

May 7th, 2020

The Honorable Lindsey Graham
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20515

The Honorable Dianne Feinstein
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20515

The Honorable Jerrold Nadler
Committee on the Judiciary
U.S. House
Washington, DC 20515

The Honorable Jim Jordan
Committee on the Judiciary
U.S. House
Washington, DC 20515

Re: Federal Agency Activity After Expiration of FISA Authorities

Dear Senator Graham, Senator Feinstein, Representative Nadler, and Representative Jordan:

The undersigned organizations write to request your assistance in securing confirmation 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. As you are aware, Congress had years, and then a 90-day extension, to carefully craft vital bipartisan reforms to surveillance authorized by the Foreign Intelligence Surveillance Act. The House chose to advance a compromise package of reforms in the USA FREEDOM Reauthorization Act. This legislation fails to address the growing number of well-documented FISA abuses and to meaningfully improve protections for people in the United States

We applaud the Senate for not hastily advancing this package and standing up against an effort to prevent any member of Congress from casting their vote for serious FISA reform. National security and our federal surveillance programs deserve thoughtful consideration. The increasing number of publicly known issues with ongoing national security surveillance demands it because of the serious risk posed to our constitutional rights.

For example, just weeks after the Senate passed its 77-day reauthorization of the expiring authorities, Inspector General Horowitz revealed that a similar pattern of unsubstantiated and inaccurate claims used to support the surveillance of Carter Page

was present across a sampling of 29 other applications.¹ This revelation – that the government is systematically failing to follow its own procedures to ensure the accuracy of FISA applications – is a severe indictment of the long-standing reliance on federal agencies to protect the rights of people in the United States through internal oversight. It also adds additional urgency for reforms that protect our rights and improve independent oversight of government surveillance programs.

Inaction by the House on the 77-day extension unanimously passed by the Senate has now left these programs unauthorized for over 45 days and further House action is not anticipated in the near future. However, no relevant federal agency has announced 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, the government has a notorious history of abusing its surveillance powers – especially Section 215.² The public deserves to know how the government is operationalizing this sunset and implementing this exception, for instance to ensure that the government is not using the latter as an umbrella for broad surveillance of unrelated activities.

Additionally, both Congress and the public need more information about a claim by Senator Richard Burr, Chairman of the Senate Select Committee on Intelligence. On March 12th, he argued on the Senate floor that in the absence of the expired FISA provisions, federal agencies have the authority to conduct metadata surveillance “without Congress's permission, with no guardrails” under Executive Order 12333.³ This constitutionally questionable claim is similar to those used to justify the National Security Agency’s bulk collection of telephone metadata and the Stellarwind program that preceded it - both of which were hidden from Congress and the public for years.⁴

We know that this legal interpretation is shared by Attorney General Barr because in 1992 he personally approved the Drug Enforcement Administration’s bulk metadata dragnet – the first publicly known attempt by federal agencies to spy on Americans’ metadata in bulk.⁵ That program stayed secret for over 20 years, and just last year an

¹ Michael Horowitz, *Management Advisory Memorandum for the Director of the Federal Bureau of Investigation Regarding the Execution of Woods Procedures for Applications Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons*, Office of the Inspector General (March 2020), <https://oig.justice.gov/reports/2020/a20047.pdf>.

²² 50 U.S.C. § 1861; § 1862; § 1863 *See also* USA PATRIOT Improvement and Reauthorization Act of 2005, H.R. 3199, 109th 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.

³ 166 Cong. Rec. S1726, 48 (daily ed. March 12, 2020) (statement of Sen. Burr)

⁴ 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 American Civil Liberties Union v. Clapper*, 785 F.3d 787 (2015) ([finding that the NSA’s telephone metadata program exceeded the authority provided by FISA and violated the First and Fourth Amendments](https://www.courtsandtribunals.com/2015/07/10/american-civil-liberties-union-v-clapper/)).

⁵ 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/o1901.pdf>; *See also* Ron Wyden, *Wyden Statement on Claims The*

Inspector General report concluded Barr approved the program without legal review.⁶ Given that the Drug Enforcement Administration also pioneered the use of “parallel construction” to conceal the use of intelligence surveillance at trial, the public currently has no way of measuring the impact of that program.⁷

We also know that the Department of Justice once endorsed a legal theory similar to that expressed by Senator Burr. Specifically, the Office of Legal Counsel concluded that the Foreign Intelligence Surveillance Act “cannot restrict the president's ability to engage in warrantless searches that protect the national security,” paving the way for Stellarwind.⁸ That underlying Office of Legal Counsel opinion was found to be so factually and procedurally flawed that Department of Justice (DOJ) and Federal Bureau of Investigation (FBI) officials subsequently threatened to resign.⁹ The DOJ ultimately renounced that opinion, saying that it and other related opinions “should not be relied upon or treated as authoritative for any purpose.”¹⁰

We do not believe these theories 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. Indeed, much of what we know about these programs comes from senior employees who blew the whistle on their own agency’s lawlessness. 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.

The privacy of all people in the United States and the Fourth Amendment itself depend on Congress ensuring the government is adhering to the law and the Constitution, especially in an area that is so uniquely shielded from judicial review. Therefore, we join you in seeking greater transparency. Before concluding that these frequently misused authorities are in fact inactive, we must know to what extent the government is exempting investigations from the sunset. Before Congress considers enacting legislation that controls how the records of hundreds of thousands of people in the United States are

President Can Spy on Americans Without Congressional Approval, Senator Ron Wyden (March 12, 2020), <https://www.wyden.senate.gov/news/press-releases/wyden-statement-on-claims-the-president-can-spy-on-americans-without-congressional-approval>.

⁶ Office of Inspector General, *supra* note 5; 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-dragnet-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/>;

⁷ Office of Inspector General, *supra* note 5.

⁸ Fine, *supra* note 4.

⁹ Fine, *supra* note 4.

¹⁰ Office of Legal Counsel, *Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001*, Department of Justice (January 15, 2009), available at <https://www.justice.gov/sites/default/files/opa/legacy/2009/03/09/memostatusolcopinions01152009.pdf>.

collected, it must know whether the government believes it has the inherent authority to collect the same records on hundreds of millions of us.

We respectfully request your assistance in securing confirmation from the Federal Bureau of Investigation, Department of Justice, and National Security Agency, that procedures have been implemented to end the use of these authorities and that the government is not conducting mass metadata surveillance on people in the United States under any claimed authority.

We are encouraged by the number of leaders in Washington calling for positive reforms of the FISA process and look forward to working under your leadership to make them a reality. For more information about these important issues please contact Jeremiah Mosteller of the Due Process Institute at jeremiah@idueprocess.com and Sean Vitka of Demand Progress at sean@demandprogress.org.

Sincerely,

Defending Rights & Dissent

Demand Progress

Due Process Institute

FreedomWorks

Attachment: Letter to Department of Justice and Office of the Director of National Intelligence requesting voluntary publication of the requested information.

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.¹

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.”²

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.³ 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.⁴ The Drug Enforcement Administration nonetheless operated that program from 1992 – 2013, ultimately ending it before the public first learned about it in 2015.⁵ 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.

¹ 50 U.S.C. § 1861; *See also* USA PATRIOT Improvement and Reauthorization Act of 2005, H.R. 3199, 109th 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.

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

³ 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-dragnet-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/>.

⁴ Office of Inspector General, *supra* note 3; Heath, *supra* note 3.

⁵ 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 and Sean Vitka of Demand Progress at sean@demandprogress.org.

Sincerely,

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