



Thanks to the Obama wiretapping controversy, Trump discovers the surveillance state

Patrick G. Eddington

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President Trump took to Twitter, his favorite communication outlet, and claimed over the weekend that President Obama had "wire tapped" him during the presidential campaign. Trump provided no actual evidence to back up the assertion: no declassified Foreign Intelligence Surveillance Court order for such surveillance, no actual voice cuts or transcripts of intercepted communications by the NSA or FBI of Trump on the phone with anyone during the campaign, etc.

Indeed, the origin of Trump's allegation may be a Heat Street blog post from last November that was subsequently repeated and amplified with other allegations by Breitbart. With that in mind, is there any truth to what Trump is alleging?

Let's start with the law. The president cannot simply pick up the phone, say to his NSA or FBI directors, "I think Trump is a threat to Hillary's campaign; give me all the dirt you have on him." Indeed, he doesn't have to.

Thanks to changes to the Foreign Intelligence Surveillance Act in 2008, when the government targets the communications of foreign entities, any calls of Americans that were "incidentally" collected are automatically evaluated for their potential "foreign intelligence" value.

But why?

FISA was revised to make it easier to find links between foreign entities and their allies or operatives in the United States. Assuming U.S. intelligence services were investigating ties between the Trump campaign and Russia, the NSA and FBI would have to determine whether any Americans in question were in a position to pass classified information to the Russians, were seeking to become Russian spies, or that Trump and his people were colluding with the Russians to help Trump win the White House.

To date, no federal entity has made public a shred of evidence that Trump or anyone connected to him is a controlled agent of the Russian government, or that there is, in fact, credible evidence of collusion between the Trump campaign and the Russian government. If intercepted

communications between Trump and his advisors with Russians involved in a scheme to help him get elected actually exist, such specific evidence has thus far not been made public. Trump certainly would have no incentive to publicize this evidence if the allegations were true.

Yet if the allegations are false, Trump, in his capacity as commander-in-chief, could order the NSA and CIA to declassify and make public whatever information they have.

The FBI could more easily resist such an order if there is an ongoing criminal investigation, and if the NSA and CIA have information relevant to a criminal inquiry, the Bureau could ask them to keep that information out of the public domain pending an indictment. This may be why the FBI has so far refused to provide House Intelligence Committee ranking member Adam Schiff, D-Calif., the information on Trump he has sought. Even so, Trump has the authority and leverage to make public what non-FBI agencies have in their possession on this controversy.

I hope Trump now understands the perils of post-Sept. 11 surveillance programs like the modified version of FISA (up for renewal this year). If he's smart, he'll demand it be changed to mandate a probable cause-based warrant to acquire and examine the communications of any American.

Patrick G. Eddington is a policy analyst in homeland security and civil liberties at the Cato Institute.