

DEVIN NUNES' SO-CALLED BIBI NETANYAHU PRECEDENT

Throughout his ongoing information operation to claim the Obama White House spied on the Trump transition team, Devin Nunes has pointed to what he claimed was a precedent: when, in December 2015, members of Congress suddenly copped on that their conversations with Bibi Netanyahu would get picked up incidentally. In his March 22 press conference, he explained,

We went through this about a year and a half ago as it related to members of Congress, if you may remember there was a report I think it was in the Wall Street Journal and but then we had to have we had a whole series of hearings and then we had to have changes made to how Congress is informed if members of Congress are picked up in surveillance and this looks it's like very similar to that.

Eli Lake dutifully repeated it in the second of his three-post series pitching Nunes' information operation.

A precedent to what may have happened with the Trump transition involved the monitoring of Israel's prime minister and other senior Israeli officials. The Wall Street Journal **reported** at the end of 2015 that members of Congress and American Jewish groups were caught up in this surveillance and that the reports were sent to the White House. This occurred during a bitter political fight over the Iran nuclear deal. In essence the Obama White House was learning about the strategy of its domestic political opposition through legal wiretaps of a foreign head of state and his aides.

But Lake didn't apparently think through what the implications of Nunes' analogy – or the differences between the two cases.

Here's the WSJ report and CBS and WaPo versions that aren't paywalled. All make it very clear that Devin Nunes took the lead in worrying about his conversations with Bibi Netanyahu being sucked up (I don't remember Republicans being as sympathetic when Jane Harman got sucked up in a conversation with AIPAC). They also describe that Obama's WH, faced with the potential that their surveillance would be seen as spying on another branch of Congress, had the NSA take charge of the unmasking.

The administration believed that Israel had leaked information gleaned from spying on the negotiations to sympathetic lawmakers and Jewish American groups seeking to undermine the talks.

According to the Journal, when the White House learned that the NSA eavesdropping had collected communications with U.S. lawmakers, it feared being accused of spying on Congress and left it to the NSA to determine what information to share with the administration. The Journal said the NSA did not pass along the names of lawmakers or any of their personal attacks on White House officials.

That's not to say they'd take the same approach here – indeed, Lake now claims, at least, that Susan Rice requested some Trump officials' names to be unmasked, distinguishing it from the Bibi case in that White House did not leave it up to NSA to decide what to unmask (though the underlying reporting makes the silly claim that Rice, Loretta Lynch, and John Brennan were among a very limited number of people who could request a name be unmasked).

The larger point is, even assuming the

collection of conversations between your political opponents and a foreign government designed to undermine your executive branch authority was scandalous, it'd still fall under the very legitimate concern of separation of powers.

Yes, Trump's aides are from a different party. But they are nevertheless part of the executive branch. And the entire basis of counterintelligence spying – the entire point of FISA – is to ensure that executive branch officials are not targeted by foreign countries to be spies, which is part of the reason Mike Flynn attracted attention (which is not to justify the leaking of that intercept). Add in the legitimate necessity to implement executive branch policy and this is a very different case than the Bibi case, even if you want to defend (as I do, to a point) Republican members of Congress collaborating with foreign governments to undermine Article II authorities.

Nunes' imagined solution – from his March 22 White House press conference – is ever nuttier.

Q: You've said legal and incidental. That doesn't sound like a proactive effort to spy.

Nunes: I would refer you to, we had a similar issue with members of Congress that were being picked up in incidental collection a little over a year ago, we had to spend a full year working with the DNI on the proper notification for members of Congress to be notified which comes through the Gang of Eight. I would refer you to that because it looks very similar to that, would be the best way I can describe it.

The ODNI current informs the Gang of Eight when members of Congress get spied on (which means claims that a lot of GOP candidates got spied on is likely hot air, but which also means that if Nunes were collected as a member of the

transition team, he'd have been the first to learn of it). Which is an important protection for separation of powers, but which also enables corrupt members of Congress to not just learn they're being surveilled but, potentially, to alert the foreign targets what channels we're using.

Maybe Trump wants that standard applied to the executive branch, but if he adopts it, we're going to have a leaking free for all. Not to mention, it would make it absolutely impossible for the government to protect against espionage related to elections.

Or perhaps Nunes is just saying something more simple. Perhaps Nunes is saying the "dozens" of intercepts where Trump officials had been unmasked (to the extent that's true) disclosed Trump's transition-period attempts to drum up a war with Iran at the behest of Israel. Perhaps the real stink here is that, in the very same days Mike Flynn was telling Russia sanctions would be loosened, Trump was publicly undermining US efforts to take a stand against Israeli illegal settlements.

Perhaps, ultimately, this is still about a belief that the Israelis should never be wiretapped.