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## **Balancing Security and Civil Liberties**

### **Principles for Rebuilding Trust in Intelligence Activities**

Since Edward Snowden fled to Russia, leaking sensitive information to selected press outlets, we have watched an uneven debate within the United States and in foreign countries about America's intelligence programs. Snowden's leaks undermine the safety of Americans and our allies. The perception that communications surveillance programs have not helped prevent terrorist attacks is wrong and reflects a profound misunderstanding of how intelligence is gathered and used.

Intelligence does not work as it is portrayed in films—a single agent does not make a startling discovery that leads to dramatic, last-minute success. Success is the product of the efforts of teams of dedicated individuals from many agencies, using many tools and techniques, and working together to assemble fragments of data from many sources into a coherent picture. This kind of analysis is not a retrospective investigation, nor can it be limited to “known terrorists” as some have suggested. The intent of intelligence is to illuminate the unknown and prevent surprise. Assertions that a collection program contributes nothing because it has not singlehandedly prevented an attack show a lack of understanding as to how the United States conducts intelligence activities and analysis to prevent harmful acts or attacks against the America and its allies.

The individuals below strongly believe that intelligence, guided by rule of law, plays an irreplaceable role in America's security. While not all intelligence actions can be made public, all must be fully subject to oversight by Congress and, where appropriate, the courts, and the goals, principles, and responsibilities of the intelligence community should be debated publicly. This is essential for democracy and for maintaining the trust of the American people. To provide a meaningful framework for public debate on domestic surveillance and foreign intelligence, we offer the following principles, not to end discussion, but to structure a more thoughtful one.

**First, America has enemies who want to inflict harm. We engage in intelligence activities to identify and stop them and to understand events that could damage American security.**

This should be completely obvious, but it is usually left out of accounts of Snowden's leaks. Those critiquing intelligence programs have ignored risk or downplayed it. A recognition that intelligence is vital for our safety must be the starting point for any honest debate on intelligence programs. We cannot protect ourselves if we do not know who our enemies are or how they plan to harm us. Not all malevolent individuals or nations have the capacity to hurt us. We cannot judge that risk unless we have a robust intelligence system.

**Second, Americans need to be informed about what our intelligence agencies do and have confidence that those activities are consistent with our laws and values.**

Every nation must undertake some activities in secret. But a democracy requires that national priorities and policies be publicly debated and that government be accountable to the citizens for its actions. To rebuild trust

and strengthen oversight, particularly for collection programs that touch U.S. persons, greater openness is essential. Too much secrecy damages national security and creates the risk that Americans will perceive necessary programs as illegitimate. The Administration can strengthen the case for intelligence activities by providing the American people with specific information on where and how these programs have prevented harm. People will not take on faith or assurance alone that the benefits of surveillance outweigh the risk to civil liberties, and we harm national security by not discussing what has been stopped.

The core of American governance is a balance between a government strong enough to secure the common good and citizens' desire to be secure in their liberties from a too-powerful government. The Constitution is the source of the laws that protect individual liberties, and it guarantees the right of the people to be secure from unreasonable searches. The key to a prudent approach to surveillance lies in deciding what is "reasonable." In making this decision the courts, the Congress, and the president act as agents of an informed citizen body, but the oversight process that has served us since the 1970s must change to reflect the expectations of citizens for greater transparency and greater public accountability. This change will reassure the public that the National Security Agency (NSA) and other intelligence organizations operate within the writ of law and only for lawful national purposes.

**Third, Congress is the essential link between citizens and the government for oversight of intelligence.**

Strong oversight mechanisms and greater transparency are the keys to acceptance and accountability for intelligence. In our representative democracy, Congress provides the essential link between government and citizens that creates democratic accountability. This gives Congress a special role in overseeing intelligence activities and explaining them to the public. Democratic governance today requires greater transparency and debate, even for secret activities. Post-facto releases on intelligence programs and activities, often made under duress, are no longer adequate for accountability or trust. Whatever the merits of the argument that the surveillance programs cannot be made public even at some general level of detail, as this would warn our opponents (who likely suspected the fact of surveillance if not its scope), the lack of public knowledge and debate is what drives much of the concern and misunderstanding. Congress must expand its public discussion of intelligence if citizens are to be assured that intelligence activities are consistent with our Constitution and democratic principles.

At the same time, as Congress considers changes to intelligence and surveillance legislation, it must remember that intelligence gathering in support of our national defense involves risk. Our structure for oversight and authorities must take this risk into account if we are to avoid building a system that has so little tolerance for risk and error that our intelligence agencies become ineffective in supporting our national defense. Congress and the Administration should strengthen and modernize oversight, but in doing this we must take the unavoidable risk that intelligence entails into account. Much of what has been built was in response to lessons learned from the 9/11 attacks. Overreaction could again make us vulnerable.

**Fourth, the courts can and should provide oversight of the Intelligence Community activities that affect U.S. persons to ensure consistency with the law**

Congress is designed for open debate over principles and resource allocation, not to manage the government's daily activities. Because of the Constitution's separation of powers, the Congress must rely on other institutions

to oversee surveillance activities. Much of this responsibility falls upon the courts, especially as it applies to surveillance of U.S. citizens. This is why Congress created the Foreign Intelligence Surveillance Court, to ensure that surveillance activities are consistent with the Constitution and the law. Collection targeting U.S. citizens should only be undertaken through lawful authorization by the Foreign Intelligence Surveillance Court. This means that the courts, not the agencies, must decide when such searches meet Constitutional standards.

**Fifth, the Foreign Intelligence Surveillance Court must be strengthened.**

Assuring trust in a rigorous and independent judicial review requires that we strengthen the ability of the Foreign Intelligence Surveillance Act (FISA) Court to protect the privacy of citizens of the United States. We can strengthen the FISA Court in several important ways. We believe the court should have increased administrative and substantive expertise independent from the Justice Department. This could include the ability to appoint technical experts to advise on programs as the court sees fit. While the FISA Court might want to appoint “special masters” who can quickly determine whether activities are within the current authorities granted by the court, or need to be returned to the court for further action and authorization, a stronger court does not require ombudsmen or a public interest advocate. While it is up to the court to decide whether or not its decisions can be made public, the FISA Court can help increase accountability by considering a greater degree of transparency in its own actions. Those decisions that have been released in recent months, properly redacted, show that transparency can accommodate operational effectiveness.

**Sixth, the use of metadata for counterterrorism should continue under restructured procedures and policies.**

Knowing when possible terrorists are linked to foreign groups, or when they are acting on their own, can be essential for assessing risk and creating countermeasures. The ability to access specific metadata records has value for counterterrorism. We believe there is a way to continue this access that builds on existing business practices and is consistent with constitutional safeguards against unreasonable search.

**Toward a Balanced Debate**

We hope that these principles will contribute to an honest debate about intelligence, civil liberties, and risk. There is broad understanding that we should expand transparency into intelligence activities; that there must be updated rules for surveillance in the new global communications environment in which we live, and that courts and Congress play a central role for intelligence oversight. Finding the way ahead will not be easy, but a public discussion that best serves the interests of Americans must take into account the complexity and risk of vital intelligence activities, the increased importance of transparency, and the necessity for new oversight modalities. We believe that this frank and informed discussion will ensure that meaningful capabilities for our intelligence community respect the constitutional rights of American citizens.

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