@protectdemocracy.org

Counsel for *Amici Curiae*

Dated: February 7, 2018

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

IN RE: MATTERS BEFORE THE FOREIGN INTELLIGENCE SURVEILLANCE COURT RELATING TO CARTER PAGE AND DECLASSIFIED BY ORDER OF THE PRESIDENT ON FEBRUARY 2, 2018	No. _____

CERTIFICATION OF BAR MEMBERSHIP AND SECURITY CLEARANCE STATUS

Pursuant to the United States Foreign Intelligence Surveillance Court's Rules of Procedure 7(h)(1), 7(i), and 63, Counsel for *Amici Curiae* respectfully submit the following information:

Bar Membership Information

The below-listed counsel for *Amici Curiae* are licensed attorneys and members, in good standing, of the bars of United States district and circuit courts. *See* FISC R.P. 7(h)(1), 63.

Justin Florence is a member, in good standing, of the following federal courts: the Supreme Court of the United States; the United States Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Federal, and District of Columbia Circuits; and the United States District Courts for the District of Columbia, the District of Massachusetts, and the District of Maryland. He is licensed to practice law by the bars of the District of Columbia and the Commonwealth of Massachusetts.

Anne Tindall is a member, in good standing, of the following federal courts: the United States Court of Appeals for the Tenth Circuit and the United States District Court for the District of Columbia. She is licensed to practice law by the bars of the District of Columbia and the State of North Carolina.

Ben Berwick is a member, in good standing, of the following federal courts: the United States District Courts for the District of Columbia, the Eastern District of Texas, the Eastern District of Wisconsin, the District of Nebraska, the Southern District of Ohio, and the Northern District of New York. He is licensed to practice law by the bar of the Commonwealth of Massachusetts.

Security Clearance Information

The above-listed counsel for *Amici* do not currently hold security clearances. *See* FISC R.P. 7(i). Because *Amici*'s motion and the related briefing does not contain classified information, *Amici* respectfully submit that all undersigned counsel may participate in proceedings related to this brief without access to classified information or security clearances. *See* FISC R.P. 63 (requiring counsel only to have "appropriate security clearances").

Respectfully submitted,

/s/ Justin Florence
Justin Florence (D.C. Bar No. 988953)
Anne Tindall (D.C. Bar No. 494607)
PROTECT DEMOCRACY PROJECT, INC.
2020 Pennsylvania Avenue, NW, Suite #163
Washington, DC 20006
Telephone: (202) 599-0466
Facsimile: (929) 777-8428
Email: Justin.Florence@protectdemocracy.org
Email: Anne.Tindall@protectdemocracy.org

Benjamin Berwick (M.A. Bar No. 679207)
PROTECT DEMOCRACY PROJECT, INC.
10 Ware Street
Cambridge, MA 02138
Telephone: (909) 326-2911
Facsimile: (929) 777-8428
Email: Ben.Berwick@protectdemocracy.org

Counsel for *Amici Curiae*

Dated: February 7, 2018

CERTIFICATE OF SERVICE

I, Justin Florence, certify that on this 7th day of February, 2018, copies of the foregoing Motion, including attached certification and proposed brief, were served on the following persons by the methods indicated:

By email and overnight UPS delivery to:

Maura Peterson, Security Specialist
Litigation Security Group
U.S. Department of Justice
2 Constitution Square
145 N Street, N.E.
Suite 2W-115
Washington, DC 20530
Email: Maura.L.Peterson@usdoj.gov
Email: Daniel.O.Hartenstine@jmd.usdoj.gov

By overnight certified USPS delivery:

Jeff Sessions
Attorney General
Office of the Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Edward O'Callaghan
Acting Assistant Attorney General for National Security
U.S. Department of Justice
National Security Division
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

/s/ Justin Florence
Justin Florence (D.C. Bar No. 988953)
PROTECT DEMOCRACY PROJECT, INC.
2020 Pennsylvania Avenue, NW, Suite #163
Washington, DC 20006
Telephone: (202) 599-0466
Facsimile: (929) 777-8428
Email: Justin.Florence@protectdemocracy.org