

C A M P A I G N F O R

ACCOUNTABILITY

January 25, 2018

BY FAX: 202-226-0997

Omar Ashmawy
Staff Director and Chief Counsel
Office of Congressional Ethics
1017 Longworth HOB
Washington, D.C. 20515

RE: Request for Investigation of Rep. Devin Nunes and HPSCI Staff

Dear Mr. Ashmawy:

Campaign for Accountability (“CfA”), a nonprofit, non-partisan organization, respectfully requests that the Office of Congressional Ethics (“OCE”) investigate whether Rep. Devin Nunes (R-CA) and majority staff of the House Permanent Select Committee on Intelligence violated committee rules and House ethics rules by leaking information provided to the committee during the course of an official investigation.

Background

Last week, following a vote of the full House Permanent Select Committee on Intelligence (“HPSCI”), the committee released transcripts of testimony provided by Fusion GPS co-founder Glenn Simpson on November 8 and 14, 2017.¹ Unfortunately, prior to the release of the full transcripts, it appears Committee Chairman Nunes and/or members of his staff selectively leaked information provided to the committee in confidence, likely to retaliate against Fusion for its role in investigating President Trump’s and the Trump campaign’s ties to Russia and to deter the firm from any engaging in any continued investigation.

First, it appears Rep. Nunes and/or committee staff improperly obtained information from the Senate Judiciary Committee. In his non-public testimony before the Senate Judiciary Committee on August 22, 2017,² Mr. Simpson confirmed the name of Fusion’s bank. Fusion had not provided the name of the bank to the HPSCI, and it had not appeared in any media accounts. Nevertheless, on October 4, 2017, Rep. Nunes, unilaterally – without the consent of HPSCI

¹ House Permanent Select Committee on Intelligence, Press Release, *Intel Committee Releases Glenn Simpson Testimony Transcripts*, January 18, 2018, available at <https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=850>.

² Concerned about “the innuendo and misinformation circulating about the transcript,” of Mr. Simpson’s confidential Senate Judiciary Committee testimony, on January 9, 2018, the ranking member of that committee, Sen. Dianne Feinstein, released the full transcript. See Danielle Haynes, *Sen. Feinstein Releases Full Transcript of Trump Dossier Testimony*, UPI, January 9, 2018, available at https://www.upi.com/Top_News/US/2018/01/09/Sen-Feinstein-releases-full-transcript-of-Trump-dossier-testimony/9911515523334/.

Ranking Member Adam Schiff (D-CA) or a full vote of the committee – issued a subpoena to Fusion’s bank.³

Once the name of the bank was in Rep. Nunes’ possession, it seems fairly certain that he and/or members of his committee staff leaked it to the press. Joshua Levy, an attorney for Fusion, explained in a declaration that on October 13, 2017, he “received an email from Matt Mosk at ABC News asking me whether a ‘House subpoena’ had been served on a bank for [Fusion’s] records.”⁴ Later that day, counsel for the bank confirmed to Mr. Levy that Rep. Nunes had, indeed, issued a subpoena to the bank on October 4, 2017 for records related to Fusion.⁵ Mr. Levy told the bank’s counsel about the press inquiry and assured the bank’s counsel that neither he nor anyone from Fusion had informed the press about the subpoena; the bank’s counsel stated that no one from the bank had leaked the information to the press either.⁶ Further, on October 20, 2017, Byron York, a well-known conservative columnist at the *Washington Examiner* published a story disclosing the name of the bank.⁷

In addition, on October 18, 2017, Fusion partners Peter Fritsch and Thomas Catan appeared for depositions demanded by HPSCI and invoked their privileges under the First and Fifth Amendments not to testify.⁸ In his declaration, Mr. Levy specifically stated, “[a]t the depositions, HPSCI staff stated that no one should disclose what was said during the deposition to anyone else.”⁹

Nevertheless, on October 19, 2017, the *Wall Street Journal* published a column by Kimberly A. Strassel entitled “The Fusion Collusion,” in which Ms. Strassel revealed information about what had occurred during the October 18 depositions.¹⁰ Ms. Strassel wrote,

Florida Rep. Tom Rooney put the Fusion attendees through a series of questions not out of spite but to clarify finally just what topics the firm is refusing to talk about. The Fifth Amendment doesn’t provide protection against answering all questions. It only protects against providing self-incriminating evidence. It is therefore revealing that Fusion took the Fifth on every topic – from its

³ Olivia Beavers, House Intel Chief Signs Off on New Subpoenas in Russia Probe, *The Hill*, October 10, 2017, available at <http://thehill.com/homenews/house/354796-nunes-signs-off-on-new-subpoenas-in-russia-investigation>.

⁴ Second Declaration of Joshua A. Levy in Support of Plaintiff’s Reply Brief in Support of its Unopposed Emergency Application for Temporary Restraining Order and Preliminary Injunction, ¶ 7, *Bean LLC/d/b/a Fusion GPS v. Defendant Bank, et al.*, C.A. 17-cv-2187-TSC (D.D.C. 2017), available at <https://www.documentcloud.org/documents/4359262-Second-Declaration-of-Joshua-Levy-10-23-17.html>.

⁵ *Id.*

⁶ *Id.*

⁷ Byron York, In Dossier Probe, Fusion GPS Asks Court to Stop House from Seeing Bank Records, *Washington Examiner*, October 20, 2017, available at <http://www.washingtonexaminer.com/byron-york-in-dossier-probe-fusion-gps-asks-court-to-stop-house-from-seeing-bank-records/article/2638187>.

⁸ *Id.* ¶ 10.

⁹ *Id.*

¹⁰ *Id.* ¶ 11.

relationship with British spook Christopher Steele, to the history of its work, to its role in the dossier.¹¹

As Ms. Strassel was not present during the depositions of Messrs. Fritsch and Catan, it is clear that someone from the committee spoke with her and revealed considerable details of the events, despite the admonition that the session remain confidential.¹²

Further, on December 7, 2017, it was reported that Associate Deputy Attorney General Bruce G. Ohr was demoted from his position at the Department of Justice “after evidence collected by [Rep. Nunes] indicate[d] that Ohr met during the 2016 campaign with Christopher Steele, former British spy who authored the ‘dossier,’” and with Mr. Simpson shortly after the election.¹³ Mr. Simpson, as it happens, voluntarily had provided information about his meeting with Mr. Ohr during his confidential interview with the HPSCI on November 14, 2017.¹⁴

Similarly, on December 11, 2017, “HPSCI staff confirmed to Fox News” that Mr. Ohr’s wife, Nellie H. Ohr, had worked as a subcontractor to Fusion GPS in the summer and fall of 2016.¹⁵ Before Fusion’s bank records had been produced to HPSCI, the work of Ms. Ohr, a former American government official with expertise in matters pertaining to Russia, had not been public.¹⁶

Thus, there are now several documented instances in which it appears Rep. Nunes and/or members of his committee staff, likely acting under the congressman’s direction, misused confidential information by leaking it to the media.

Legal Analysis

Leaking Confidential Information

In 2007, the United States Court of Appeals for the District of Columbia Circuit, in an *en banc* opinion, found Rep. James McDermott (D-WA), then a member of the House Committee on Standards of Official Conduct, was liable for disclosing a tape recording of an illegally

¹¹ Kimberly A. Strassel, [The Fusion Collusion](https://www.wsj.com/articles/the-fusion-collusion-1508455434), *Wall Street Journal*, October 19, 2017, available at <https://www.wsj.com/articles/the-fusion-collusion-1508455434>.

¹² It is also extraordinarily unlikely that anyone from the minority staff leaked this information, given that Ms. Strassel – a well-known conservative – continued by criticizing the conduct of the minority staff lawyers: “The untold story is the Democrats’ unprecedented behavior. Mr. Rooney had barely started when committee staffers for Mr. Schiff interrupted, accused him of badgering witnesses, and suggested he was acting unethically. Jaws dropped . . .” *Id.*

¹³ James Rosen and Jake Gibson, [Top DOJ Official Demoted Amid Probe of Contacts with Trump Dossier Firm](http://www.foxnews.com/politics/2017/12/07/top-doj-official-demoted-amid-probe-contacts-with-trump-dossier-firm.html), *Fox News*, December 7, 2017, available at <http://www.foxnews.com/politics/2017/12/07/top-doj-official-demoted-amid-probe-contacts-with-trump-dossier-firm.html>.

¹⁴ [Declaration of Glenn R. Simpson in Support of Plaintiff’s Notice of Additional Record Evidence](https://www.scribd.com/document/367039977/Glenn-Simpson-declaration), ¶ 6 *Bean LLC d/b/a Fusion GPS v. Defendant Bank, et al.*, C.A. 17-cv-2187-RJL (D.D.C. Dec. 12, 2017), available at <https://www.scribd.com/document/367039977/Glenn-Simpson-declaration> “Simpson Declaration”.

¹⁵ Rosen and Gibson, *Fox News*, Dec. 11, 2017.

¹⁶ Simpson Declaration, ¶ 5.

intercepted conversation in which Rep. John Boehner (R-OH) had participated.¹⁷ Rep. McDermott had received the tape from a third party and argued he had a First Amendment right to disclose the recording.¹⁸ The D.C. Circuit rejected Rep. McDermott's argument relying on the Supreme Court case, *United States v. Aguilar*, which held that the First Amendment did not give a federal judge, who obtained information about an investigative wiretap from another judge, the right to disclose that information with the subject of the wiretap.¹⁹ The *Aguilar* Court found the judge was not:

simply a member of the general public who happened to lawfully acquire possession of information about the wiretap; he was a Federal District Court Judge who learned of a confidential wiretap application from the judge who had authorized the interception, and who wished to preserve the integrity of the court. **Government officials in sensitive confidential positions may have special duties of non-disclosure.**²⁰

As the *Boehner* court noted, "*Aguilar* stands for the principle that those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information."²¹ Finding no First Amendment defense to violating a federal statute prohibiting the disclosure of investigative searches, the court found Rep. McDermott had no shield from civil liability or from discipline imposed by the House.²²

Following the court's decision, the House Committee on Standards of Official Conduct considered whether, by disclosing the tape, Rep. McDermott had violated House ethics rules. As a member of the ethics committee when he had received the information, the committee considered whether Rep. McDermott had violated the committee's confidentiality rules.²³ Like the HPSCI, the ethics committee's rules prohibited disclosure of information obtained through membership on the committee.²⁴ By making "secretive disclosures to the news media," the ethics committee held, "Rep. McDermott's actions were not consistent with the spirit of the Committee's rules."²⁵

The ethics committee cited to House Rule 23, clause 2, which provides "[a] Member . . . shall adhere to the spirit and the letter of the Rules of the House and to the rules of duly constituted committees thereof." This rule has been interpreted to mean that "Members, officers and employees may not do indirectly what they would be barred from doing, directly."²⁶

¹⁷ *Boehner v. McDermott*, 484 F.3d 573 (D.C. Cir.), *cert. denied*, 552 U.S. 1072 (2007).

¹⁸ *Id.*

¹⁹ *Id.* (citing *United States v. Aguilar*, 515 U.S. 593 (1995)).

²⁰ 515 U.S. at 605-06 (emphasis added).

²¹ 484 F.3d at 579.

²² *Id.* at 580.

²³ House Comm. on Standards of Official Conduct, *In the Matter of Rep. James McDermott*, H. Rep. No. 109-732 109th Cong., 2d Sess. 16-17 (2006).

²⁴ *Id.*

²⁵ *Id.* at 17.

²⁶ *Id.*, fn. 78, *see also* House Comm. on Standards of Official Conduct, *House Ethics Manual* at 17 (2008 ed.).

Here, as HPSCI rules make clear, committee members and staff may not simply release information received through their work on the committee. Rather, the rules specifically prohibit members of the committee and committee staff from discussing, disclosing, or causing to be discussed or disclosed “any classified information received by the Committee from any source,” or “[t]he substance of any hearing that was closed to the public pursuant to these rules or the Rules of the House.”²⁷ HPSCI’s rules also provide that “[a]ny records or notes taken by any person memorializing material otherwise prohibited from disclosure by members of the Committee and Committee staff . . . including . . . the substance of any hearing or briefing that was closed to the public, shall remain Committee material subject to these rules and may not be publicly discussed, disclosed, or caused to be publicly discussed or disclosed, unless authorized by the Committee . . .”²⁸

Therefore, it appears that the disclosure of confidential information by Rep. Nunes and/or members of his staff acting at his direction, including: the name of Fusion’s bank, information concerning the depositions of Messrs. Fritsch and Catan, portions of transcripts of confidential interviews, the facts of Mr. Ohr’s demotion and Ms. Ohr’s subcontracting arrangement with Fusion GPS all violate House committee rules.

Neither the fact that the information pertained to an ongoing committee investigation conducted under Rep. Nunes’s direction nor the fact that the material was of considerable public interest excuses the disclosure. Indeed, the *Boehner* court noted federal law frequently prohibits disclosure of lawfully obtained truthful information of public importance. Among the many examples: grand jurors, court reporters, and prosecutors may not reveal grand jury information; the Privacy Act prohibits government employees from disclosing agency records containing personal information to unauthorized sources; the Espionage Act punishes officials who disclose sensitive national defense information to those not authorized to receive it; employees of the IRS may not disclose tax return information; and judicial employees may not disclose confidential information received in the course of their official duties.²⁹

As a result, just as the D.C. Circuit found Rep. McDermott knowingly disclosed an unlawfully intercepted communication in violation of the wiretapping statute, and the House Committee on Standards of Official Conduct found Rep. McDermott violated the rules of the committee and the House, here, the Office of Congressional Ethics should find substantial reason to believe Rep. Nunes and/or members of his staff acting at Rep. Nunes’ direction willfully disclosed confidential information in violation of HPSCI special duties of non-disclosure.

Conduct Not Reflecting Creditably on the House

Rule XXIII of the House Ethics Manual requires all members of the House to conduct themselves Aat all times in a manner that reflects creditably on the House.³⁰ This ethics standard

²⁷ Permanent Select Committee on Intelligence, Rule 12(a)(1), Rules of Procedure (115th Cong.), available at https://intelligence.house.gov/uploadedfiles/hpsci_rules_of_procedure_-_115th_congress.pdf.

²⁸ Rule 12(a)(4).

²⁹ *Boehner* at 577-78.

³⁰ Rule 23, clause 1.

is considered to be the most comprehensive provision of the code.³¹ When this section was first adopted, the Select Committee on Standards of Official Conduct of the 90th Congress noted that it was included within the Code to deal with Aflagrant violations of the law that reflect on ACongress as a whole, and that might otherwise go unpunished.³² This rule has been relied on by the Ethics Committee in numerous prior cases in which the Committee found unethical conduct including: the failure to report campaign contributions,³³ making false statements to the Committee,³⁴ criminal convictions for bribery,³⁵ or accepting illegal gratuities,³⁶ and accepting gifts from persons with interest in legislation in violation of the gift rule.³⁷

If, as it appears, Rep. Nunes and/or members of his committee staff acting at his direction used their positions on the HPSCI to obtain information regarding Fusion GPS and to release that information publicly in an effort to harm the firm in retaliation for its investigation into the ties between then-presidential candidate Donald J. Trump and the Trump campaign to Russia, this conduct does not reflect creditably on the House.

We look forward to your prompt investigation of this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dan E Stevens", with a long horizontal flourish extending to the right.

Daniel E. Stevens
Executive Director

³¹ *House Ethics Manual*, at 12.

³² House Comm. on Standards of Official Conduct, *Report Under the Authority of H. Res. 418*, H. Rep. No. 1176, 90th Cong., 2d Sess. 17 (1968).

³³ House Comm. on Standards of Official Conduct, *In the Matter of Representative John J. McFall*, H. Rep. No. 95-1742, 95th Cong., 2d Sess. 2-3 (1978) (Count 1); *In the Matter of Representative Edward R. Roybal*, H. Rep. No. 95-1743, 95th Cong., 2d Sess. 2-3 (1978).

³⁴ House Comm. on Standards of Official Conduct, *In the Matter of Representative Charles H. Wilson (of California)*, H. Rep. No. 95-1741, 95th Cong., 2d Sess. 4-5 (1978); H. Rep. No. 95-1743 (Counts 3-4).

³⁵ House Comm. on Standards of Official Conduct, *In the Matter of Representative Michael J. Myers*, H. Rep. No. 96-1387, 96th Cong., 2d Sess. 2, 5 (1980); see 126 Cong. Rec. 28953-78 (Oct. 2, 1980) (debate and vote of expulsion); *In the Matter of Representative John W. Jenrette, Jr.*, H. Rep. No. 96-1537, 96th Cong., 2d Sess. 4 (1980) (Member resigned); *In the Matter of Representative Raymond F. Lederer*, H. Rep. No. 97-110, 97th Cong., 1st Sess. 4, 16-17 (1981) (Member resigned after Committee recommended expulsion). In another case, the Committee issued a Statement of Alleged Violation concerning bribery and perjury, but took no further action when the Member resigned (*In the Matter of Representative Daniel J. Flood*, H. Rep. No. 96-856, 96th Cong., 2d Sess. 4-16, 125-126 (1980)).

³⁶ House Comm. on Standards of Official Conduct, *In the Matter of Representative Mario Biaggi*, H. Rep. No. 100-506, 100th Cong., 2d Sess. 7, 9 (1988) (Member resigned while expulsion resolution was pending).

³⁷ House Comm. on Standards of Official Conduct, *In the Matter of Representative Charles H. Wilson (of California)*, H. Rep. No. 96-930, 96th Cong. 2d Sess. 4-5 (1980); see 126 Cong. Rec. 13801-20 (June 10, 1980) (debate and vote of censure).