

OBAMA: MY OVERSEAS SPYING NOT CONSTRAINED BY THE LAW I PASSED AS SENATOR

In a democracy in which separation of powers still functioned as intended, this would be a deliberate provocation (my transcription):

The Snowden disclosures have identified areas of legitimate concern. Some of it has also been highly sensationalized and has been painted in a way that's not accurate. I've said before and I will say again: the NSA actually does a very good job about not engaging in domestic surveillance. Not reading people's emails, not listening to the content of their phone calls. Outside of our borders, the NSA is more aggressive. It's not constrained by laws. And part of what we're trying to do over the next month or so is having done an independent review – brought a bunch of folks, civil libertarians, lawyers, and others, to examine what's being done – I'll be proposing some self-restraint on the NSA and to initiate some reforms that can give people some more confidence.

Where to start?

First, it is false to say NSA does a very good job of not engaging in domestic surveillance. They've been caught doing so, on a programmatic scale, under Obama's Administration, twice. At least one of those programs simply moved overseas after being caught. The President basically said that being caught twice illegally wiretapping thousands (under the upstream

collection) and millions (under the Internet dragnet) of Americans domestically is a good job!

Add in the fact that NSA can read the content of collected US person communications with no Reasonable Articulable Suspicion, with no reporting requirements. That certainly amounts to the authority to conduct fairly unlimited amounts of domestic surveillance via the back door loophole.

And to suggest NSA is “not constrained by laws” overseas is equally false.

First, there’s the Constitution. Under that, even EO 12333 activity should come at the direction of the President. In this passage, the President says Snowden’s disclosures have raised legitimate concerns. I know ODNI and NSA will point to the National Intelligence Priorities Framework as their authorization on these activities the President now finds problematic. But if they’re doing things overseas that raise concerns, then it is an admission from the White House it has inadequate control of the NSA.

More importantly, it is false to say even that NSA is not constrained by mere laws overseas. Section 703 of the FISA Amendments Act – a law which Obama played a crucially important role in passing as a Senator – says NSA can’t wiretap Americans overseas without specific authority from FISC. Section 704 limits physical searches, which NSA uses to authorize collection from servers. As far as I know, no one has considered whether the deliberate collection of US person content overseas – albeit in bulk – complies with Section 703 and 704. But it at least lays out some limits on NSA’s overseas spying.

To all this, Obama’s solution is to propose self-restraint on the NSA.

Again, it is the role of the President – and the White House more generally – to oversee activities conducted under Article II authority. The language Obama uses here suggests an NSA unbound by his control, one he “proposes” to

rein in rather than “orders” to do so.

That equates to NSA operating beyond the law,
both here and abroad.