

NSA Surveillance Program Oversight: White House, Congress Point Fingers At Each Other

By: Sam Stein- June 07, 2013

Revelations of massive data mining by the National Security Agency have prompted a blame game between the White House and Congress over how much responsibility each has for the program.

President Barack Obama on Friday defended his administration's broad surveillance operations by arguing that checks and balances ensure privacy concerns were addressed. If they weren't, he added, citizens could point the finger at Congress in addition to him.

"These programs are subject to congressional oversight and congressional reauthorization and congressional debate," Obama said. "And if there are members of Congress who feel differently, then they should speak up."

The president made references to congressional oversight 15 times during his remarks. In a separate comment to The Huffington Post, a senior administration official said on the condition of anonymity that the administration has held at least 13 briefing sessions with members of Congress on the Patriot Act and its provisions.

While the administration sought to share responsibility for the surveillance -- which reportedly gathered phone records from Verizon, AT&T and Sprint Nextel customers -- lawmakers weren't eager to accept it. Several quickly denied they had been kept apprised of the NSA's actions.

"I knew about the program because I specifically sought it out," Sen. Jeff Merkley (D-Ore.) said on MSNBC. "It's not something that's briefed outside the Intelligence Committee. I had to get special permission to find out about the program." Merkley said he was not briefed on the NSA's email surveillance program, PRISM.

Several Republican lawmakers, likewise, said that they had unaware of the phone surveillance. Sen. Jim Inhofe (R-Okla.) told Politico he learned about the program from news reports.

Considering the criticism of the vast surveillance program, it's far from surprising that Congress and the White House would differ about the extent to which lawmakers knew about it. But Friday's back and forth also underscored how fragmented congressional oversight on these matters can be. Lawmakers may have had access to information. But aides to them said there were serious hurdles to getting the information and major restrictions on what could be done with it.

The senior administration official said lawmakers in Congress had many chances to discuss the Patriot Act and its provisions with administration officials from May 2009 to May 2011. Those sessions included six hearings, two briefings (large settings with question-and-answer sessions), and two meetings. They were held for Judiciary and Intelligence committee members in the House and the Senate.

On three occasions, the audience was expanded, according to the administration official. In May 2011, administration officials held a gathering for the House Republican Conference, and a separate one for the House Democratic Caucus. In February 2011, officials invited all senators for a briefing.

All of the sessions dealt predominantly with the reauthorization of the Patriot Act. It's unclear if discussion touched on the NSA data-mining operations. On March 15, 2011, a classified briefing was held to discuss a Patriot Act amendment that had been offered by Sen. Dick Durbin (D-Ill.). The Illinois Democrat was pushing a provision that would have required the government to describe "with particularity" the target of roving wiretaps.

At the meeting for senators in February 2011, held in the vice president's office off the Senate floor, lawmakers were offered the opportunity to discuss Section 215 of the Patriot Act, which provides the legal basis for the NSA data mining. Attendees included Director of National Intelligence James Clapper, FBI Director Robert Mueller, and National Security Agency Director Keith Alexander. Officials who briefed lawmakers at the other sessions included Sean Joyce, deputy FBI director; Todd Hinnen, head of the National Security Division of the Department of Justice; and David Kris, assistant attorney general for national security.

"The Department of Justice has taken multiple actions to inform members of these authorities, including providing in-person briefings and classified white papers," said the senior administration official. "The classified white papers were provided to the Intelligence Committees, along with a formal request that the white papers be made available for review by all members in the respective committee spaces."

Those requests resulted in at least two additional oversight opportunities. On Feb. 23, 2010, and Feb. 8, 2011, the chair and ranking member of the Senate Intelligence Committee, Sens. Dianne Feinstein (D-Calif.) and Saxby Chambliss (R-Ga.), sent letters advising their colleagues of a chance to review "an updated classified report" on Patriot Act surveillance programs, including those that touched on data collection.

But it was not without conditions. Reviewing the report had to be done in "a secure setting" and the senators who attended were restricted from taking notes or talking about it later. The biggest restriction, according to several Senate aides, was that staff members working for senators who weren't on the Intelligence Committee were not allowed to attend.

"While these members of Congress are allowed to see these documents, their staff can't see them -- unless they have the appropriate security clearance," said Jennifer Hoelzer, a former top aide to Sen. Ron Wyden (D-Ore.), one of the top critics of the secrecy surrounding the NSA program. "The administration gets to make their case to these folks that these programs are necessary and then they can't talk to anyone else about it. Even Ron, as a member of the Intelligence

Committee, could only talk to his intelligence committee designee about these issues. I'm not exaggerating when I say that I spent over 1,000 hours working on this issue and I wasn't allowed to know what it was.

“Why does this matter? Well, how many members of Congress do you think are experts on metadata? My guess is not very many,” Hoelzer added. “Under normal circumstances, that's not a big deal. I mean, we don't expect every member of Congress to personally be an expert on everything. That's why they have staff who are experts on a wide variety of issues. But again, most members of Congress couldn't consult their staff about these programs.”

Restricted from vetting information by legal experts, telecommunications officials, or even their own top aides, lawmakers are “more likely to take the administration's side of the story,” Hoelzer argued.

Even if they don't take the administration's side, there is little they could do to object. Merkley, for one, was reduced to calling for declassification of information about the NSA program because he otherwise couldn't publicly criticize the program.

In some respects, members of Congress are fortunate to receive the information they do. The laws compelling the executive branch to offer details are slim. Julian Sanchez, a research fellow at the Cato Institute and an expert on congressional procedure, noted that there is mandatory annual reporting of the Patriot Act's Section 215 orders. Other laws require semiannual assessments of compliance with Section 702 of the Foreign Intelligence Surveillance Act, which the NSA has said it has used to acquire foreign intelligence information through its PRISM Internet surveillance program.

Outside of that, however, there is little power for the legislature.

“More generally,” said Sanchez, “briefing on intelligence activities (other than covert ops) is a matter of convention rather than legal requirement.”