

# OPEN THE GOVERNMENT.ORG

## AMERICANS FOR LESS SECRECY, MORE DEMOCRACY

### Press Release

Contact: Patrice McDermott, OpenTheGovernment.org, 202-332-6736

### Coalition letter calls for halt to NSA data sharing with law enforcement agencies

WASHINGTON, April 7, 2016 – Today, more than 30 organizations committed to government openness, personal privacy, civil liberties and human rights, are calling for the halt to proposed policy changes that could allow domestic law enforcement and intelligence agencies to circumvent constitutional protections and pose new threats to the privacy and civil liberties of ordinary Americans.

The letter calls attention to policy changes currently being developed in secret, which could give law enforcement agencies access to raw data collected by the NSA under Executive Order (EO) 12333 -- a presidential directive governing overseas surveillance operations that has largely escaped public scrutiny. The proposed changes are particularly troubling, because while EO 12333 sets forth a broad framework for the collection of foreign intelligence information overseas, it also sweeps in massive amounts of Americans' data as well, including private messages, address books, and Internet metadata.

The *New York Times* [reported](#) that the White House and the Director of National Intelligence are in the process of establishing procedures to expand intra-governmental access to raw data gathered by the NSA, including communications to, from, and about U.S. persons. The reporting has sparked renewed attention to the expansive data collection programs carried out under EO 12333. Members of Congress have asked for the NSA to confirm whether the Agency intends to routinely provide intelligence information—collected without a warrant—to domestic law enforcement agencies, and makes clear that the proposed shift in policy should not be done in secret.

The signatories write, “We join Representatives Lieu and Farenthold in requesting that you halt efforts to modify EO 12333 information sharing procedures and any other related efforts that would expand the sharing of raw information gathered by NSA with agencies that have law enforcement functions. We also ask that you release the 21-page draft order referenced in the *New York Times* article to enable the American public to weigh in on a planned policy change that would directly affect their rights and interests.”

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OpenTheGovernment.org is a coalition transcending party lines of more than 90 consumer and good government groups, librarians, environmentalists, labor, journalists, and others – focused on pushing back governmental secrecy and promoting openness.

**Congress of the United States**  
**Washington, DC 20515**

March 23, 2016

Admiral Michael S. Rogers  
Director, National Security Agency  
Commander, U.S. Cyber Command  
4409 Llewellyn Ave  
Fort Meade, MD 20755

Dear Admiral Rogers:

Thank you for your service to our country as a career military officer. We are writing in our capacity as Members of the House Oversight & Government Reform Committee because we are alarmed by press reports that state National Security Agency (NSA) data may soon routinely be used for domestic policing.<sup>1</sup> If media accounts are true, this radical policy shift by the NSA would be unconstitutional, and dangerous.

We respectfully request you confirm whether the NSA intends to routinely provide intelligence information—collected without a warrant—to domestic law enforcement agencies. If the NSA intends to go down this uncharted path, we request that you stop. The proposed shift in the relationship between our intelligence agencies and the American people should not be done in secret. The American people deserve a public debate. The United States has a long standing principle of keeping our intelligence and military spy apparatus focused on foreign adversaries and not the American people.

Congress granted the NSA extraordinary authority to conduct warrantless collection of communications and other data.<sup>2</sup> Unlike domestic law enforcement's mission, NSA's mission is focused on foreign intelligence and counterintelligence. In a publicly released document, the NSA stated that "NSA is an element of the U.S. intelligence community charged with collecting and reporting intelligence for foreign intelligence and counterintelligence purposes."<sup>3</sup> NSA's mission has never been, and should never be, domestic policing or domestic spying.

Congress, on the other hand, did not grant extraordinary warrantless surveillance and collection powers to domestic law enforcement agencies. The Executive Branch would be violating the Separation of Powers by unilaterally transferring warrantless data collected under the NSA's extraordinary authority to domestic agencies, which do not have such authority.

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<sup>1</sup> See Radley Balko, "Surprise! NSA Data Will Soon Be Used For Domestic Policing That Has Nothing To Do With Terrorism," *Washington Post*, March 10, 2016; Joel Kurtinitis, "While You Were Watching Donald Trump, Obama Expanded Domestic Spying ... Again," *The Blaze*, March 10, 2016.

<sup>2</sup> See Foreign Intelligence Surveillance Act and the Patriot Act.

<sup>3</sup> "The National Security Agency: Missions, Authority, Oversight and Partnerships," p. 2, *NSA*, August 9, 2013.

The apparent proposal to give vast information collected without warrants to domestic agencies would also violate the Fourth Amendment of the United States Constitution. According to the *New York Times*, the new system would permit analysts at other agencies “to obtain direct access to raw information from the NSA’s surveillance to evaluate for themselves.”<sup>4</sup> We cannot let this happen.

The Fourth Amendment is clear: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” Some, or perhaps much, of the information the NSA collects would not have passed the probable cause test for a warrant. Domestic law enforcement agencies—which need a warrant supported by probable cause to search or seize—cannot do an end run around the Fourth Amendment by searching warrantless information collected by the NSA.

We believe allowing the NSA to be used as an arm of domestic law enforcement is unconstitutional. Our country has always drawn a line between our military and intelligence services, and domestic policing and spying. We do not—and should not—use U.S. Army Apache helicopters to quell domestic riots; Navy Seal Teams to take down counterfeiting rings; or the NSA to conduct surveillance on domestic street gangs.

Last year, Congress and the American people reigned in the NSA because of its overreach in spying on Americans. We respectfully request that you respect the will of the people and not repeat the same mistake.

Sincerely,



Ted W. Lieu  
Member of Congress



Blake Farenthold  
Member of Congress

cc:

The Honorable Jason Chaffetz, Chairman, House Oversight & Government Reform Committee  
The Honorable Elijah Cummings, Ranking Member, House Oversight & Government Reform Committee

The Honorable Devin Nunes, Chairman, House Permanent Select Committee on Intelligence  
The Honorable Adam Schiff, Ranking Member, House Permanent Select Committee on Intelligence  
The Honorable Bob Goodlatte, Chairman, House Judiciary Committee  
The Honorable John Conyers, Ranking Member, House Judiciary Committee

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<sup>4</sup> See Charlie Savage, “Obama Administration Set To Expand Sharing Of Data That N.S.A. Intercepts,” *New York Times*, February 25, 2016.

March 7, 2016

Hon. James R. Clapper  
Director, Office of the Director of National Intelligence  
Washington, DC 20511

Admiral Michael S. Rogers  
Director, National Security Agency  
Fort Meade, MD 20755

Re: Changes to Executive Order 12333 Minimization Procedures

Dear Director Clapper and Admiral Rogers:

The undersigned organizations write to request that you halt the proposed changes to Executive Order 12333 policies that would share raw data collected by the National Security Agency with law enforcement agencies. As you know, EO 12333 sets forth a framework for the collection of foreign intelligence information overseas, but sweeps in massive amounts of Americans' data as well, including private messages, address books, and Internet metadata.<sup>1</sup> Considering the extent and scope of the information collected under EO 12333, the policy changes under consideration could allow agencies like the FBI to circumvent constitutional protections and will pose new threats to the privacy and civil liberties of ordinary Americans. At a minimum, when the administration seeks to ratchet back privacy protections for Americans, Congress and the American public should have the opportunity to weigh in.

The *New York Times* reported that the White House and the Director of National Intelligence are in the process of establishing procedures to expand intra-governmental access to raw data gathered by the NSA, including communications to, from, and about U.S. persons.<sup>2</sup> As a threshold matter, we were dismayed to learn about this development in the press instead of directly from your offices. News reports indicate the NSA has been developing these new procedures "for years"—since at least the start of the administration. The secrecy of this major undertaking undercuts Intelligence Community claims of increased transparency and engagement with civil society and the public and is inconsistent with the

1 Ellen Nakashima and Ashkan Soltani, "Privacy watchdog's next target: the least-known but biggest aspect of NSA surveillance," *Washington Post* (July 24, 2014), available at <http://wapo.st/1SmuqEx>.

2 Charlie Savage, "Obama Administration Set to Expand Sharing of Data That N.S.A. Intercepts," *N.Y. Times* (Feb. 25, 2016), available at <http://nyti.ms/21H1a0i>; See also Amos Toh, Faiza Patel, and Elizabeth Goitein, "Overseas Surveillance in an Interconnected World," Brennan Center report, Part IV.B, available at <http://bit.ly/1UfSdMW>.

“Principles of Intelligence Transparency” adopted by ODNI in January of this year and reaffirmed through an implementation plan issued by ODNI in February.<sup>3</sup>

Moreover, the reported changes would fatally weaken existing restrictions on access to the phone calls, emails, and other data the NSA collects. Currently, under United States Signals Intelligence Directive 18 (USSID18), access to raw data containing U.S. persons’ identities is limited.<sup>4</sup> Intelligence reports disseminated to other agencies may include U.S. persons’ identities only if the U.S. person has consented, the information is publicly available, or the identity of the U.S. person is necessary to understand the foreign intelligence information or assess its importance.<sup>5</sup> The reported changes would jettison these longstanding restrictions and allow multiple other government agencies access to the NSA’s raw take.

This change is particularly troubling because EO 12333 data collection is far broader than the controversial surveillance programs carried out under the auspices of other legal authorities, such as Section 702 of the Foreign Intelligence Surveillance Act (FISA). Data obtained under EO 12333 may be gathered through mass, even indiscriminate, surveillance. Given that even wholly domestic communications today may be routed or stored overseas, such broad surveillance inevitably captures the data of millions of Americans.<sup>6</sup> Sharing such information with U.S. law enforcement agencies would allow them to circumvent the strict, constitutionally mandated rules of evidence gathering that govern ordinary criminal investigations. The ongoing but largely obscured practice of parallel construction, whereby information gathered for national security purposes is laundered through domestic law enforcement while concealing its origins and manufacturing a new discovery history, undermines the important role that Courts play in policing the bounds of our Constitution and could become a more common occurrence under these new procedures.<sup>7</sup>

The secret shift in policy is particularly troubling at a time when Congress and government oversight bodies are calling for the NSA to move in the other direction—to provide more information to the general public about the legal authorities governing U.S. surveillance programs and to enact greater privacy protections for U.S. persons affected by these programs. Last year, Congress enacted the USA

3 Principle 2 states the IC will “[b]e proactive and clear in making information publicly available through authorized channels, including taking affirmative steps to...provide timely transparency on matters of public interest,” and “engage with stakeholders to better explain information and to understand diverse perspectives...”

4 USSID18 § 6.2.

5 USSID18 § 7.2.

6 See Toh, Patel, and Goitein, Brennan Center report, Part I.C, <http://bit.ly/1UfSdMW>

7 See Request to the United States Commission on Civil Rights to investigate disproportionate impacts of “Parallel Construction” on communities of color, prepared by Sean Vitka, X-Lab, <http://bit.ly/1ZKEddd>.

Freedom Act to prohibit the U.S. government's mass collection of Americans' phone records. Surely Congress did not intend for the government to evade this prohibition through new NSA procedures giving law enforcement agencies easy access to Americans' phone metadata swept in under EO 12333.

Similarly, the independent group of experts appointed by President Obama to review surveillance practices in 2013 recommended significantly *tightening* the limits on the retention and use of information about U.S. persons collected under Section 702 of FISA "or under any other authority that justifies the interception of a communication on the ground that it is directed at a non-United States person who is located outside the United States."<sup>8</sup> In addition, recognizing the implications of EO 12333 surveillance, the congressionally created Privacy and Civil Liberties Oversight Board is currently examining several EO 12333 programs.

Congress has taken notice of the NSA's planned changes. Members of the House Oversight and Government Reform Committee recently wrote a letter to NSA Director Admiral Rogers asking for the NSA to confirm whether the Agency intends to routinely provide intelligence information—collected without a warrant—to domestic law enforcement agencies. If the NSA intends to go down this uncharted path, the letter states, "we request that you stop." The letter further emphasizes that the proposed shift in the relationship between our intelligence agencies and the American people should not be done in secret.<sup>9</sup>

We join Representatives Lieu and Farenthold in requesting that you halt efforts to modify EO 12333 information sharing procedures and any other related efforts that would expand the sharing of raw information gathered by NSA with agencies that have law enforcement functions. We also ask that you release the 21-page draft policy referenced in the *New York Times* article to enable the American public to weigh in on a planned policy change that would directly affect their rights and interests.

We would appreciate and request the opportunity to discuss this matter in greater detail. To reply to this letter, or to arrange a call or meeting, please contact any of the following representatives of our coalition:

Elizabeth Goitein, Co-Director  
Liberty & National Security Program  
Brennan Center for Justice  
goiteine@mercury.law.nyu.edu  
202.249.7192

Patrice McDermott, Executive Director  
OpenTheGovernment.org  
pmcdermott@openthegovernment.org  
202-332-6737  
Mark M. Jaycox  
Civil Liberties Legislative Lead

8 Recommendation 12, Review Group on Intelligence and Communications Technologies.

9 Letter to Admiral Michael S. Rogers, Director, National Security Agency, from Representatives Ted W. Lieu and Blake Farenthold, March 23, 2016: <http://bit.ly/25whjke>.

Electronic Frontier Foundation  
Jaycox@eff.org  
415-436-9333

Daniel Schuman, Policy Director  
Demand Progress  
daniel@demandprogress.org  
202-577-6100

Thank you for your prompt response.

Sincerely,

Advocacy for Principled Action in  
Government  
American Civil Liberties Union  
American-Arab Anti-Discrimination  
Committee  
Arab American Institute  
American Library Association  
Bill of Rights Defense Committee  
Brennan Center for Justice  
Campaign for Liberty  
Constitutional Alliance  
Defending Dissent Foundation  
Demand Progress  
Electronic Privacy Information Center  
(EPIC)  
Electronic Frontier Foundation  
Free Speech Coalition  
Fight for the Future

Government Accountability Project  
The Niskanen Center  
Media Freedom Foundation  
National Security Counselors  
National Association of Criminal  
Defense Lawyers  
Liberty Coalition  
New America's Open Technology  
Institute OpenTheGovernment.org  
Project Censored  
Project On Government Oversight  
Public Citizen  
Restore The Fourth  
RootsAction.org  
R Street  
Sunlight Foundation  
TechFreedom  
X-Lab

cc:Members of the United States Senate Committee on the Judiciary  
Members of the United States House of Representatives Committee on the  
Judiciary