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Review Group on Intelligence and Communications Technologies

Dear Review Group Members

As an American living abroad, I would like to offer the following comments in regard to the challenges facing the Review Group.

**How will America reconcile its republican political institutions to the imperial imperative of safety?**

The Review Group has a difficult, though honourable, task. You have to explain why a legitimate government can use what can be perceived as illegitimate methods to secure a government's ultimate goal: to protect the political good. As Aristotle explained in the *Politics*, we come together for life (security) we stay together for the good life. If we start with that understanding, we have a context to understand the role of the government and the relationship between the citizen and the government. Before we begin, I want to caution the group against a simple view that the issue can be solved by finding a "balance" between security and privacy, technology and politics, and foreign policy and domestic policy. If you take that view, you will continue to think technologically rather than constitutionally or politically. You will not be able to address the problem by technological means. If you search for a

“balance”, you will need to “quantify” the balance. Soon, you will have political scientists and economists who will propose equations, such as expected utility analysis, that will explain the “right amount of privacy” to “balance” against the “right amount of “security”. Such thinking is dangerously flawed and must be rejected. If you embrace it, you have rejected the core constitutional principles of the United States of America. The country is founded upon a right judgement of political principles not a “balance” of probabilities or a “trade-off” between principles. The search for a “balance” will only avoid the political responsibility of making a choice, and the longer it is avoided the greater the cost for the correct choice. Although some may view the issue as a political balance or compromise, there are fundamental rights and principles upon which the country is founded that offer no compromise. America’s founding in 1776 and the re-founding under Lincoln in 1863 showed that we have inalienable rights that cannot be “balanced” or compromised. We cannot live half slave and half free nor can we accept a compromised view of what it means to be human. There are no trade-offs on matters of principle. Let us leave aside these theoretical discussions and turn to the main issues.

### **A political question not a technological question.**

How shall you proceed in your task? As I mentioned earlier, we must reject the view that the surveillance is a technological problem with a technological solution. What has been a constant theme through the debate over the NSA revelations is that a technological solution (encryption) can be found for what is perceived as a technological problem (surveillance). The problem, at its source, is not technological; it is political. The question you need to answer is a political philosophical one because it addresses how we are to live, why we are to live that way, and whether

that is the best way to live. We must not get lost in a definition or debate about what constitutes “surveillance” or what constitutes “privacy”. The issue is not about the privacy or what it means. We must decide fundamental questions that shape any notion of privacy. We need to understand why we have a government, its role and the role of the citizen in a representational democracy. What are the limits a government beyond which it cannot go to secure and enlarge the rights of its citizens? When we consider these questions, we realize that surveillance is a political issue never a technological one. When people propose technology to stop or constrain surveillance, they simply remain within the same technological framework. As a result, they cannot solve the surveillance problem. To put it crudely, technology defeats technology, which means any technological solution will be overcome by the next technological innovation.

What dominates the arguments about surveillance, explicitly or implicitly, is that we cannot trust the government. Therein, the Review Group has a larger task before it that it cannot resolve alone. The NSA has a particularly important task because the reasons for its mission and how they support democracy has not been told effectively or convincingly. By that, I do not mean we need more public relations or a better media strategy or even better relationship with the media. Instead, it is about educating the people who work at the NSA, as a start, as to the NSA’s mission and why the work is being done. We must remember that Edward Snowden came from within the organisation and from within the United States. Both of these points should be a sober reminder that the regime has work to do in educating its citizens towards the fundamental principles of its mission. To develop trust, we need the government and the NSA to explain what they are doing, but not simply how they are

doing it, but rather why they are doing it. If this is left to a simple response of “National Security” then that simply begs the question. How does the programme contribute national security? How does the programme protect what is in most need of being protected?

### **We need to begin with the question of why we need a government**

The issue demonstrates why we have a representational democracy. We elect people to decide why we need surveillance and set up oversight mechanisms and procedures for the agencies that engage in surveillance. In that regard, the rule of law is applied. The people and the agencies are bound to act within the law.

The problem is that politics is infused with a technological vision. The technological view of politics means that we no longer understand what man is nor do we understand what is intrinsically worth defending about man. Instead, there seems to be a focus on technology, and the technology of privacy, as if by achieving “privacy” through a technological solution we would determine or restore a political relationship between the individual and the state. We need to be reminded why we need and want a government to use surveillance. The government chose to use surveillance. The men and women we elected acted on the belief that technological surveillance serves the common good. Surveillance only becomes dangerous when the government refuses to obey the laws upon which it is founded to protect the individual. The state loses its political legitimacy when surveillance no longer serves the common good. In that regard, the state’s illegitimacy does not rest upon its technological choices, but upon its political choices.

### **It is not a question of Law**

The problem of surveillance is not one that can be “solved” by a law. The legal framework is required but surveillance exists because of a deeper political issue. It is not a question of be resolved within a legal framework but it is not going to be decided on how a law should be interpreted or applied. As the issue relates to national security, it transcends domestic and international divide between politics within the regime and lawlessness outside the state. The United States faces threats that exist outside its constitutional capacity to resolve because they require the government to act extra-constitutionally to protect the constitution. To put it directly, the Constitution is not a suicide pact. The regime can do whatever it takes, in extreme situations, to defend itself. The whole principle of nuclear deterrence is based on that principle. These threats are rare, but they are real. Extremists who wish to use violence to thwart or overthrow American interests both domestic and foreign do not fit a neat constitutional category. The response to these threats cannot be by police or law enforcement because it transcends the domestic political sphere. As they exist beyond the borders and the pose a catastrophic threat to the state, they require a state of war to deal with them. Yet, who would the United States declare war against to make it “legal”? The public law 107-40 (Authorisation to use Military Force) tries to bridge this ambiguity. At one level, the law has succeeded because so long as this law is in effect, the United States government can take all measures necessary to deal with the threat. Yet at a deeper level, it failed to resolve the constitutional ambiguity of how a democratic regime wages war without being politically at war? Even without that law, the United States, as a regime, has the natural right to self-defence. Yet, how do we resolve democratically what is a threat which requires the government to be granted the powers it has been under AUMF. In other words, what are the limits to a government’s right to defend itself. What we

have is a political question that dominates your work. You cannot address the question of surveillance without a response to this fundamental question.

### **It is about bureaucracy but not as we understand it.**

Bureaucracy is the operational part of the issue at least concerning unauthorized disclosure, which also relates to how best to use the technology. The NSA is large bureaucracy with a vast array of tools that it can use to for its mission. However, the people who use those tools and the purposes to which they serve and how its operations are controlled fit within a bureaucratic framework. A bureaucracy is built on its culture. What is the culture that the NSA inculcates? How is it assessed? Is it open, with a critical upwards communication? Unauthorised disclosures and the improper use of the technology are not going to be remedied by the law. When people do those things, they know they are breaking the law. They do it because they believe they are right. They believe they are right because they are not convinced that the NSA's or the government are acting appropriately.

### **Changing the Intelligence Community's dysfunctional culture**

The issue is more than a dysfunctional bureaucracy even though we have plenty of evidence of dysfunctionality. What the NSA and other intelligence agencies suffer from is secrecy meets blame avoidance. The description comes from a variation on Christopher Hood's excellent work [What happens when transparency meets blame avoidance?](#) We can see this problem clearly in the work by [Dr. Nolan on information sharing in the National Counterterrorism Center](#). Her dissertation best express the problem in the intelligence community and explains many of the operational problems associated with the surveillance programme. What she reports is a culture

in disarray, no clear management, officers suffering information overload and they have not clear understanding of how it fits together. The Review Group should be concerned by the stories within that dissertation. The Valet story shows that the NCTC has no appropriate induction programme and no business could operate with such a disregard for how staff are managed. The problem within the intelligence community is not its size or its technology; it is the culture. The solution is not to make the intelligence community smaller. The solution is to change its culture. The Review Group faces another challenge that will require it to address fundamental political choices because the intelligence community reflects a wider political culture of neglect and deference that undermines accountability within the intelligence community.

To change an organisation's culture you have to change the way it does business.

[You have to change the way people manage and the way people are managed.](#) In particular a robust culture has strong critical upwards communication systems where junior employees can tell senior employees what is not working and why without fear of disapproval. In such a culture, the organisation learns from its mistakes to prevent them, not just fix them. What this requires as well is a management structure that creates and sustains a robust internal communication system. To create a robust culture, the intelligence community must invest in and train its [middle managers who have to translate an agency's strategic vision into a practical reality](#) without creating unintended outcomes. The danger is that without the strong internal communication system, middle managers [will do their best to translate their understanding of the strategic vision against practical demands of the day-to-day work, which will create the unintended outcomes.](#)

## **It is not about how we classify or declassify documents**

When the government classifies or declassifies a document, it follows a bureaucratic procedure. The procedure is not the problem. The procedure is only a symptom of the problem. The problem is the failure of political judgement because it is not guided by the political good. Instead, it is guided by precedence and compliance with established criteria. In addition, the over-classification of documents and the failure to declassify reflect and reveal a blame avoidance culture. No one wants to declassify a document that will create a scandal or lead to deaths. The bureaucrats who make the decisions are not trained or allowed to use their judgement because they are not trained or educated as to the political good the decision to classify or declassify is to serve. Instead, they become path dependent. They follow previous decisions. They rely upon the past rather than attempt to decide what the good is that the decision to classify or declassify serves. Is that decision the best way to serve that good as evaluated against the objective criteria used to decide the issue? If the process is to be reformed, it will require a change in the criteria to classify or declassify. However, that will only work if there is a change in the political culture that sets the framework for any decision. Although the decision has become a bureaucratic because bureaucrats have decided how they will interpret the existing criteria and how they will apply it, it is still a political decision. What reform has to address is the political decision that initiates the process.

**The issue is more than bureaucratic culture or organisational culture, it is about the country.**

The Review Group must offer more than solutions to technological issues, or operational hurdles, or recalcitrant organisational and bureaucratic cultures. What the review group must do is address the wider government culture and how it has come to embrace surveillance to secure the ends for which it was constituted. What the Review Group must do is discuss the relationship between the government and the people. The relationship explains the surveillance issue because surveillance is justified by the constitutional requirements of the [Public Law 107-40 \(September 18, 2001\); 115 Stat. 224](#) also known as the Authorisation of Military Force (AUMF). The AUMF has changed the country. Since that decision, the country and the government have become increasingly militarized and power centralized to the executive branch at the expense of the judiciary and the legislative branches. The AUMF has shaped and continues to shape the citizen's relationship to the government. The surveillance issue only reflects the constitutional and political ambiguity created by the AUMF. Until that law is repealed, the government remains on war footing, which means that its' constitutional and legal relationship with its citizens is strained by conflicting demands.

### **What is to the nature of our political regime? Empire or a republic?**

We confront the fundamental political issue that decides the surveillance question. If America is not at war, why does it have the massive security infrastructure? If America is at war, what is the goal, what is the purpose, what is the strategy for victory, which will determine how relate military means to the political ends? What we find is that neither can be answered and both are true. America faces the problem that cannot be balanced and cannot be reduced to a trade-off. America cannot be half-free and half-slave. America cannot be at war abroad and at peace at

home. The surveillance shows that the logic that dictates the government's foreign policy behaviour has infused the domestic political arena. The use of drones, surveillance, and the militarisation of the police are a consequence of the constitutional political ambiguity created by AUFM. We face the danger that the republic, founded upon limited government, is in danger of collapse under the demand, created by the threat of terrorist attack, of imperial safety imperative. The demand for safety is open-ended and knows no limit. We must return to the republican reality that to be free is to be insecure and accept a limit to the government's ability to enlarge and protect our rights. Yet, the Review Group will have to reconcile that insight to the reality that the American government and its bureaucracy are created and maintained to delivery a Lockean liberalism goal of comfortable self-preservation as set out by the founders.<sup>1</sup>

In the end, the Review Group must answer \*the\* political question: What is to be the nature of our political regime?

### **Related Bibliography**

The following are a list of essays I wrote on the issues that the Review Group is considering. I hope you find them of interest and use in your work.

The NSA surveillance state and the illusion of privacy

The Problem of Surveillance in a Democratic Society

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<sup>1</sup> I discuss this problem in detail in my book *America at the Brink of Empire*. In that book, I looked at the Vietnam War as it presented a similar challenge because it was an undeclared war that created political ambiguity over the nature of the regime. <http://lsupress.org/books/detail/america-at-the-brink-of-empire/>

## Why Encryption Threatens Democracy

When the NSA cannot decrypt the seeds of the electronic state of nature are planted.

Why do we have the NSA and why do we need surveillance: A response to Greenwald and others.

Thank you for considering my comments. If they raise questions or if you would like any further details, I would be pleased to respond.

With best wishes for your work,

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