



October 4, 2013

Memorandum

To: the President's Review Group on Intelligence and Communications Technologies.

From: Kate Martin

The President's direction to the Review Group charged the Group with consideration among other things of the "need to maintain public trust." There is no question that the trust of the American people in the Intelligence Community is essential to the success of those agencies and that mistrust of the intelligence agencies contributes to public mistrust of government in general.

Others have written about the privacy concerns raised by the government's access to new technological capabilities and by specific surveillance programs. This memorandum will outline some of the broader issues concerning government power and democratic decision-making raised by the scope of government surveillance of Americans, which we hope the Review Group will consider and discuss in its report, followed by some more specific recommendations. Those broader issues include:

1. *Are there adequate protections in place against the perennial danger posed by secret government surveillance of its own citizens: that such surveillance will be used by those in power to chill political dissent, to target minority groups, or simply against the political opposition.*

Most of the current discussion concerning oversight and safeguards against abuse is focused on preventing or uncovering specific violations of current law. Very little study, if any has been done on what loopholes exist in current laws and structures that could permit White House or other high level officials from demanding secret access to information collected on Americans. So long as the White House articulated some counter-terrorism, national security or foreign intelligence rationale for obtaining the information, it is not obvious that there would be any limits on access by White House officials or any real protections against misuse of such information. Equally worrisome is the possibility that such access and misuse could remain secret for some substantial period of time.

While there are historical precedents for such worries, the history of the current surveillance programs since 2001 itself suggests that there are inadequate protections against a White House and an NSA (or FBI) Director setting up an operation to obtain information on Americans outside established procedures and laws. (The leaked draft report by the NSA

Inspector General<sup>1</sup> tells a story of the White House and the NSA Director setting up a compartmented program to collect information on Americans and others outside the law, and keeping it secret for a substantial period of time not only from the public, but from most of the government officials who would be expected to be informed.)

2. *Has there been adequate public disclosure concerning the scope of government collection and use of information about Americans to enable informed public debate and democratic decision-making concerning what powers the government should have to conduct surveillance of Americans? Are there still secret programs for such collection and use which Americans should be informed about? Has there been adequate public disclosure concerning the legal authorities for government collection and use of information on Americans, especially in light of the complexity of those authorities?*

There clearly were secret programs collecting Americans' telephony and internet metadata before Snowden's disclosures. They have now been acknowledged by the government. But there is reason to fear that the scope of government collection and data-analysis programs on Americans' information, whether by the NSA, the FBI or some other agency, is still being kept secret. (See for example, *The New York Times*, "N.S.A. Gathers Data on Social Connections of U.S. Citizens," Sept. 28, 2013<sup>2</sup> and Director Alexander's testimony regarding that story before the Senate Judiciary Committee on October 2, 2013.)

3. *Do the current terms of the debate assume the legitimacy of keeping government programs to collect and use information on Americans secret, so long as such programs are for "foreign intelligence" purposes?*

*Would adoption of such an assumption seriously erode the public right's to know and democratic decision-making processes?*

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<sup>1</sup> The leaked draft is referenced in a recent paper by former Assistant Attorney General David Kris, On the Bulk Collection of Tangible Things, <http://www.lawfareblog.com/wp-content/uploads/2013/09/Lawfare-Research-Paper-Series-No.-4-1.pdf>. [The publicly released version of the final Inspector Generals' report redacts the history of the metadata and content collection programs which were eventually transitioned to the current 215 and 702 programs.](#) *Report on the President's Surveillance Program, Offices of the Inspectors General of the Department of Defense, Department of Justice, Central Intelligence Agency, National Security Agency, and Office of the Director of National Intelligence, July 10, 2009. Unclassified version available at <http://www.justice.gov/oig/special/s0907.pdf>.*

<sup>2</sup> <http://www.nytimes.com/2013/09/29/us/nsa-examines-social-networks-of-us-citizens.html?pagewanted=all/>.

*Are we seeing the development of a doctrine that justifies secret law so long as it concerns activities labeled foreign intelligence, even when those activities include massive government collection of information on Americans?*

There is much reason to worry that the answer to these questions are yes. For example, in 2005 when the Congress was considering reauthorization of several sections of the Patriot Act, including national security letter authority, the American people and apparently many Members of Congress only learned of the scope of the use of the authority from the Washington Post. When the New York Times then reported on NSA programs being run outside the Patriot Act and the FISA, the government stonewalled and never provided a complete description of either the scope of the surveillance of Americans or its legal views. Perhaps the most telling evidence of acceptance of the view that government surveillance authority may be kept secret from Americans is that the Obama administration, despite its commitment to transparency, apparently accepted the intelligence community's argument that it had to keep its legal interpretation of 215 secret because it had to keep secret the fact of the program. The idea that secret law or secret interpretations of the law concerning the authorities for government collection on Americans could be justified so long as that collection is in support of "foreign intelligence" is extraordinary and dangerous.

The pro-secrecy point of view has apparently already become so engrained in government thinking that the Justice Department has made the unprecedented claim that when Congress reenacted section 215 it ratified the government's secret interpretation of that section, even though it had prevented Members of Congress from publicly debating or objecting to the interpretation and had affirmatively refused to share the interpretation with the American public. It is not clear that government officials even understand the extraordinary nature of such an argument. They apparently simply see this kind of secrecy as analogous to Congress voting to authorize money for a secret overseas operation, which at least some Members have been briefed about it secret. But adopting secret laws about government activities concerning Americans is fundamentally different. All governments engage in secret overseas activities and the line about what is legitimately kept secret from the public back home is not always clear. But a democratic country cannot have secret laws directed against its own citizens; doing so violates the compact making citizens the ultimate sovereign. That compact requires public participation through informed debate in determining what laws will govern the relations between the government and the people.

- 4. Is respect for the law being undermined by the failure to provide a full accounting of the history of current surveillance programs, which originated in the secret and in our view unlawful NSA surveillance programs initiated by President Bush?*

The current NSA surveillance programs reflect changes made in the secret programs initiated by the Bush administration in 2001 and partially revealed by The New York Times and

others in 2005 -06. There is little doubt that those programs violated the statutory FISA protections in effect at the time. While that administration crafted secret arguments that the President could override statutory requirements and that the 2001 Authorization for Use of Military Force amended the statutory requirements for surveillance of Americans, serious questions remain about the legality of those programs.

Nevertheless, there has been no public acknowledgement, investigation or reporting on those violations. No measures have been taken to deter future violations or to provide democratic accountability.<sup>3</sup> In this respect, the illegal surveillance programs conducted under the prior administration have been addressed quite differently than the illegal interrogation programs. The Obama administration has publicly discredited and acknowledged illegal techniques were used in the interrogation programs. But the history of the Bush administration NSA programs is still classified and there has been no public accounting of violations of the law.

One of the key benefits of the Church committee investigations was that the intelligence community understood and accepted that it was bound by laws and there would be consequences for breaking such laws, even if done at the direction of or with the blessing of political leaders. That lesson is being eroded through passage of time. It may be lost altogether by the failure to provide any accountability for these legal violations, especially when the same or similar surveillance programs are simply continued with new legal justifications.

**Recommendations:**

1. The Review Group should identify in its report the fundamental governance problems outlined above that have been highlighted by recent disclosures, as subjects requiring further review and public debate. To the extent the Group has time, it should write a public report that describes these broader concerns regarding secret activities by the government directed at Americans, secret law-making in both Congress and the Executive, and secret violations of the law by the Executive branch (separate from violations by individual rogue employees.) More specifically, a review and report are needed outlining :
  - a. Whether and how secret law has been made on the issue of presidential war powers, interpretations of surveillance law and Fourth Amendment protections, or interpretations of congressional authorization to use military force;
  - b. Whether and how the legislative process of public debate and consideration has been distorted on these issues; and

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<sup>3</sup> While Congress attempted to prevent future administrations from relying on an AUMF argument in the 2008 FISA Amendments Act, it did not sanction past violations in any way. It only provided immunity from liability to the telephone companies for their violations of the law.

- c. Whether and how the fundamental notion that individuals have a right to judicial review of claims that the government has violated their rights has been seriously undermined. This subject is worthy of more extensive examination. In 1978 and again in 1994, FISA provided that government could conduct secret searches and seizures targeted against individual Americans without ever notifying them that the government had searched their personal effects and without those individuals ever having the opportunity to bring a judicial challenge to such searches and seizures (unless they were indicted). That authority was enacted as a narrow exception to the usual practice. With the expansion of foreign intelligence authorities and capabilities directed against Americans' information, a reexamination of this expanded exception is overdue. The current proposals for additional advocacy before the FISA court do not address this problem. (A partial remedy is outlined below.)
2. The Review Group should call upon the Executive Branch to continue its declassification and disclosure of information needed for an informed public debate, including:
  - a. The history of the surveillance programs beginning in 2001; and
  - b. The scope of current surveillance authorities and programs, especially those which either collect massive amounts of information about Americans or information about millions of Americans. (Senator Feinstein has announced that the Senate Intelligence Committee has undertaken a broader review of surveillance programs; the Executive Branch should facilitate that review and ensure that it can be done publicly to the greatest extent possible).
3. The Review Group should emphasize the importance of public accountability for law breaking by the Executive Branch (even when justified on national security grounds) and call for an investigation and public report concerning possible legal violations in the prior NSA surveillance programs known as the "President's Surveillance Program." (Whether and how individuals should be held personally accountable may be addressed separately.)
4. Such in depth reviews and reports are needed in order to determine how to best structure U.S. government collection of information on Americans going forward in order to best protect both civil liberties and security. It is not clear who should write such a report. Ideally, Congress would convene an investigation – modeled perhaps on the Joint Inquiry concerning the 9/11 attacks<sup>4</sup> with adequate funding, dedicated independent staff and the clout to obtain needed information. The President could also empower an outside group

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<sup>4</sup> Joint Inquiry into Intelligence Community Activities before and after the Terrorist Attacks of September 11, 2001, H. Rept. 107-792 (December 31, 2001) <http://www.gpo.gov/fdsys/pkg/CRPT-107hrpt792/pdf/CRPT-107hrpt792.pdf>.

to do so at his direction (this Group for example). There is a precedent in the Report issued by the President's Intelligence Oversight Board, "Report on the Guatemala Review," June 28, 1996.<sup>5</sup>

5. The Review Group should separately recommend that the Executive Branch agree to prepare a comprehensive public report concerning government collection and use of information about Americans for national security or foreign intelligence purposes, which report may also inform the broader inquiries outlined above and more specific questions about particular legal reforms. The report should detail:
  - All the statutory authorities, agency rules and guidelines for such collection, use, data-mining, sharing and retention of information about Americans;
  - Which agencies may exercise which authorities, e.g., FBI, DHS, etc. and what information may be shared between each agency; and
  - The scope of the collection of Americans' information, including the kinds of information, the amount of information collected and the approximate number of Americans whose information has been collected.

Recommendations regarding specific fixes to current surveillance authorities:

As this Group is aware, Congress is now engaged in a welcome debate on specific reforms to sections 215 and 702 of the Foreign Intelligence Surveillance Act. As expected, the intelligence community has already made the case to the President that the bulk collection program under section 215 should continue.

We urge the Review Group to recommend to the President that the administration undertake a broader review of whether current authorities and programs best serve the national interest in the long run before concluding that any current authority is required. We are unaware of any broader review (other than this one) that has been conducted of the underlying assumptions being used to evaluate these authorities and programs. The questions and reviews outlined above should inform the administration's consideration of specific statutory reforms going forward.

That broader review should include stakeholders outside the agencies which are involved in the specific programs. The review should take into account at a minimum the following factors:

The nature and scope of the threat of terrorist attacks inside the domestic U.S., including of course, the degree of uncertainty concerning these matters;

The cost of the current programs, including opportunity costs, and an analysis of the costs to public trust, democratic accountability, and the government's ability to

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<sup>5</sup>See April 7, 1995 Memorandum setting forth Terms of Reference, <https://www.fas.org/irp/news/1995/950410m.htm>.

safeguard classified information; (there is a legitimate question whether the Snowden leaks would have occurred if the existence of the 215 telephony metadata program had been disclosed and the government's description of its authority to collect Americans information under section 702 had been more straightforward, rather than simply reciting the mantra of no domestic targeting and only "incidental" collection);

Whether and how surveillance that deliberately seeks and collects information on Americans can and should be predicated on some information of suspected wrong-doing- this used to be the basic principle for permitting government surveillance with some exceptions; those exceptions have substantially expanded, but no countervailing protections for privacy, First Amendment and due process rights have been adopted;

How does the current overlap between criminal and national security purposes in investigations and surveillance of Americans impact civil liberties and the effectiveness of government efforts; and

To what extent does the current complexity of surveillance laws interfere with government efficiency and effectiveness and with public understanding and trust? Is there a fix for this?

#### Recommendations regarding judicial review of current 215 telephony metadata program:

While the issue of judicial review is complicated, there are two immediate steps which could partly ameliorate the lack of such review. First, the government has argued that the ACLU is precluded from challenging collection of its metadata under section 215 by provisions of the FISA act. While we disagree with that reading of FISA, it can easily be fixed so that there is no statutory preclusion of judicial review by those whose metadata has been collected under 215. Second, the Center for National Security Studies has asked the FISA court to provide procedures for public briefing, including amici briefs in connection with its consideration of the government's request for renewal of its 90-day 215 orders. We have asked the government to agree to such proceedings and would respectfully ask the Review Group to urge that they do so.

#### Some observations:

Some commentators have claimed that the framework for thinking about these admittedly complex and difficult issues is the framework that applies to intelligence which, by its nature, must be secret. On this basis, they then posit the choice as continuing collection and analysis under the secret intelligence framework or stopping such activities altogether. Such analysis ignores the important differences between foreign intelligence activities overseas (and some kinds of counterintelligence activities in the US) and government collection of information on Americans in order to prevent terrorist attacks inside the United States. (One key difference, of course, is that the government usually brings criminal charges against Americans found plotting terrorist attacks, when criminal prosecution is not the most common purpose of foreign

intelligence activities.) Ignoring the differences then provides an argument for the status quo without demonstrating that the status quo is either the best alternative or even a justifiable one. Similarly, those commentators who urge that the issue now is simply one of “compliance” -- how to assure that current rules are followed-- also ignore the truly fundamental questions about how the government can effectively respond to new globalized technologically sophisticated threats without both altering the basic tenets of democratic decision-making and eroding Bill of Rights protections.

We urge the Review Group to respond to the President’s directive by outlining these questions, detailing the information needed to answer them, and considering the best processes for doing so.

Thank you for your consideration.