

Ash Carter
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Mary Fletcher, Chief
Defense Privacy and Civil Liberties Division
241 18th Street South Suite 101
Arlington, VA 22202

November 4, 2015

Mr. Carter and Ms. Fletcher:

On March 31, 2015 several organizations called on the Department of Defense to: 1) establish a single point of contact to field inquiries and complaints about potential human rights violations, as required by Executive Order 13107; and 2) publish the name and contact information for that point of contact for the public's use. Today, we write again to renew those requests.

Earlier this month, the Court of Justice of the European Union struck down the EU-U.S. Safe Harbor arrangement, emphasizing the lack of remedy for improper processing of personal data. Substantial reform of U.S. surveillance laws and authorities, such as Section 702 of the FISA Amendments Act and Executive Order 12333, will be necessary in order to assure the EU and the rest of the world that U.S. companies are able to adequately respect the privacy of non-U.S. persons.

Appointing a point of contact under EO 13107 will not assuage all of the questions about safe harbor. Nor will it automatically bring U.S. federal agencies in accord with international treaties, like the International Covenant on Civil and Political Rights. However, it is an important first step toward demonstrating that the United States takes seriously its international human rights commitments and obligations.

For more information, please see our initial letter, signed by several noted international civil society, human rights, and technology policy organizations, which is attached here.

Sincerely,

Access Now
Advocacy for Principled Action in
Government
American-Arab Anti-Discrimination
Committee
American Library Association
Bill of Rights Defense Committee
Center for Democracy and Technology
Center for Digital Democracy
Center for Financial Privacy and Human
Rights
Constitutional Alliance
Consumer Action
Consumer Federation of America
Consumer Watchdog

Cyber Privacy Project
Defending Dissent Foundation
Electronic Frontier Foundation
Electronic Privacy Information Center
Fight for the Future
Government Accountability Project
The Identity Project (PapersPlease.org)
New America's Open Technology Institute
OpenTheGovernment.org
Patient Privacy Rights
Privacy Times
Restore the Fourth
TechFreedom

Ash Carter
Secretary of Defense
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Mr. William L. Erwin, Acting Chief
Defense Privacy and Civil Liberties Division
241 18th Street South Suite 101
Arlington, VA 22202

March 31, 2015

Mr. Carter and Mr. Erwin -

The undersigned organizations call on the Department of Defense to establish a single point of contact to field inquiries and complaints about potential human rights violations, as required by Executive Order 13107. Your agency should also publish the name and contact information for that point of contact for the public.

On December 10, 1998, President Clinton signed Executive Order (“EO”) 13107, “Implementation of Human Rights Treaties.” EO 13107 reiterates the requirement that all executive agencies must comply with the legal duties imposed on the United States as a state party to various human rights treaties, including the International Covenant on Civil and Political Rights (“ICCPR”).¹ The U.S. State Department recently reaffirmed its commitment to the implementation of EO 13107.²

To ensure compliance with human rights treaties, EO 13107 mandates, among other things, that the head of each executive agency “shall designate a single contact officer who will be responsible for overall coordination of ... respon[ses] to inquiries, requests for information, and complaints about violations of human rights obligations that fall within its area of responsibility...”³ Complaints that fall within an agency’s area of responsibility must

¹ Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 10, 1998). Executive Orders are legally binding on executive agencies and remain in force during a change of administration. Legal Effectiveness of a Presidential Directive, As Compared to An Executive Order, Op. Off. Legal Counsel (Jan. 29, 2000). Civil society organizations have previously called on the Obama Administration to properly implement EO 13107. *See, e.g.*, Written Submission of the ACLU on Domestic Human Rights Implementation (Aug. 1, 2014) *available at* https://www.aclu.org/sites/default/files/assets/aclusubmissionaugust1consultation_0.pdf. “[T]he Obama Administration has cited EO 13107 as ‘establishing a framework for implementation of human rights obligations by the executive branch agencies.’” HUMAN RIGHTS INSTITUTE, CLOSING THE GAP: THE FEDERAL ROLE IN RESPECTING & ENSURING HUMAN RIGHTS AT THE STATE AND LOCAL LEVEL 19 (2013), *available at* <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/State%20and%20Local%20Shadow%20Report%20%28ecopy%29.pdf>. The UN Human Rights Committee included the question as to whether the U.S. “intends to reinvigorate Executive Order 13107” in its list of issues to raise in relation to the country’s fourth periodic report. List of Issues in Relation to the Fourth Periodic Report of the United States of America (CCPR/C/USA/Q/4 and Corr. 1) (April 29, 2013) *available at* <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsijKy20sgGcLSyqccX0g1nk3FW%2by259hAHCqEMzpdNIQ9sSE6eSLqy1itbTJ2ydz%2bMwU%2bXhqgK4Tthl2nKE6Y0txqfn%2bdrvBdhrty1J0AEm>.

² U.S. Dep’t of State, United States Written Responses to Questions From the United Nations Human Rights Committee Concerning the Fourth Periodic Report (July 3, 2013) *available at* <http://www.state.gov/j/drl/rls/212393.htm>.

³ *See, e.g.*, COMPLAINTS, <http://www.dhs.gov/complaints> (last visited March 3, 2015). The term “Executive Agency” means a “Executive department, a Government corporation, and an independent establishment.” The list of Executive Departments and agencies are defined at 5 U.S.C. §§ 101-105. 5 U.S.C. § 101 provides an exclusive list of Executive Departments. The U.S. government provides a list of all Independent Agencies and

receive a response,⁴ and an Interagency Working Group on Human Rights Treaties (also mandated by the EO) must direct an annual review of non-trivial complaints.⁵

As explained below, these procedural requirements are of great importance to ensuring the United States' compliance with human rights treaties. However, despite the unambiguous responsibility given to designate a contact point, only a single agency, the Department of Homeland Security, has fulfilled its obligation to do so.⁶ By failing to designate a contact point for complaints, federal executive agencies have avoided hearing from individuals in the U.S. and around the world about any failures to protect human rights.

One of the foundational international treaties on human rights, the ICCPR outlines rights that are "derive[d] from the inherent dignity of the human person."⁷ The ICCPR is an essential focal point for establishing international norms for the protection of the fundamental rights and freedoms necessary to ensure a free society, and is binding upon the United States.⁸ An important component of U.S. legal obligations under the ICCPR is the ability for those denied their fundamental rights under the instruments to challenge the denial and obtain a remedy.⁹

Government Corporations. INDEPENDENT AGENCIES AND GOVERNMENT CORPORATIONS, <http://www.usa.gov/Agencies/Federal/Independent.shtml> (last visited February 6, 2015)

⁴ Exec. Order No. 13,107, *supra* note 1, at Sec. 3.

⁵ Exec. Order No. 13,107, *supra* note 1, at Sec. 4(c)(vii); However, "[t]he duties of the Human Rights Treaties Interagency Working Group established in E.O. 13107 [have been] transferred to the PCC on Democracy, Human Rights, and International Operations." NSPD 1 (Feb. 13, 2001), *available at* <http://www.fas.org/irp/offdocs/nspd/nspd-1.htm>. The status of the Working Group is unclear. "[T]here is no publicly available information on the mandate, membership or activities of [the Working Group.]"

<http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/State%20and%20Local%20Shadow%20Report%20%28ecopy%29.pdf> (page 10). Re-establishment of the Working Group is also essential to ensuring proper oversight of human rights obligations. https://www.aclu.org/sites/default/files/assets/aclusubmissionaugust1consultation_0.pdf.

⁶ COMPLAINTS, <http://www.dhs.gov/complaints> (last visited March 3, 2015). The DHS designated the Officer for Civil Rights and Civil Liberties as the single contact officer. Memorandum from Daniel Sutherland to Secretary Chertoff, Sept. 11, 2006, *available at* <http://papersplease.org/wp/wp-content/uploads/2011/09/chertoff-EO13107-11sep2006.pdf>

⁷ International Convention on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

⁸ Guidance on a more detailed application of some of the broad principles found in the ICCPR is found in the International Principles on the Application of Human Rights to Communications Surveillance ("the Principles"), which have been grounded in well-established international laws and policies. The Principles have been endorsed by over 400 civil society organizations globally. International Principles on the Application of Human Rights to Communications Surveillance, *available at* <https://necessaryandproportionate.org/>.

⁹ In contrast to most other state parties of the ICCPR, the United States maintains that the Covenant does not obligate it to respect the rights of those not located within its territory. One such example is the chasm between the protections offered to U.S. persons with respect to electronic surveillance as compared to non-U.S. persons. *See, e.g.*, NATIONAL SECURITY AGENCY, UNITED STATES SIGNALS INTELLIGENCE DIRECTIVE 18 (2011) *available at* <http://www.dni.gov/files/documents/1118/CLEANEDFinal%20USSID%20SP0018.pdf>. This interpretation of U.S. obligations has been criticized as under inclusive by various authorities, including the

When the U.S. ratified the ICCPR it included a reservation describing the treaty as non-self-executing, which the government argues to mean that without legislation individuals cannot bring a formal challenge in U.S. courts against the government's failure to respect its provisions. Accordingly, the informal process established by EO 13107 is essential to ensuring that individuals have the ability to assert the fundamental rights set out in the ICCPR.¹⁰ However, so far heads of agencies have unlawfully avoided their responsibility in this respect, to the detriment of individuals.

As a matter of law, your department is required to establish a point of contact to process complaints about potential human rights violations.¹¹ We now call on you to fulfill your legal obligations by establishing this point of contact and publishing the same in order to ensure that individuals have a path toward recognition of the U.S. failure to protect their rights.

Human Rights Committee and a Special Rapporteur to the General Assembly of the UN. *Compare* Harold Koh, Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights, Op. Off. Legal Counsel (Oct. 19, 2010) *available at* <https://s3.amazonaws.com/s3.documentcloud.org/documents/1053853/state-department-iccpr-memo.pdf> (outlining the current US policy of interpreting "individuals within its territory and subject to its jurisdiction" as a single group), *and* Charlie Savage, *U.S. Seems Unlikely to Accept That Rights Treaty Applies to Its Actions Abroad*, N.Y. TIMES, March 6, 2014, *available at* <http://www.nytimes.com/2014/03/07/world/us-seems-unlikely-to-accept-that-rights-treaty-applies-to-its-actions-abroad.html> (stating that the agencies had "unanimously" decided that the current interpretation is correct), *with* UN Human Rights Committee (HRC), Concluding observations on the fourth periodic report of the United States of America, April 23, 2014, CCPR/C/USA/CO/4, *available at* <http://www.refworld.org/docid/5374afcd4.html> (HRC observations that US obligated to acknowledge extraterritorial application of ICCPR in certain circumstances), *and* General Assembly, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Sept. 23, 2014, A/69/397, *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/545/19/PDF/N1454519.pdf?OpenElement> (arguing that extraterritorial surveillance may be subject to territorial restrictions and that asymmetric protections between nationals and non-nationals violates the principle non-discrimination found in Article 26).

¹⁰ The First Optional Protocol to the ICCPR provides an individual complaint mechanism for treaty violations, but the U.S. has not ratified the Protocol. Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 302, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx>; *see* OPTIONAL PROTOCOL ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en (last visited Feb. 10, 2015).

¹¹ We believe a properly processed complaint is reviewed and investigated by agency officials, and some responsive action is taken within a reasonable period of time. The number of complaints received should be reported annually. For a similar process, see the process established by the Department of Homeland Security Privacy Office under Section 803 of the 9/11 Commission Act of 2007. *See* DEP'T OF HOMELAND SEC., FIRST QUARTER FISCAL YEAR 2014 REPORT TO CONGRESS (2014) *available at* http://www.dhs.gov/sites/default/files/publications/Section%20803%20Report%20Q1%202014-4-30-14_0.pdf.

If you have any questions or would like to further discuss the details of this letter, you can contact Amie Stepanovich at Access, and she will communicate with the other signatories.

Sincerely,

Access

Advocacy for Principled Action in Government

American-Arab Anti-Discrimination Committee

American Library Association

Center for Democracy and Technology

Center for Financial Privacy and Human Rights

Constitutional Alliance

Cyber Privacy Project

Electronic Frontier Foundation

Government Accountability Project

The Identity Project (PapersPlease.org)

International Modern Media Institute (IS)

New America's Open Technology Institute

Open Net Korea

OpenTheGovernment.org

Patient Privacy Rights

PEN American Center

Privacy Journal

Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC)

Web Foundation

Zimbabwe Human Rights NGO Forum