

Trump, Obama, and Wiretaps: What's Going On?



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No trace of evidence has presented itself for President Trump's discovery that President Obama ordered someone or other to "tapp my phones" late last year. (Yes, he spelled it that way.) The provenance of what Trump "just found out" on Saturday morning seems to be a fabulist tale from radio host Mark Levin, fleshed out by *Breitbart News*.

How low has President Obama gone to tapp my phones during the very sacred election process. This is Nixon/Watergate. Bad (or sick) guy!

— Donald J. Trump (@realDonaldTrump) March 4, 2017

Given that Trump is president now, his eruptions oblige senior White House aides to collaborate in the snark hunt and pretend to believe it is real. The *New York Times* reported that White House Counsel Donald F. McGahn II was working to "secure access" to what he "believed" was a Foreign Intelligence Surveillance Act (FISA) order targeting Trump associates. Critics from both parties called that blatant interference with law enforcement. White House officials amended the account, saying McGahn was merely "gleaning information" from the Justice Department. There is next to no chance that Justice or the FBI would provide that either.

Is it legal for a sitting President to be "wire tapping" a race for president prior to an election? Turned down by court earlier. A NEW LOW!

— Donald J. Trump (@realDonaldTrump) March 4, 2017

"All we're saying is let's take a closer look," deputy White House press secretary Sarah Huckabee Sanders said on ABC's *This Week* yesterday. "Let's look into this. If this happened, if this is accurate, this is the biggest overreach and the biggest scandal."

Let's be thorough. Suppose the public record is correct as far as it goes. What could and could not be true about the president's tale of surveillance on him and his entourage?

Under What Circumstances Can the Government Wiretap an American?

There are two ways for government officials to legally listen in on the phone calls of people inside the United States: criminal wiretaps under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (commonly known as “Title III warrants”), and national security wiretaps under the Foreign Intelligence Surveillance Act of 1978, or FISA.

Title III warrants are used to collect evidence in a criminal investigation for use in court. If you’ve seen *The Wire*, for example, you’re familiar with how this works: Before McNulty and Bunk could eavesdrop on Baltimore’s drug kingpins, they had to convince a prosecutor, and the prosecutor had to convince a judge, that there was probable cause to believe Avon Barksdale had committed or would commit a serious crime. (Well, that’s how they were *supposed* to do it.) In Title III warrant applications, federal prosecutors must also justify the necessity of a wiretap over a less intrusive method of finding facts. If there was a criminal wiretap at a Trump Tower phone number, it would mean the Justice Department had convinced a federal judge that someone using the phone in question had *probably* committed—or was going to commit—a serious crime.

FISA warrants, on the other hand, are used to collect information on U.S. soil about suspected foreign agents. To obtain a FISA warrant, the FBI must convince one of eleven judges (they rotate) on the Foreign Intelligence Surveillance Court (or FISC, pronounced “fisk”) that there is probable cause that the government’s target is an “agent of a foreign power.” If the FBI successfully obtained a FISA warrant to tap a phone line in Trump Tower, it would mean that a FISC judge was satisfied that someone using that phone was *probably* in the service of a foreign power.

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To be clear, Trump’s suggestion that Obama himself ordered a wiretap is a serious accusation that far exceeds the legal parameters of FISA or Title III. Under the Constitution, the president is both chief law enforcement officer and commander in chief, but warrants are not obtained at the behest of the president. They are obtained by the Justice Department. Strong legal norms would have kept Obama far away from any such investigation. If he had tried to offer direction, law enforcement authorities would have pushed back. If he had attempted to issue orders, there would have been high-level resignations and leaks.

What's the Process for Getting a FISA Warrant?

Obtaining a FISA warrant is no walk in the park, although the government almost always succeeds. If Obama's Justice Department had sought one for telephones in Trump Tower, the process would have worked like this: First, the FBI and lawyers in Justice Department's National Security Division (NSD) would have prepared a declaration laying out their rationale and evidence of probable cause. Then, a top intelligence official, usually the FBI director, would have certified that the warrant's purpose was "foreign intelligence" that could not be obtained by other means. Then, either the attorney general, deputy attorney general, or the head of the National Security Division would approve the package. Only then would an NSD lawyer appear before the FISC with a stack of paper several inches high. In order to target an American citizen, the burden of proof would be much higher than merely showing contact with a foreign government.

Could Trump Tower Phone Calls Have Been Collected Some Other Way?

Though Trump specifically suggested a wiretap at Trump Tower, it is possible that people there were monitored during calls with a foreign target on the other end. That is called "incidental" collection in U.S. intelligence argot. This scenario very likely accounts for the interception of Lieutenant General Michael Flynn's conversations with Russian ambassador Sergey Kislyak. Eavesdropping on ambassadors from rival powers is routine.

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FISA requires the names of Americans under incidental surveillance to be "minimized," or made anonymous. (The provision applies to any "U.S. person," a category encompassing citizens, permanent residents, and anyone located on U.S. soil at the time of the interception, unless it has been established that they are not a citizen or permanent resident.) However, if the U.S. person's identity is deemed important to understanding the meaning of an intelligence report—as it would have been for Flynn and Kislyak's chat about sanctions—the name may be deanonymized and distributed to those with a need to know it. Indeed, loopholes in the minimization procedures under FISA has been a consistent cause of concern for American privacy advocates. Thus, there could very well be transcripts of phone calls placed to and from Trump Tower, with names named, even without a FISA order against them. The other ends of those calls would have been the targets.

Finally, it's worth noting that the more reputable reports about a FISA order involving Trump—from the *BBC* and the

Guardian—do not explicitly mention wiretaps. Rather, they refer to the collection of “electronic records” belonging to two Russian banks with possible links to the Trump organization. As Julian Sanchez of the Cato Institute notes, a FISA order to collect the business records of a foreign entity would not require a demonstration of probable cause. Rather, obtaining these “tangible things” under Section 215 would only require a showing that the information is “relevant to an authorized investigation,” even if it included data pertaining to an American. Though journalists sometimes fudge the distinction, such an order is not technically a “warrant.” It would not permit surveillance of phone calls, but it might be used for all kinds of other data.

So What Actually Happened?

It’s hard to say. Could the FBI or another intelligence agency have intercepted communications by Trump or his staff? Sure. It could have happened lawfully, as described above: by way of a national security warrant from the FISA Court, a criminal warrant from a U.S. District Court, or “incidental” collection on Trump and company as they talked to foreign intelligence targets.

In any of those scenarios, the surveillance would probably not have been limited to telephone calls. Intelligence and law enforcement agencies are equally interested, if not more so, in emails, faxes, text messages, and digital information in just about any form. There is just so much more of this stuff, and it’s all searchable. Some surveillance happens live and some scoops up records from computer servers—private or commercial.

James Clapper, the retired Director of National Intelligence (DNI), offered an unusually direct response on NBC’s Meet the Press yesterday when Chuck Todd asked about Trump’s accusation:

For the part of the national security apparatus that I oversaw as DNI, there was no such wiretap activity mounted against the president-elect at the time, or as a candidate, or against his campaign.

There were three gaps in Clapper’s statement. He acknowledged one of them. “I can’t speak for other Title III authorized entities in the government or a state or local entity,” he said. So there could have been a criminal investigation of which Clapper would not normally be aware. Another gap, perhaps overtly picky on our parts, is that Clapper specified only Trump and his campaign. He did not explicitly say there was no intelligence warrant that targeted Trump’s associates, informal advisers, or even members of his family.

The third gap, like the second, is hypothetical. It is based on the intelligence community's habit of parsing words narrowly. Lay people such as Trump speak of wiretaps when they are talking about electronic surveillance writ large. An experienced professional like Clapper would ordinarily distinguish telephone from Internet surveillance. (The terms of art are "dialed number recognition" and "digital network intelligence," respectively.) Wiretapping generally refers only to eavesdropping on telephone calls. It is certainly possible that Clapper simply echoed Chuck Todd's question about "an illegal wiretap." Less likely, we think, but not out of the question—the former DNI chose deliberately not to deny the existence of a FISA warrant for the Trump campaign's electronic documents and messages.

If we take Clapper's remark as authoritative, and we know of no reason not to, then surveillance under a criminal court authority remains on the table. Here the public record is much less clear. Electronic surveillance under Title III authority is the job of the FBI. If the FBI had a court order, there is no Watergate-style scandal to allege.

Obama, for his part, offered an equally careful and limited comment on the facts. His spokesman, Kevin Lewis, issued this statement: "Neither President Obama nor any White House official ever ordered surveillance on any U.S. citizen. Any suggestion otherwise is simply false." *Breitbart News* described that statement as a "non-denial denial," noting that Obama insiders "do not deny that such a wiretap existed." Spin aside, *Breitbart* was exactly right. Another way to put the point is that Trump may have been subject to lawful and proper surveillance in a criminal investigation after an independent judge found probable cause. It is less clear why that talking point would appeal to Trump or his advocates.

The progression of the president's Saturday morning tweets suggested a darker theory. He asked, "Is it legal for a sitting president to be 'wire tapping' a race for president prior to an election?" Thirteen minutes later, he reached his conclusion. "This is Nixon/Watergate," he wrote.

But again, short of sending a team of plumbers to break into Trump Tower, which does not seem to be part of the legend here, Obama could not have spied on Trump without the FBI.

Accusing Obama of illegal surveillance thus amounted to saying the FBI went along willingly. It was this, according to the *New York Times*, that led Director James B. Comey to ask the Justice Department for a public affirmation that no such operation took place. (It is not obvious who could authorize such a statement, with Attorney General Jeff Sessions recused from the matter and a deputy yet to be confirmed.) Like Clapper and Obama, each for his own reason, Comey has chosen not to deny the existence of a properly founded criminal probe.

With that in mind, Trump marked another milestone in his Cold War with the FBI when he dispatched his spokeswoman to ABC's *Good Morning America* yesterday. George Stephanopoulos, the host, asked Sanders whether Trump accepted Comey's reported denial of an illegal wiretap.

“You know, I don’t think he does, George,” Sanders said.

Editor’s note: This article was updated on March 7, 2017 after its original publication to include clarifications on the concept of “U.S. person” and gaps in Clapper’s statement.



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