

A Critique of President Obama's Reforms of U.S. Intelligence

A Center for Security Policy Analysis

Fred Fleitz and Clare Lopes

1/27/2014

Fred Fleitz served in U.S. national security positions for 25 years at the CIA, DIA, Department of State and the House Intelligence Committee staff. Clare Lopez is a strategic policy and intelligence expert with a focus on national defense, Islam, and counterterrorism. Both serve as senior fellow at the Center for Security Policy. This paper critiques the intelligence reforms announced by President Obama on January 17 and a presidential directive issued that day. This paper follows up on a January 13 white paper issued by the Center previewing Mr Obama's intelligence reform announcement.

On January 17, 2014 President Barack Obama gave a speech unveiling “reforms” of U.S. intelligence in response to the national debate about intelligence programs due to the illegal disclosure of classified documents by former NSA technician Edward Snowden. The president’s speech and an accompanying presidential directive were based on recommendations by a five-member panel President Obama named last August, the Review Group on Intelligence and Communications Technologies.

The Center for Security Policy (CSP) welcomed President Obama’s statements of support for the U.S. Intelligence Community and his decision to reject some of the more radical recommendations by the Review Group. Unfortunately, the intelligence “reforms” he announced will do serious damage to U.S. intelligence collection capabilities. Our [January 13 memo](#) provided a critique of the Review Group’s recommendations to help inform the debate over U.S. intelligence programs and the president’s response to the Review Group. This memo critiques President Obama’s intelligence reform decisions in the hope that the problematic ones will be reversed by the President or Congress.

1) President Obama’s Endorsement of U.S. Intelligence Professionals is Contradicted by the Bulk of His Speech and the New Presidential Directive on Intelligence Reform

At the start of his January 17th speech on intelligence reforms, President Obama defended U.S. intelligence analysts as patriots who have followed the law. He said intelligence officers consistently follow protocols designed to protect the privacy of Americans and stressed that “they’re not abusing authorities in order to listen in to your private phone calls or read your emails.” President Obama noted the role intelligence has played in promoting the security of our nation since the days of Paul Revere. He said the United States faces a variety of new and serious threats today and that we therefore “cannot unilaterally disarm our intelligence operations.”

CSP agrees with these remarks by the president and believes they are long overdue. Such an endorsement of U.S. intelligence officers should have been made by President Obama last summer when the debate began to rage against NSA programs leaked by Edward Snowden.

We are also disappointed that President Obama included partisan swipes at his predecessor in his speech when he again condemned the Bush administration’s enhanced interrogation program and so-called warrantless wiretaps as examples of government overreach that raised the possibility of Americans losing some of their core liberties in the pursuit of security. These claims, which President Obama has made before, are false and damage the global reputation of the United States. The enhanced interrogation program was briefed to Congress, did not violate U.S. law and was effective in halting terrorist attacks. Former CIA Director Michael Hayden said in 2006 that as late as 2006 fully half of the government’s knowledge about the structure and activities of al Qaeda came from harsh interrogations.

Attacks by Congressional Democrats on the Bush administration’s effort to monitor communications of terrorist suspects without warrants were conclusively disproven in August

2008 when the Foreign Intelligence Surveillance Court affirmed the government's constitutional authority to conduct this program to collect national security intelligence without judicial approval. The Supreme Court threw out a challenge to the program in February 2013. It is time for President Obama to stop repeating these canards about the Bush administration's counterterrorism efforts that have been effective in protecting our nation since 9/11.

More importantly, despite President Obama's praise of U.S. intelligence officers as patriots and affirming that they have followed protocols to protect the privacy of Americans, he nevertheless announced major restrictions on the Section 215 metadata program because of the potential that it could be misused. The president's remarks portrayed signals intelligence in a negative light, indicating that alternatives to this form of intelligence are preferable because of his disapproval of the ethics of intercepting communications of foreign citizens and violating their privacy.

President Obama's comments misrepresent U.S. intelligence operations and, despite his rhetoric saluting the professionalism of signals intelligence collectors, he encourages the questioning of their conduct. Collecting signals intelligence is no more unethical than paying informers to steal secret documents of other governments, recruiting sources inside foreign governments or having U.S. operatives physically break into foreign facilities to conduct intelligence missions. These things are what the intelligence field is all about and represent activities that the U.S. government would never do at home but must do abroad to protect our interests and freedom in a dangerous world.

President Obama stated in his speech that signals intelligence will not be used to suppress or burden criticism or dissent, or for disadvantaging persons based on their ethnicity, race, gender, sexual orientation or religion. This statement was uncalled for as there are no indications such abuses have ever happened. They also unfairly impugn NSA officers. More troubling is that this statement probably is in response to a Review Group recommendation to bar signals collection on the basis of religion or political beliefs, a rule that would make it difficult to collect intelligence against al Qaeda and similar terrorist groups.

The president also barred the collection of intelligence of private commercial information or trade secrets except for national security or counterintelligence purposes and said such intelligence cannot be collected to provide competitive advantages to U.S. businesses. U.S. intelligence agencies are already prohibited by law from doing the latter. President Obama's rules on collection of commercial information will prevent such information from being used to promote many U.S. interests such as protecting against economic warfare, arms sales to human rights violators, and other issues that impact U.S. interests but may not affect American national security.

CSP's Bottom Line: President Obama's comments reflect a bias against signals intelligence and imply it is being collected without good reason. In fact, signals intelligence is a valuable and extremely efficient way of collecting foreign intelligence. It is subject to careful controls and collection requirements. Contrary to President Obama's remarks, signals intelligence is a crucial and irreplaceable source of vital information on national security threats. Signals intelligence collects much more information than human sources, usually does not place the lives of human sources at risk and runs a lower risk of

international incidents when this type of collection goes wrong. Signals intelligence is often more accurate because it is not subject to faulty memories or personal agendas that can influence reporting from human sources. President Obama's comments deriding signals intelligence could undermine the important contribution it is making to promote U.S. security and interests.

2) NSA's Metadata Program Will be Undermined by President Obama's Reforms

President Obama said he wanted the NSA metadata program to continue because he believe it provides important intelligence and was designed to address intelligence collection gaps which existed before the 9/11 terrorist attacks that prevented U.S. intelligence agencies from quickly collecting information on terrorist communications. He noted that there is no evidence this program has been "intentionally abused" and explained it does not involve the content of phone calls – only phone records which can be queried "if and when we have a reasonable suspicion that a particular number is linked to a terrorist organization."

Despite these assurances by President Obama about the metadata program, he proposed significant reforms to restrict and reorganize it. Under President Obama's new rules, the metadata database can only be queried with a court order or in an emergency. He wants a private entity rather than the government to hold metadata and tasked the Attorney General and the Director of National Intelligence to come up with a plan by March 28 on how to do this.

Requiring court orders before the metadata database can be queried will bog it down with bureaucracy and lawyers, making it much harder to use. Moreover, this rule will put judges in an intelligence policy role that should be left to senior intelligence officials.

The president's decision to have third parties hold metadata will make this data harder to access and will present real security concerns as this information will be held by a larger set of non-U.S. government employees. Former CIA Director Michael Hayden recently said about this idea: "in my view, it will be very difficult to come up with a new plan that matches the current state of affairs in terms of security, privacy and operational effectiveness."¹ Moving the metadata to third parties will also need the approval of Congress, which appears unlikely as the leadership of the House and Senate intelligence committees oppose such a move and other major changes to this program.

President Obama also wants the Attorney General and intelligence officials to recommend alternatives to the metadata program and placed strict limitations on its use. The new presidential directive on intelligence reform says metadata can now only be used to detect or counter:

“(1) espionage and other threats and activities directed by foreign powers or their intelligence services against the United States; (2) threats to the United States and its

¹ Sari Horwitz and Ellen Nakashima, "Obama goal for quick revamp of NSA program may be unworkable, some U.S. officials fear," *Washington Post*, January 22, 2014.

interests from terrorism; (3) threats to the United States and its interests from the development, possession, proliferation or use of weapons of mass destruction; (4) cybersecurity threats; (5) threats to U.S. or allied Armed Forces or other U.S. allied personnel; (6) transnational criminal threats, including illicit finance and sanctions evasion related to other purposes named in this section.”

The president also said there will be an annual review which will present recommendations to him on additions and deletions of permissible uses of the metadata program.

If this program is critical to U.S. national security and has not been abused as the president said, why did he announce such significant limitations on its application and effectiveness? We believe it is a mistake to impose narrow grounds for the use of this program which will limit its application to address other contingencies. For example, under President Obama's new rule on when the metadata program can be used, NSA analysts would be barred from collection against issues such as

- Suppression of dissidents by foreign governments
- Genocide
- Conventional arms sales
- Coup plots
- Economic warfare
- Energy security, including efforts by OPEC states to raise oil prices.

CSP's Bottom Line: President Obama's reforms of the metadata program will make it less effective and more likely to violate the privacy of Americans. They also are a not-so-subtle indictment of NSA personnel suggesting that, despite President Obama's praise of them as patriots who follow protocols to not violate the privacy of Americans, he does not trust them and promotes the idea that abuses of NSA programs will occur.

3) Requiring Intelligence Agencies to Respect the Privacy Rights of Non-U.S. Citizens is Inconsistent With the Nature of Intelligence and Will Harm U.S. National Security

President Obama's intelligence reforms include requiring that U.S. intelligence agencies make the protection of the civil liberties of non-U.S. citizens abroad a high priority. According to the intelligence reform presidential directive, “privacy and civil liberties shall be integral considerations of U.S. signals intelligence activities,” the president tasked the Attorney General and the Director of National Intelligence to come up with guidelines to implement this new standard. The president said in his speech, “the bottom line is that people around the world, regardless of their nationality, should know that the United States is not spying on ordinary people who don't threaten our national security, and that we take their privacy concerns into account in our policies and procedures.”

President Obama's NSA reform directive also says that if the privacy rights of a foreign person are violated, the United States will take steps to determine whether to notify the non-U.S. person's government.

CSP views this as a dangerous shift in U.S. intelligence policy for two reasons.

First, it is inconsistent with the nature of U.S. intelligence which is to break the laws of other countries to steal information to advance American security and interests. The privacy and civil liberties of U.S. citizens and residents are protected by the U.S. Constitution. Those protections do not extend and should not be extended to non-U.S. persons abroad who have none of the duties and obligations of citizens and residents. Providing privacy rights to foreign persons would never be reciprocated and would shield American adversaries from U.S. intelligence agencies.

We believe requiring U.S. intelligence agencies to factor privacy rights into intelligence collection against foreign citizens abroad will severely undermine signals intelligence and will force intelligence officers to not pursue some signals collection efforts out of fear of violating this new standard.

Second, the president's directive to emphasize intelligence collection against foreign government officials and not "ordinary people" is unworkable and will complicate collection against terrorists, narco-traffickers, and other international criminals. This standard could also limit U.S. intelligence collection against government advisors, former government officials, scientists or technicians working on WMD-related research, etc. Drawing the line under Mr. Obama's new privacy rule between "government" and "non-government" foreigners will be difficult and could prevent collection against terrorist suspects as well as agents of hostile intelligence services perhaps working against U.S. interests in foreign countries.

Some planning for the 9/11 terrorist attacks by Mohammed Atta and other al Qaeda members took place in Hamburg, Germany. Will President Obama's new privacy rights for non-U.S. citizens abroad prevent NSA from collecting information against the next terrorist plot against the United States being planned in a friendly state?

CSP's Bottom Line: President Obama's directive to U.S. intelligence agencies to factor in the privacy concerns of non-U.S. citizen abroad and to avoid collecting against foreigners who do not work for their governments is stunningly naïve and will greatly complicate U.S. intelligence collection. We hope intelligence officials or Congress can reverse this new rule.

4) Exempting Dozens of Foreign Heads of State From U.S. Intelligence Surveillance is a Serious Mistake

President Obama has decided that U.S. intelligence agencies will not monitor the communications of the heads of state of "U.S. friends and allies" unless there is a compelling national security purpose. President Obama said in his speech "if I want to know what they [foreign heads of state] think about an issue, I'll pick up the phone and call them, rather than

turning to surveillance.” The president also said that U.S. officials will work to “rebuild trust” in the aftermath of Snowden leak about U.S. spying on foreign leaders.

CSP views the president's comment about calling foreign leaders instead of consulting surveillance against them a facile statement belying the reality that intelligence provides a way to find out what these leaders do not want the president to know. It is foolish to think a phone call from President Obama will convince foreign officials to reveal such information.

We also believe this is a solution to a non-existent problem. All nations spy and America's friends and allies are known to conduct intensive espionage against the United States. Despite the outrage by European leaders over reports of U.S. electronic surveillance against them, these complaints were for public consumption and did not reflect a breach in their relations with Washington.

While CSP believes a U.S. policy not to spy on a handful of the leaders of close U.S. allies may be appropriate, choosing which states to add to the current “Five-Eyes” intelligence sharing group (composed of the U.S., the U.K, Canada, Australia, and New Zealand) will be difficult. Ten years ago, Germany and France were aligned with Russia against the United States on the war in Iraq. Barring collection against German and French leaders during this war would not have been in U.S. interests and may have put U.S. troops at risk. There also are frequent instances when close U.S. allies pursue economic and political policies inimical to U.S. interests, including allowing terrorist suspects to reside on their soil.

It is unclear what President Obama meant when he referred to the leaders of “U.S. friends and allies.” This appears to bar collection against a large number of countries, probably dozens. Will this apply to every European state? Egypt? Saudi Arabia? Turkey? Mexico? While the United States has varying degrees of friendly relations with these states, we have frequent policy differences with them with major security and economic implications. Barring collection against the leaders of these countries will deny U.S. leaders important intelligence. This policy will also put the United States at a disadvantage as it will not be reciprocated by other states.

CSP's Bottom Line: U.S. national security will be harmed by President Obama's rule barring electronic surveillance against a large number of leaders of U.S. friends and allies. This rule will prevent the United States from acquiring important information on leadership plans and intentions.

CSP Views on Other Obama Intelligence Reforms

- **Congress Should Reject President Obama's Proposal for FISA Court Advocates.** Although President Obama did not accept the Review Group's recommendation that an outside advocate be named to participate in all judicial review by the Foreign Intelligence Surveillance Act Court (FISA Court) of sensitive intelligence activities, he did recommend that Congress authorize the establishment of a panel of advocates from outside the government to provide an independent voice in significant cases before the

court. We oppose this proposal because we believe it would bog down intelligence collection in more bureaucracy and because it addresses non-existent privacy concerns.

We note that John D. Bates, a former FISA Court presiding judge, opposes the creation of a FISA advocate and said in a [January 15 letter](#) to Senate Intelligence Committee Chairwoman Dianne Feinstein: “Given the nature of FISA proceedings, the participation of an advocate would neither create a truly adversarial process nor constructively assist the Courts in assessing the facts, as the advocate would be unable to communicate with the target or conduct an independent investigation.”

- **Care Must be Taken in Declassifying Information on Sensitive Intelligence Programs.** We are concerned about the president’s intention to “provide greater transparency to our surveillance activities” and declassify FISA Court decisions and National Security Letters. The president said a review he ordered led to the declassification of over 40 opinions and orders of the Foreign Intelligence Surveillance Court, which provides judicial review of the Section 702 program targeting foreign individuals overseas and the Section 215 telephone metadata program.

The President also declared that there will be an annual review of FISA Court decisions to review for the purpose of declassification any future opinions of the court with broad privacy implications. We believe President Obama should not be pressing for such rapid declassification of sensitive intelligence collection programs as this information will be used by America’s adversaries to cover their tracks. A more responsible approach would be to provide more frequent reports to the congressional intelligence committees so they can review these programs on behalf of the American people without compromising their effectiveness.

- **“Big Data” and its Implications for Privacy and Intelligence Collection Must be Studied Properly.** President Obama said he is naming his counselor John Podesta to lead a comprehensive review of “big data” with the President’s Council of Advisors on Science and Technology, privacy experts, technologists and business leaders. CSP agrees that a review of big data could be helpful. But we worry this review will be tilted toward approaching big data as a security threat, and will fail to address the intelligence collection possibilities it presents. We therefore call for a balanced review of this issue with members named on a bipartisan basis by Congress. Senior intelligence officials should name members to this commission to ensure that intelligence equities are represented.
- **President Obama Must Make Improving the Security Clearance Process and the Security of Classified Networks a Priority.** The president said nothing about these issues and made only brief and vague comments about Edward Snowden. Instead, his entire speech was devoted to reforms to address potential abuses by U.S. intelligence agencies.

This was the wrong approach. We believe the primary issue here is how a low-level computer technician managed to steal 1.7 million classified documents and bring them to

China and Russia. Given the enormous damage that Mr. Snowden has done to U.S. intelligence programs and recent reports that he may be a Russian agent, President Obama must announce a comprehensive program to tighten the security clearance process, reduce the number of clearance holders and improve the security of classified computer networks. In our view there is strong bipartisan support for this in Congress.