

May 6th, 2020

The Honorable William P. Barr  
Attorney General of the United States  
Department of Justice  
Washington, D.C. 20530

The Honorable Richard A. Grenell  
Acting Director of National Intelligence  
Office of the Director of National  
Intelligence  
Washington, DC 20511

Re: Federal Agency Activity After Expiration of FISA Authorities

Dear Attorney General William Barr and Acting Director Richard Grenell,

The undersigned organizations write to ask you to confirm that federal agencies have ended the surveillance activities authorized under the three expired provisions of the Foreign Intelligence Surveillance Act (FISA), including surveillance of records that would otherwise be governed by Section 215 of the USA PATRIOT Act. Our bipartisan coalition is thankful for your work on behalf of our nation's security and believes it is even more critical during this time of crisis to protect the constitutional rights of all people in the United States.

As you are aware, Congress had several years, and then a 90-day extension, to reauthorize the expired FISA authorities. Congress did not reauthorize them, however, because the Senate has chosen to consider additional privacy protections and the House has so far declined to pass another short-term, "clean" reauthorization. We applaud their choice to thoughtfully craft reforms before extending these authorities. National security and the constitutional rights of all Americans are not topics that should be hastily considered in pursuit of a legislative compromise.

It has now been over 45 days since these authorities expired. No public information has been released by any relevant federal agency or official to announce the necessary plans to suspend any Section 215 surveillance or other surveillance activities that are now lacking Congressional authorization. Although the law provides for limited use of these authorities beyond expiration for ongoing investigations and conduct that occurred

before expiration, the American public deserves to know how the government is responding to this authorization sunset and implementing this limited exception to lawfully continue surveillance activities.<sup>1</sup>

Additionally, Congressional leadership and the American public deserve to know, and must know before reauthorizing these authorities, how the government has interpreted limits on executive authority to conduct metadata surveillance of people in the United States. Recent comments from Senate Select Committee on Intelligence Chairman Richard Burr assert that, at least in the absence of the expired FISA provisions, federal agencies have the authority to conduct metadata surveillance “without Congress's permission, with no guardrails.”<sup>2</sup>

Federal agencies have previously utilized questionable interpretations of executive power, similar to this one, in order to justify a variety of surveillance programs that were kept secret from Congress and the courts.<sup>3</sup> In some cases, the result was mass surveillance of innocent people in the United States. Just last year, the Department of Justice Inspector General concluded that one specific bulk surveillance program had been initiated without sufficient legal review.<sup>4</sup> The Drug Enforcement Administration nonetheless operated that program from 1992 – 2013, ultimately ending it before the public first learned about it in 2015.<sup>5</sup> Before Congress considers once again empowering the government to obtain records under Section 215, the public must first know if the executive branch believes it can obtain such records on people in the United States *without* Section 215, and, if so, subject to what limits.

The rights of all people in the United States depend on Congress ensuring the government is adhering to federal law and the Constitution. We do not believe these legal interpretations reflect the official positions of the Trump Administration, the majority of Congress, or even the majority of attorneys who work for the relevant federal agencies.

---

<sup>1</sup> 50 U.S.C. § 1861; *See also* USA PATRIOT Improvement and Reauthorization Act of 2005, H.R. 3199, 109<sup>th</sup> Cong. § 102 (2006) (providing exception to sunset of authorization “with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect”); *See generally* 50 U.S.C. § 1805 and note.

<sup>2</sup> 166 Cong. Rec. S1726, 48 (daily ed. March 12, 2020) (statement of Sen. Burr).

<sup>3</sup> Office of the Inspector General, *A Review of the Drug Enforcement Administration's Use of Administrative Subpoenas to Collect or Exploit Bulk Data*, Department of Justice (March 2019), <https://oig.justice.gov/reports/2019/01901.pdf>; Glenn Fine, et al., *Report on the President's Surveillance Program*, Department of Justice (July 10, 2009), <https://oig.justice.gov/reports/2015/PSP-09-18-15-full.pdf>; *See also* Brad Heath, *Justice under AG Barr began vast surveillance program without legal review – in 1992, inspector general finds*, USA Today (March 28, 2019), <https://www.usatoday.com/story/news/politics/2019/03/28/review-finds-phone-data-drag-net-dea-doj-began-without-legal-review/3299438002/>; Brad Heath, *U.S. secretly tracked billions of calls for decades*, USA Today (April 8, 2015), <https://www.usatoday.com/story/news/2015/04/07/dea-bulk-telephone-surveillance-operation/70808616/>.

<sup>4</sup> Office of Inspector General, *supra* note 3; Heath, *supra* note 3.

<sup>5</sup> Office of Inspector General, *supra* note 3.

Yet these unsupported legal theories have a history of advancing during times of crisis, like the nation is experiencing today. Given the uncertainty many Americans are feeling on account of COVID-19 and heightened potential for violations of the rights of people in the United States, it is even more imperative that our federal agencies provide assurance they are not undertaking activities that would violate these rights.

**We respectfully request that your agencies publicly disclose the procedures being implemented to end the use of the expired surveillance authorities under the Foreign Intelligence Surveillance Act and any efforts to utilize other legal authorities, like Executive Order 12333, to justify continued operation of the same or similar surveillance activities.**

Thank you again for your commitment to ensuring the safety of all Americans during these uncertain times. We look forward to hearing confirmation from your offices that federal agencies are complying with this sunset of authorization and will not be using questionable legal interpretations to justify the continued operation of these or similar programs. For more information please contact Jeremiah Mosteller of Due Process Institute at [jeremiah@idueprocess.com](mailto:jeremiah@idueprocess.com) and Sean Vitka of Demand Progress at [sean@demandprogress.org](mailto:sean@demandprogress.org).

Sincerely,

Defending Rights & Dissent

Demand Progress

Due Process Institute

FreedomWorks

CC: Senator Lindsey Graham  
Senator Dianne Feinstein  
Representative Jerrold Nadler  
Representative Jim Jordan