

# FISA IS NOT A MAGIC WORD

The NYT had an article yesterday reporting on investigations into three (not four) of Donald Trump's associates. The lead explains that authorities are reviewing "intercepted communications" in an investigation.

American law enforcement and intelligence agencies are examining intercepted communications and financial transactions as part of a broad investigation into possible links between Russian officials and associates of President-elect Donald J. Trump, including his former campaign chairman Paul Manafort, current and former senior American officials said.

The article differs from many of the reports on investigations into Trump because it is not so breathless and shows far more understanding of how DOJ works. Sadly, most readers appear not to have gotten this far into the story, which admits it's not even clear whether the investigation is primarily about ties between Trump and the DNC hack.

It is not clear whether the intercepted communications had anything to do with Mr. Trump's campaign, or Mr. Trump himself. It is also unclear whether the inquiry has anything to do with an investigation into the hacking of the Democratic National Committee's computers and other attempts to disrupt the elections in November.

A number of people, including – bizarrely! – former DHS Assistant Secretary for Intergovernmental Affairs Juliette Kayyem have asked why the NYT article doesn't mention FISA.

Great piece. Honest ? Is there reason

why it doesn't mention word FISA? I don't know other ways to intercept comms.

Kayyem asks that, even about an article that partially raises another – the most common – way intercepts get done: by targeting foreigners.

The counterintelligence investigation centers at least in part on the business dealings that some of the president-elect's past and present advisers have had with Russia. Mr. Manafort has done business in Ukraine and Russia. Some of his contacts there were under surveillance by the National Security Agency for suspected links to Russia's Federal Security Service, one of the officials said.

The Russians alleged to have bought off Manafort, and the Russians alleged to have hacked the DNC are all legal targets without a FISA order (unless they're targeting in the US, and even then, in some cases you wouldn't need a FISA order). But these people are described as Russians and Ukrainians *in Europe*, so no FISA order needed. Moreover, the BBC article that started this line of reporting made clear the investigation arises from an intercept from a Baltic ally. Even if the US did the spying, foreign targets could be collected on under EO 12333 or under Section 702 of FISA without an individual order, and the Manafort sides of those conversations would be read. Indeed, those communications would be read *precisely because* a US person was having conversations with targets of interest.

So to review, here are the ways that the government might collect data in this case.

- As the BBC reported, the US gets intercepts from its foreign partners, and

appears to have done so here.

- For foreign targets like those described, much US surveillance takes place under EO 12333. The NSA is collecting on switches and satellites carrying such communications, and to the extent that they're not encrypted (or encrypted using technology the NSA has broken) those communications are readily available without a court order.
- Those foreign targets located in Europe are also legal targets under Section 702. For national security cases (including counterintelligence ones) NSA routinely shares the raw feed off such collection with FBI, and FBI is not only allowed to read both sides of those conversations, but to go back and search for US persons in them without any suspicion of wrong-doing.
- This counterintelligence investigation is primarily about money changing hands. That's Treasury's job, and its methods of coercion for collecting information don't usually involve

courts. Banks are obliged to hand over certain kinds of suspicious transfers in any case. Treasury also gets to go to SWIFT and get what it wants. That's not an "intercept" in the traditional sense, but is likely a key piece of evidence in this case.

The issue, then, is when someone like Manafort becomes the target of the investigation and/or when Russians in the US (but not exclusively at an Embassy) are targeted. In that case, the following might explain intercepts.

- In some respects, Manafort's behavior reeks of classic influence peddling, a lobbyist gone wrong. To the extent that's the case, it might be investigated under regular criminal law with pretty much the same secrecy that FISA will give you (especially given that multiple sources are leaking like sieves about FISA orders now). So FBI could have obtained a criminal warrant targeting Manafort's communications.
- To target Manafort anywhere in the world, the FBI/NSA would need a FISA order. Domestically, that'd be a traditional order(s). Given the overseas connection,

they'd likely get a 705b order, allowing them to keep spying if Manafort were to leave the country.

- To target Russians who are in the country but not at the Russian embassy, the government would need a FISA order.

To be sure, there were earlier reports that FBI asked for FISA orders in June and July, finally obtaining one (not three) in October. Even there, the original BBC report suggested the Americans were not the primary targets, but foreign targets, though it misstates who could actually be targeted (and seems to think Russian banks would require a FISA order).

Lawyers from the National Security Division in the Department of Justice then drew up an application. They took it to the secret US court that deals with intelligence, the Fisa court, named after the Foreign Intelligence Surveillance Act. They wanted permission to intercept the electronic records from two Russian banks.

Their first application, in June, was rejected outright by the judge. They returned with a more narrowly drawn order in July and were rejected again. Finally, before a new judge, the order was granted, on 15 October, three weeks before election day.

Neither Mr Trump nor his associates are named in the Fisa order, which would only cover foreign citizens or foreign entities – in this case the Russian banks

A more recent, but breathless, version of the story originally misstated the standard for

FISA, but does get closer to suggesting Trump's associates are the targets.

Note that in one place NYT refers to "investigations" plural.

The F.B.I. is leading the investigations, aided by the National Security Agency, the C.I.A. and the Treasury Department's financial crimes unit.

It is possible that there are separate investigation(s), one targeting Manafort for clear influence peddling, another targeting Roger Stone for apparent involvement in the hand-off of DNC documents to Wikileaks, and a third for corrupt business dealings on the part of Carter Page. It is also possible that such independent investigations could converge on the election, if what the Trump dossier claims is true. It is further possible that if all of those investigations converged into one election-related investigation, there'd still be no way to prove Trump knew of Russian involvement; right now, only his associates have been "targeted," to the extent even that has occurred. (Roger Stone, of course, is an old hand at giving the President plausible deniability about the rat-fucking done in his name.)

Finally, there's one more (delicious) detail most people have missed. Just last week the intelligence community rolled out its new E.O. 12333 sharing guidelines. I suspect such guidelines were in place between FBI and NSA before then; for a variety of reasons I think they may have been sharing such data since ... September. But as I'll show in a follow-up, one very clear objective for the expanded E.O. 12333 sharing is to give FBI (and CIA) direct access to raw E.O. 12333 collected information for counterintelligence purposes. That means all those intercepts on Russian and Ukrainian people talking to Manafort, going back over a year? At least as of January 3, the FBI (and CIA) can

have those, including Manafort's side of the conversation, in raw form.