



CONSTITUTION *Daily*

Smart Conversation about the Constitution

Obama's NSA speech could make few people happy

Posted 6 hours, 4 minutes ago.

By NCC Staff

Justice Department at 11 a.m. on Friday. The *New York Times* and others who claim to have advance knowledge of Obama's plan say the President will put a major problem – the collection of phone data – in the hands of administration officials and Congress to decide.

The Associated Press reported before the speech that President Obama would call for an end to direct government access to Americans' phone data, citing a senior administration official.

However, the President wants Attorney General Eric Holder and intelligence officials to come up with a plan for moving the massive data collection out of government hands in the next few months.

As previously reported, the President also wants Congress involved in the decision, and congressional officials told the AP that such moves would need House and Senate approval.

Critics of the NSA say its collection of information about Americans' phone and Internet activity probably violates the Constitution's Fourth Amendment. Supporters say the agency is acting legally under powers granted to it by Congress.

The *Times* said the speech "leaves in place many current programs, but embraces the spirit of reform and keeps the door open to changes later."

To be sure, the President could change his thinking prior to his talk, but for now, the supporters and critics of the NSA's spying programs aren't expecting to be totally satisfied by the President's approach.

The Cato Institute's Julian Sanchez told the Huffington Post on Thursday what most NSA followers expect: "You're going to basically see nobody being very happy."

The rumored actions include the following:

1. The collection of bulk phone metadata will remain in the federal government hands – for now. A five-person panel formed by Obama made 46 recommendations, including moving this giant collection of phone call information back to telecommunications companies, or a third-party. Instead, the President will ask his own officials and Congress to debate the issue, and agree on a plan to move the database of the NSA’s hands. The President also wants the NSA to seek permission from the secret FISC court before accessing phone records.
2. The appointment of a special advocate to argue cases inside the secret Foreign Intelligence Surveillance Court (or FISC) court. Critics of the court point out that it is not an adversarial court, and just a “rubber stamp” venue for the NSA. Supporters of FISC, including Judge John D. Bates (who heads the Administrative Office of the U.S. Court System) strongly object to this idea. Bates has called the proposed advocate “counter-productive.

Cass R. Sunstein, one of the five Obama panel members, disagreed publicly with Bates.

“We respectfully disagree with that one, on the ground that the judge sometimes is not in the ideal position to know whether a particular view needs representation and that in our tradition, standardly, the judge doesn’t decide whether one or another view gets a lawyer,” he said.

3. Another contentious process is the process of issuing National Security Letters. These documents allow the FBI to collect financial records with court approval. President Obama is expected to reject a recommendation from his own panel that would require a court order for such letters.

4. Don’t expect big changes to the PRISM program that harvests Internet and other data from Americans and non-Americans alike. The *Los Angeles Times* says the President won’t ask for new restrictions on data about U.S. citizens collected under Section 702 of the Foreign Intelligence Surveillance Act.

In August, when President Obama gave his last major speech on the NSA, he made it clear he wanted to hear from Congress, his critics, and the five-person panel before announcing his recommendations.

“This is how we’re going to resolve our differences in the United States — through vigorous public debate, guided by our Constitution, with reverence for our history as a nation of laws, and with respect for the facts,” he said.