



February 28, 2017

The Honorable Richard Burr, Chair
The Honorable Mark Warner, Ranking Member
U.S. Senate Select Committee on Intelligence
211 Hart Senate Office Building
Washington, DC 20510

RE: Nomination hearing for Sen. Dan Coats as Director of National Intelligence

Dear Chairman Burr and Ranking Member Warner:

We write to you regarding the nomination of Sen. Dan Coats for Director of National Intelligence. As the principal officer in charge of the U.S. Intelligence Community, the DNI has significant responsibilities over the safety, security, and privacy of the American people. The DNI should uphold our Constitutional freedoms and continue former Director Clapper's progress on oversight of and transparency regarding the surveillance capabilities of the federal government. These issues are central to EPIC's work and vital to the functioning of our democracy.

The Electronic Privacy Information Center was established in 1994 to focus public attention on emerging privacy and civil liberties issues. EPIC engages in a wide range of public policy and litigation activities. EPIC testified before the 9-11 Commission on "Security and Liberty: Protecting Privacy, Preventing Terrorism."¹

Transparency and Reporting

We commend former DNI Clapper for the progress made on transparency of surveillance programs – under his leadership, the Office of the Director of National Intelligence (ODNI) published important information about the Section 702 program², established an annual

¹ Testimony of EPIC President Marc Rotenberg, *Security and Liberty: Protecting Privacy, Preventing Terrorism*, Hearing Before the National Commission on Terrorist Attacks Upon the United States, United States Senate, Dec. 8, 2003, <https://epic.org/privacy/terrorism/911commtest.pdf>.

² See e.g. Semiannual Assessment of Compliance with Procedures and Guidelines Issued Pursuant to Section 702 of the Foreign Intelligence Surveillance Act, Submitted by the Attorney General and the Director of National Intelligence ("Joint Assessment") (November 2016), *available at* <https://www.dni.gov/files/documents/icotr/15th-702Joint-Assessment-Nov2016-FINAL-REDACTED1517.pdf>.

transparency report³, and engaged civil liberties organizations in the work of the DNI. The Committee should seek assurance from Sen. Coats that the ODNI will continue to improve transparency and oversight of surveillance programs. In addition, the Committee should pay particular attention to two significant problems that require further attention: over classification and cybersecurity threats to our democracy.

Over Classification

Despite improvements on transparency, the problem of over classification remains an issue that thwarts open government. Last year, Director Clapper outlined several initiatives to address this problem: (1) reduce the number of original classification authorities, (2) increase discretionary declassification, (3) create a uniform classification guide, and (4) eliminate the “confidential” designation.⁴ Director Clapper specifically ordered these agencies to review the feasibility of these proposals and respond in a February 2017 update and final report to the Information Security Oversight Office (ISOO) by the end of June 2017. The Committee should seek assurances from Senator Coats that he will continue to promote reform of the government classification system.

As EPIC explained in testimony before the House Judiciary Committee in 2012, declassification is especially important with respect to legal opinions issued by the Foreign Intelligence Surveillance Court (FISC), often referred to as a “secret court.”⁵ Congress recognized in the USA FREEDOM Act that FISC opinions contain important interpretations of law relevant to the privacy of individuals and the oversight of government surveillance programs. The law now requires the DNI, in consultation with the Attorney General, to:

conduct a declassification review of each decision, order, or opinion issued by the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review (as defined in section 601(e)) that includes a significant construction or interpretation of any provision of law [...] and, consistent with that review, make publicly available to the greatest extent practicable each such decision, order, or opinion.⁶

This provision gives the DNI enormous powers over the level of transparency of FISC opinions. The incoming DNI should prioritize both proactive and retroactive declassification of FISC opinions to ensure public oversight of the broad surveillance authority held by the court. Public

³ Press Release, Director of of National Intelligence, ODNI Releases Third Annual Statistical Transparency Report Regarding Use of National Security Authorities (May 2, 2016), *available at* <https://www.dni.gov/index.php/newsroom/press-releases/215-press-releases-2016/1371-odni-releases-third-annual-statistical-transparency-report-regarding-use-of-national-security-authorities>.

⁴ Memorandum for Distribution from James R. Clapper re: Addendum to FY 2017 Fundamental Classification Review, ES 2016-00158, Mar. 26, 2016, <https://fas.org/sgp/othergov/intel/dni-fcgr.pdf>.

⁵ See Testimony of EPIC President Marc Rotenberg, *The FISA Amendments Act of 2008*, Hearing before the House Committee on the Judiciary, U.S. House of Representatives, May 31, 2012, <https://epic.org/privacy/testimony/EPIC-FISA-Amd-Act-Testimony-HJC.pdf>.

⁶ 50 U.S.C. § 1872.

oversight helps ensure that law enforcement resources are appropriately and efficiently used while safeguarding important constitutional privacy interests.

Democracy and Cybersecurity

Russian interference with elections in democratic countries, including the United States, is now a central concern for Congress. In *EPIC v. ODNI*, EPIC is seeking the release of the complete ODNI report on the Russian interference with the 2016 U.S. Presidential Election. A limited, declassified version of the report was published on Jan. 6, 2017.⁷ This report stated that Russia carried out a multi-pronged attack on the 2016 U.S. Presidential Election to “undermine public faith in the US democratic process.” However, the report states that “this version does not include the full supporting information on key elements of the influence campaign.” As EPIC made clear in the case filed recently in federal district court in Washington, DC, “there is an urgent need to make available to the public the Complete ODNI Assessment to fully assess the Russian interference with the 2016 Presidential election and to prevent future attacks in democratic institutions.”⁸

There are upcoming federal elections in Europe. The French national election is scheduled for April 23, 2017. The German national election is September 24, 2017. The Dutch government has already chosen to count all ballots in next month’s election by hand to prevent cyber attack.⁹ Russian attacks on democratic institutions are expected to continue.¹⁰ The U.S. Intelligence community has reportedly shared the classified ODNI report with European governments to help limit Russian interference with their elections.¹¹ The public need to understand Russian efforts to influence democratic elections cannot be overstated. EPIC has recently launched a “Democracy and Cybersecurity” Project to raise public awareness of this crucial issue.¹²

Conclusion

We ask that this letter be entered in the hearing record. EPIC looks forward to working with the Senate Intelligence Committee on these important issues.

Sincerely,

/s/ Marc Rotenberg
Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald
Caitriona Fitzgerald
EPIC Policy Director

⁷ Office of the Dir. of Nat’l Intelligence, *Assessing Russian Activities and Intentions in Recent US Elections* (2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf [hereinafter Declassified ODNI Assessment].

⁸ Complaint at 3, *EPIC v. ODNI*, *supra* note 2.

⁹ Sewell Chan, *Fearful of Hacking, Dutch Will Count Ballots by Hand*, New York Times (Feb. 1, 2017).

¹⁰ Declassified ODNI Assessment, *supra* note 7, at 5.

¹¹ Martin Matishak, *U.S. shares hacking intel with Europe as Russia shifts focus*, POLITICO Pro (Feb. 6, 2017).

¹² *Democracy and Cybersecurity: Preserving Democratic Institutions*, EPIC, <https://epic.org/democracy/>.