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5 on 45: What does the FBI's surveillance of Manafort mean?

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CONTRIBUTORS:

ADRIANNA PITA

SUSAN HENNESSEY

Fellow - Governance Studies

Managing Editor - Lawfare

(MUSIC)

PITA: You're listening to 5 on 45 from the Brookings Podcast Network, analysis and commentary from Brookings experts on today's news regarding the Trump administration.

HENNESSEY: I'm Susan Hennessey. I'm a fellow in Governance Studies here at the Brookings Institution and the managing editor of Lawfare. Last night, CNN and The New York Times published some scoops on former Trump campaign chairman Paul Manafort.

The CNN story reports that the U.S. government investigators wiretapped Paul Manafort, the one-time Trump campaign chairman, both before and after the 2016 presidential election. Reportedly, the government obtained two warrants for Manafort under Title One of the Foreign Intelligence Surveillance Act. The first was in 2014 and was related to Manafort's work for the pro-Russian Ukrainian regime. That warrant was not renewed because of lack of evidence. Then, a second warrant was issued sometime after the election in service of the FBI's investigation into Russian influence of the election and potential ties between the Trump campaign and Russian operatives. That surveillance continued into this year.

The New York Times story really contains one highly significant fact and that's that Manafort has been informed that he will be indicted. The FBI had been investigating Manafort not only for his involvement in the Russian election interference, but also for possible violations of tax law, money laundering prohibitions, and requirements to disclose foreign lobbying. There's still a lot we don't know about these stories, but here are some preliminary questions and even more preliminary answers.

First, what does it mean that Manafort was informed he will be indicted? The language that the Times story uses isn't really legally precise. It might mean that Manafort has been formally informed that he is an investigative target. That's a designation that means that prosecutors intend to ask a grand jury to indict him. It could instead suggest something less than that, something like an aggressive statement from

prosecutors or investigators who are trying to pressure him into cooperation. But it does mean that special counsel Robert Mueller's investigation has reached a critical stage. The point at which he may soon start making allegations in public.

So what does the fact of a FISA warrant mean? So put simply, under Title One of FISA a person can be targeted if the government establishes probable cause that he or she is "the agent of a foreign power." Now the definition of the agent of a foreign power is different for U.S. persons versus non-U.S. persons. Manafort is a U.S. person. That's a category that includes but actually isn't limited to U.S. citizens. So that means that Manafort can only be deemed the agent of a foreign power under FISA. If the government shows a judge probable cause that he engaged or planned to engage in particular violations of U.S. law in service of a foreign power.

So does this all mean that Trump was right to say that he was wiretapped? No. Nothing in these reports vindicate Trump's claims that he or Trump Tower were wiretapped. Trump previously accused President Obama of wiretapping him.

The Manafort story simply says that Manafort was a target and that Trump might have been talking to him in the same time period. It doesn't report that Trump was subject to collection. But even if he was, and it's certainly possible that he was, that doesn't in any way vindicate the president's claims. Being incidentally collected is not the same as being wiretapped. And there isn't anything untoward about incidental collection. It happens routinely in both criminal and intelligence context when non-targeted individuals communicate with a target.

Besides, there's already been multiple and far more concrete examples of the Trump campaign and incidental collection, for example, stories related to Susan Rice and unmasking. Reportedly Trump's own national security adviser, H.R. McMaster, has determined there was no wrongdoing in those cases. So for people who don't believe those prior stories vindicate Trump's claim of wiretapping then neither does this one.

So what does this all mean for the future of the Trump Russia investigation? No one knows for sure. It's clear that this story isn't going away anytime soon. It's clear that Mueller knows a great deal that the rest of us don't. And it's clear that the White House's

public dismissiveness aside, there is a real reason for the president and his inner circle to worry about the many shoes left to drop.

But beyond that things remain murky, and people are anticipating a swift and to this drama should temper their expectation.

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