

THE OVERSIGHT BLACK HOLE OF THE MERKEL TAP

In one of the better pieces on White House and anonymous NSA official claims about whether President Obama knew of the wiretaps on Angela Merkel, the NSA spokesperson gets to the crux of the issue.

“NSA is not a free agent,” said NSA spokesperson Vanee Vines. “The agency’s activities stem from the National Intelligence Priorities Framework, which guides prioritization for the operation, planning, and programming of U.S. intelligence analysis and collection.” The framework is approved by the top leaders of the government, but it leaves the question of how best to gather intelligence to the individual agencies.

This statement gets at why the anonymous NSA source claims that someone – whether it be Keith Alexander or another briefer – informed Obama of the tap on Merkel in 2010 and that he authorized it continue and the White House’s rebuttal that he didn’t know about the wiretaps on world leaders.

The account suggests President Barack Obama went nearly five years without knowing his own spies were bugging the phones of world leaders. Officials said the NSA has so many eavesdropping operations under way that it wouldn’t have been practical to brief him on all of them.

They added that the president was briefed on and approved of broader intelligence-collection “priorities,” but that those below him make decisions about specific intelligence targets.

The senior U.S. official said that the current practice has been for these types of surveillance decisions to be made at the agency level. "These decisions are made at NSA," the official said. "The president doesn't sign off on this stuff." That protocol now is under review, the official added.

That is, the President approves the National Intelligence Priorities Framework and gets the results of the collection authorized by it, but he may not know specifically how each piece of intelligence was collected. I have no doubt Obama approved a continued focus on EU leaders in the aftermath of the financial crisis, but find it plausible that he did not know that would include monitoring Merkel's private cell phone.

Here's how the NIPF describes it working.

1. The National Intelligence Priorities Framework (NIPF) is the DNI's sole mechanism for establishing national intelligence priorities.

2. Intelligence topics reviewed by the National Security Council (NSC) Principals Committee (PC) and approved by the President semi-annually shall form the basis of the NIPF and the detailed priorities established by the DNI.

3. The NIPF consists of:

a. Intelligence topics approved by the President.

b. A process for assigning priorities to countries and non-state actors relevant to the approved intelligence topics.

c. A matrix showing these priorities.

4. The NIPF matrix reflects customers' priorities for intelligence support and ensures that long-term intelligence

issues are addressed.

5. The NIPF matrix is updated semi-annually, and ad hoc adjustments may be made to reflect changes in world events and policy priorities.

6. The ODNI and IC elements shall use the NIPF in allocating collection and analytic resources.

And while I don't doubt that Keith Alexander has had specific conversations with the President about sources and methods, with one exception, the formal process (and therefore the thing bureaucrats will point to in case of embarrassment) works through the NSC.

The exception is this:

10. The Assistant Deputy Director of National Intelligence for the President's Daily Brief shall assist the DDNI/A in developing national intelligence priorities during the semi-annual reviews.

That is, the guy in charge of producing and delivering the President's Daily Brief may provide input into this process outside the NSC chain (remember this policy was written under the Bush Administration, which has a rather storied history of demanding intelligence via the daily briefers, probably to hide having obtained it via another source).

The problem with all this, of course, is that it is treated as clandestine intelligence gathering, just like recruiting Human Sources. While it is secret, it is not the kind of covert op that requires deniability and therefore specific Congressional approval.

Indeed, while normally the discovery of a single tap (remember the bug allegedly found in Ecuador's Embassy) will cause a minor diplomatic tiff, the sheer scale of this – and that world leaders are collectively positioned to take advantage of Obama's embarrassment over it –

makes it a bigger deal requiring these non-denial denials.

The bigger problem with this is that it means this massive program (both the bulk collection and the taps on phones) receives very little oversight outside of the Agency and ODNI. The Intelligence Community would – and presumably did – get kudos for all the nifty insights onto how Merkel's political relationships worked (this is her political, not official, phone), but very few questions about what kind of specific operations are happening.

Here's the thing. Unlike many of the domestic and quasi-domestic programs, this probably really is perfectly legal (at least under domestic law – it is being challenged both for violating German and international law). Congress has long left the President's ability to collect foreign intelligence relatively unchecked and we don't extend Constitutional protections to foreigners not in the US.

But the other problem with it is that these EO 12333 by technical necessity also collect on US persons. And that may well be illegal. Though if no one outside the Agency and DNI is reviewing, how will we stop it?

The White House keeps inching closer to admitting that there need to be real constraints on what we're doing.

In conjunction with our British partners, we have developed the ability to collect and scan and store much of the telecom traffic in the world. It's a monstrous machine that developed under a reasonable albeit thoroughly outmoded legal structure.

And yet no one noticed that it had turned into a monster.