

MEMORANDUM FOR PRESIDENT BARACK OBAMA  
ATTORNEY GENERAL LORETTA LYNCH

November 28, 2016

As former professional staff members of the U.S. Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the “Church Committee”), we are writing to urge that the White House and the Justice Department negotiate a settlement of the charges against Edward Snowden that both sides can accept.

There is no question that Edward Snowden’s disclosures led to public awareness which stimulated reform. Whether or not these clear benefits to the country merit a pardon, they surely do counsel for leniency.

In the American political system, bipartisan government reforms are generally regarded as the most legitimate and durable. Recently, however, our government has all but stopped making bipartisan reforms. There is one big exception: the surveillance reforms inspired by Edward Snowden’s revelations.

It was Snowden who supplied journalists with evidence that our government had, for many years, been collecting information about the domestic phone calls of millions of Americans. As a result, a bipartisan coalition in Congress formed to amend the Patriot Act to prohibit the practice. In the Senate, Mike Lee, a conservative Republican from Utah, joined with Patrick Leahy, a liberal Democrat from Vermont, to

sponsor the reform. In the House, the move toward reform started with two Michigan Congressmen, Justin Amash, a junior Tea Party Republican from Grand Rapids, and John Conyers, a veteran liberal Democrat from Detroit. Republican Congressman James Sensenbrenner, a primary author of the Patriot Act and its extensions, also backed the reforms saying he and his colleagues had not intended to permit the NSA's widespread scooping up of data about Americans' communications.

It was also Snowden's material that showed the extent to which the National Security Agency intercepts and filters international electronic communications from undersea fiber optic cables, and taps internal links connecting data centers for Internet companies like Yahoo! and Google. All this was in pursuit of former NSA Director Keith Alexander's directive to "collect it all." Untold millions of Americans' communications are swept up in these programs, where they are available for perusal by the FBI and CIA through what has become known as the "backdoor" search loophole. Republican Reps. Ted Poe and Tom Massie have joined with Democratic Rep. Zoe Lofgren in sponsoring legislation to ban this practice.

Snowden's documents also revealed the broad scope of NSA spying on foreigners including eavesdropping on close allies in addition to potential adversaries like Russia and China. While some have argued that leaking such "legal" surveillance activities disqualifies Snowden from any mercy, President Barack Obama has acknowledged that stronger controls were necessary. He implemented the first-ever reforms to afford privacy protection for foreigners from surveillance unless it is necessary to protect our national security.

The NSA, CIA, and Defense Department maintain that harm resulted from the disclosures, particularly with respect to our efforts overseas, where they say

relationships with intelligence partners have been damaged and our adversaries may know more about our capabilities. No one is asking that these claims be ignored, only that they be checked, and then weighed against the benefits.

America clearly did benefit from Snowden's disclosures. Former Attorney-General Eric Holder said that Snowden "performed a public service by raising the debate that we engaged in and by the changes that we made." President Obama has said that the public debate regarding surveillance and accountability that Snowden generated "will make us stronger." The President also issued an executive order recognizing that foreigners have privacy interests—an acknowledgement no previous President had ever made—and also asked the intelligence community to find ways to provide foreigners with some protections previously provided only to Americans.

Without Snowden, it would have been decades, if ever, until Americans learned what intelligence agencies acting in our name had been up to. We know first hand that lack of disclosure can cause just as many, if not more, harms to the nation than disclosure. When intelligence agencies operate in the dark, they often have gone too far in trampling on the legitimate rights of law-abiding Americans and damaging our reputation internationally. We saw this repeated time and time again when serving as staff members for the U.S. Senate Select Committee, known as the Church Committee, that in 1975-76 conducted the most extensive bipartisan investigation of a government's secret activities ever, in this country or elsewhere.

Among the mass of long-lasting abuses that we uncovered were: For 30 years, NSA had obtained copies of every telegram leaving the United States. For 25 years, the FBI had planted an informer in the NAACP despite knowing from the outset that it did nothing illegal. For decades, the FBI had run a secret program called

COINTELPRO designed to harass and destroy groups and individuals whose lawful policy positions the Bureau did not like. Actions included secretly breaking up marriages of dissidents, getting teachers fired based on false information, provoking beatings and shootings, and trying to get civil rights leader Martin Luther King, Jr., to commit suicide by using information from bugs in his hotel rooms. For years, the CIA attempted to assassinate foreign leaders of countries with whom we were not at war, experimented with the use of drugs like LSD on “unwitting” Americans, and conducted domestic surveillance of anti-Vietnam War protesters and civil rights activists—which was in direct contravention of the CIA’s charter.

The number of Americans caught up in these decades-long webs of excessive—and secret—intelligence activity was huge. Moreover, the Church Committee’s disclosures revealed that six presidents, coming from both parties—from Franklin Roosevelt to Richard Nixon—had abused their secret powers. All this set the stage for bipartisan reforms that made our intelligence agencies stronger by bringing them into compliance with the law and American values, and by establishing independent oversight mechanisms. As Republican leader Senator Howard Baker said at the end of the Church Committee, our disclosures “in the long run result[ed] in a stronger and more efficient intelligence community.”

Snowden’s disclosures—which significantly lessened the time that overbroad and inappropriate secret surveillance lasted in the 21st century—have had and will continue to have the same beneficial impact.

Some oppose leniency for Snowden because he violated the law. But many in the national security establishment who committed serious crimes have received little or no punishment. President Obama’s decision to “look forward, not backward”

absolved from liability the officials who designed and implemented the torture and extraordinary rendition programs at the CIA and Defense Department during the George W. Bush Administration. It also meant that those who destroyed evidence of these crimes and misled Congress about illegal torture and surveillance would never face charges.

In addition, the government has also been lenient to high-level officials who made illegal disclosures or destroyed classified information. Examples are cases involving National Security Advisor Sandy Berger and CIA Directors David Petraeus and John Deutch.

CIA Director David Petraeus, who also had been a top general, violated the law and his obligation to protect national security information when he provided his biographer, who was also his close friend, with voluminous notebooks documenting Top Secret military and intelligence operations, as well as sharing classified information with reporters. He also made false statements to the FBI to avoid accountability for his actions. Yet he was allowed to plead guilty to just one misdemeanor for which he received no jail time. Former National Security Advisor Sandy Berger broke the law when he removed several highly classified documents sought by the 9/11 Commission from the National Archives and then destroyed them. He too was allowed to plead guilty to a misdemeanor and received a fine and probation. President Bill Clinton pardoned former CIA Director John Deutch before the Justice Department filed a misdemeanor charge against him for improperly taking hundreds of files containing highly classified information and storing them on an unprotected home computer. In all these cases, recognition of the public service the individuals had provided weighed against strict enforcement of the law, to come to a fair and just result.

There are, of course, differences between these cases and Snowden's. But the crucial point is that only in Snowden's case was the motivation behind his illegal activity to benefit America. The three others involved efforts to gain glory or avoid criticism, or simple convenience and simple disregard for the law that put our security at risk. Yet the perpetrators were treated leniently.

Snowden's explicit intent was to raise public awareness about activities that he believed (and that all three branches of government have to varying degrees affirmed) were illegal, or overbroad, so that there could be a robust public discussion about the proper scope of government surveillance.

Snowden did not try to mask his identity, or lie to the FBI. He knew he would pay a personal price. As he has.

Contrary to his critics, Snowden did *not* flee to Russia. Rather he was trapped there when our government revoked his passport during the first leg of his flight to Ecuador, where he had requested asylum. Exile in Russia was not his choice, and has come at a high price personally, to him and his family. The United States thwarted his efforts to obtain safe passage to other countries that had offered asylum, going so far as to force Bolivian President Evo Morales' plane to the ground in Austria to ensure Snowden wasn't on it.

The House Intelligence Committee has also claimed that Snowden should have brought his concerns to superiors in the NSA and to Congress. But Snowden knew that former NSA official Thomas Drake tried to report his qualms about NSA programs, and was charged with violations of the Espionage Act nonetheless. More importantly, the Intelligence Committees in Congress had known for years about the programs Snowden exposed. But the Committees had not acted. Nothing happened in Congress

until public pressure, fueled by Snowden's disclosures, caused lawmakers on both sides of the aisle to act.

Snowden also learned from Chelsea Manning's wholesale document dump to WikiLeaks, some of which put individuals and organizations named in the documents at risk. Rather than simply publishing the NSA documents on the Internet, Snowden provided them to media organizations, believing that the journalistic process would ensure that only materials in the public interest would be published, and that the government would have a chance to argue for redactions or withholding of materials that might truly cause harm. While this method is not perfect, it was the best of the possible choices available to get the word out with the least chance of harm. Such prudence is also relevant to leniency for Snowden.

Some argue that Snowden should surrender to U.S. authorities, face trial under the Espionage Act and make his argument that he acted in the public interest in a courtroom. But, under the Espionage Act, a defense of acting in the public interest is not allowed. Snowden also could not tell a jury that his actions spurred reform. The Espionage Act, a harsh law, was designed to prosecute spying on behalf of foreign nations rather than whistle blowing to inform the American public about government overreach.

Under current law, the only way to weigh the public benefits of Snowden's leaks and account for his aim to help America is for the government to mitigate the charges through settlement discussions.

The status quo is untenable. Snowden presumably does not want to stay in Russia, and our government does not want him there. As the U.S. relationship with Russian deteriorates, the risk to all interests involved increases. There is no question that

Snowden broke the law. But previous cases in which others violated the same law suggest leniency. And, most importantly, Snowden actions were not for personal benefit, but were intended to spur reform. And they did so.

We therefore urge that the White House and the Justice Department negotiate a settlement with Edward Snowden of the charges against him that both sides can accept.

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