

January 14, 2016

The Honorable Jason Chaffetz
Chairman, Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Elijah Cummings
Ranking Member, Committee on Oversight and Government Reform
2471 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Chaffetz and Ranking Member Cummings:

We are writing regarding the December 30, 2015, letter to NSA Director Michael Rogers inquiring into “the processes NSA employees follow in determining whether intercepted communications involve[] Members of Congress and the latitude agency employees have in screening communications with Members of Congress for further dissemination within the Executive Branch.”¹

Congressional independence from the Executive Branch is essential to our system of separated powers enshrined in the Constitution. This independence must include protection from Executive Branch surveillance when conducting legislative and oversight functions. We applaud the inquiry into whether the Executive Branch has overstepped its proper role through intentional or “incidental” collection of communications involving Members of Congress.

As part of this inquiry, we urge you to hold public hearings into this issue. Hearings should address whether the Executive Branch has intercepted communications regarding the Congress, federal courts, and other independent government agencies; the sufficiency of existing protections to ensure that the communications of Congress, the courts, and other independent government agencies are not intercepted; and the need for additional legislation to ensure appropriate separation of powers in this context.

In addition, we urge you to publicly share guidance governing the process the NSA follows regarding interception of communications from or to the Congress, the courts, and other independent government agencies, and in screening such communications for further dissemination. During prior congressional investigations of Intelligence Community activities, congressional requests for information have been interpreted narrowly and not always in accordance with their plain meaning. Accordingly, we encourage a broader and deeper inquiry that goes beyond the private staff briefing requested for January 15. This inquiry should examine past collection practices; collection of communications and metadata involving congressional staff and legislative support agency staff; communications with Congress by critics of the government, including whistleblowers; and possible data collection of activities conducted by the courts and by government agencies that are independent from the Executive Branch.

¹ <https://oversight.house.gov/wp-content/uploads/2015/12/2015-12-30-Letter-to-Rogers.pdf>

Finally, we urge you to develop legislation to limit collection of communications involving legislative and judicial branch activities, as well as independent Executive Branch agencies. NSA guidance on data collection efforts is subject to agency interpretation and these dissemination practices are subject to change. Legislation should flatly prohibit Executive Branch interception of communications and collection of metadata involving Members of Congress, congressional staff, legislative support agency staff, and the work of any independent government agency, unless explicitly and directly authorized by a federal judicial warrant pursuant to a judicial finding of probable cause. The ban also should extend to the federal judiciary, including communications by litigants with the courts, especially since these data collection efforts may be inadvertently infringing upon attorney-client privileges.

Thank you for your attention to the crucial question of separation of powers and legislative and judicial autonomy. We welcome the opportunity to discuss this further. Please contact Daniel Schuman, Demand Progress policy director, at daniel@demandprogress.org, or Sascha Meinrath, X-Lab director and Palmer Chair in Telecommunications at Penn State University, at sascha@psu.edu.

With best regards,

American Civil Liberties Union
American Library Association
Demand Progress
Electronic Frontier Foundation
FreedomWorks
Government Accountability Project
National Security Archive
National Security Counselors
OpenTheGovernment.org
Project On Government Oversight (POGO)
R Street Institute
Restore The Fourth, Inc.
RootsAction.org
X-Lab

cc: Members, House Committee on Oversight and Government Reform
Members, House Permanent Select Committee on Intelligence
Members, House Committee on the Judiciary