

October 26, 2020

**Additional background on FOIA request from former Sen. Mark Udall,
former Rep. Bob Goodlatte, Demand Progress Education Fund, and
the Project for Privacy & Surveillance Accountability:**

On March 15, 2020, three parts of the USA PATRIOT Act expired, including the [constantly abused Section 215](#), which in 2013 [Edward Snowden revealed](#) to be the secret basis of the NSA's [illegal bulk telephony metadata program](#). The Second Circuit Court of Appeals concluded that program [was illegal](#) and Congress subsequently outlawed it in 2015, but its successor program also had to be shut down after it also proved to be [overly broad and wasteful](#).

The authorities, including Section 215, sunsetted after then-Chairman of the Senate Intelligence Committee Richard Burr (R-NC) said he would "[let us go dark](#)" rather than allow privacy champions like Sens. Patrick Leahy (D-VT) and Mike Lee (R-UT) to offer broadly supported privacy amendments, for instance one specifically designed to protect religious groups and the press. Speaker Pelosi subsequently [rejected a short-term reauthorization](#) of the authorities in an apparent attempt to stop votes on this and other reforms, cementing the sunset.

In the absence of Section 215, [Burr claimed on the Senate floor](#) that the government "can do all of this, without Congress's permission, with no guardrails," pursuant to inherent executive authority, specifically citing Executive Order 12333. Congress and the public must know if this was true and whether it was an effort to signal Congressional acquiescence to such surveillance, which could strengthen the government's possible claims of inherent executive authority.

The last time the government claimed inherent executive authority to conduct surveillance like what is at stake here, those claims were kept secret for years ([in the Director of the NSA's safe](#)) until whistleblowers revealed the illegal surveillance established by them. Nonetheless, the relevant legal arguments were never fully released, and may directly relate to the government's possible continued domestic surveillance since the sunset of Section 215. The FOIA request identifies similar specific documents that must be released.

The government relied on secret claims of inherent executive authority to start the most staggeringly illegal and unconstitutional surveillance program in modern history, Stellarwind (a.k.a. Stellar Wind), which operated at least from 2001-2006. Similarly, in 1992, during his first tenure as Attorney General, William Barr personally authorized the "[precursor](#)" to both Stellarwind and the subsequent bulk telephony metadata program revealed by Snowden. Barr authorized that illegal bulk surveillance program [without legal review](#) under the Drug Enforcement Administration (DEA), even though it was "the government's first known effort to gather records on Americans in bulk." *That* program

operated until 2013, was not revealed [until 2015](#), and because the DEA pioneered the use of [parallel construction](#) to stop defendants from challenging the constitutionality of such surveillance, the public has no way to assess the legality of the surveillance or the number of people it imprisoned.

In May, 2020, Chairman of the House Intelligence Committee Adam Schiff (D-CA) [sabotaged an amendment](#) to Section 215 that would have prohibited its use for the warrantless collection of internet browsing and search histories. In the words of Senator Wyden (D-OR), who serves on the Senate Intelligence Committee, when Schiff cut immigrants out of the protection, he also allowed for the “[dragnet collection of online activity](#)” of Americans. Schiff has refused to acknowledge whether his altered statutory language permits dragnet surveillance of online activity.