

Congress of the United States
Washington, DC 20515

September 24, 2020

The Honorable William P. Barr
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

The Honorable John Ratcliffe
Director of National Intelligence
Office of the Director of National Intelligence
Washington, D.C. 20511

Dear Attorney General Barr and Director Ratcliffe,

On March 15, 2020, three Foreign Intelligence Surveillance Act (FISA) provisions expired: the business records (known as section 215), roving wiretap, and lone wolf authorities. Despite the expiration of these authorities, we are concerned that the administration believes it has the inherent authority to surveil the American people without any Congressional authorization.

During the reauthorization debate surrounding these provisions, Senator Burr, then Chairman of the Senate Select Committee on Intelligence, stated that under Executive Order 12333, the executive branch could continue to engage in mass records surveillance of people in the United States without Congressional approval. A similar interpretation of inherent executive power was put forward in classified legal memoranda to justify the illegal 2001 Stellarwind program. Under Stellarwind, the executive branch secretly conducted warrantless surveillance of communications content, as well as mass collection of communications metadata. Stellarwind operated in direct contradiction to FISA and the Constitution for years. With the expiration of Section 215, we are concerned that the executive branch may, once again, be using questionable legal theories of executive authority to justify the illegal surveillance of the American people.

The American people should be greatly concerned with this possibility, given the long and recent history of the intelligence community's failure to respect the limits established by FISA. Under Section 215, the intelligence community has repeatedly violated limits on collection, retention, and sharing of American citizens' personal information, including their credit card information, location data, and call detail records. Recent opinions released by the FISA Court show that the FBI has frequently violated the court-ordered limits on searching through data collected under Section 702 of FISA for the communications of Americans. Further, Inspector General Horowitz's recent reports have outlined rampant disregard for the government's own privacy safeguards when Americans are targeted for electronic surveillance under FISA Title I. In light

of this record, we are concerned about the state of every American's Fourth Amendment right to privacy if the administration is operating any surveillance on American citizens without express Congressional authorization and oversight.

To confirm that the administration is not illegally surveilling the American people, we write to request a clear and public explanation of the guidance issued to relevant federal agencies to ensure that surveillance activities under the expired USA FREEDOM authorities have ended, and we request the administration's interpretation of its inherent surveillance authorities. We ask that you respond to the following questions by October 6, 2020:

- 1) Is any federal agency using Executive Order 12333 or any other claimed inherent surveillance powers to acquire records or communications for which it previously would have sought a court order under one of the three expired authorities? If so, please provide all operative legal opinions that conclude this would be lawful.
- 2) Please provide documentation of all guidance issued to relevant agencies regarding any continued authority to collect records or communications that previously would have been obtained under one of the three expired authorities.
- 3) Did you prepare or distribute guidance to agents or field offices regarding authorities they should rely on in lieu of the expired Patriot Act provisions? If so, what authorities did such guidance recommend as alternatives? In addition, please provide a copy of such guidance.
- 4) In the federal government's view, what are the inherent or explicit legal authorities that authorize the domestic collection of internet search history and website browsing information? Please specifically identify each such authority.
- 5) Does the government understand Section 215, prior to its expiration on March 15, 2020, to authorize the collection of internet search history and website browsing information (regardless of whether such collection occurred)? If so, please provide all relevant legal opinions supporting this interpretation.
- 6) Does the government understand Section 215, prior to its expiration on March 15, 2020, to have authorized the collection of all visitors to a given IP address or similar identifier (regardless of whether such collection occurred)? If so, please provide all relevant legal opinions supporting this interpretation. Would identifiers acquired under such dragnet surveillance be included in transparency reporting covering "unique identifiers used to communicate information"? Do you currently interpret such transparency provisions requiring the disclosure of unique identifiers in business records that are not communication records?
- 7) Does the government treat domestic information (including information originating from a US-based area code or IP address) and identifiers as presumptively foreign or as presumptively not belonging to a United States person? Is this treatment limited to Section 215, or is a similar legal theory relied upon for the purposes of records acquired under claimed inherent executive authority? Please explain to what extent domestic records are treated differently than those originating outside of the United States.

- 8) When engaging in surveillance under Section 215 and other authorities, does the government presumptively treat information and identifiers as foreign, absent specific facts that would suggest they are associated with a non-US person?
- 9) Does the government claim inherent executive power to purchase records that would require a court order to compel the production of records under Section 215?
- 10) Has the government argued before any court, or has the executive branch independently concluded, that it has inherent authority, in the absence of an express statutory prohibition, to acquire domestic records? If so, what limits has the government argued exist relative to that power, for instance, regarding the volume of records acquired or the number of people impacted?
- 11) Regarding the domestic deployment of advanced surveillance technologies, does the government ground any such practices on its administrative subpoena powers, such as the one codified in 21 U.S.C. § 876(a)?
- 12) To what extent has the executive branch concluded that the FBI may rely on administrative subpoena authorities in lieu of Section 215? Does the DOJ continue to collect records under Section 215 orders issued prior to the expiration? If so, what types of records has the agency collected; how many records have been collected, and how many individual accounts have been implicated, and how many 215 orders issued prior to expiration continue to be relied on?
- 13) Has the DOJ issued more or more expansive National Security Letters since the expiration of the authorities?
- a) What specific categories of records does the government believe it can demand through a National Security Letter?
- b) Is the November 5, 2008, OLC opinion - finding that an NSL may only be issued for the name, address, length of service, and local and long-distance toll billing records- still in effect? If not, what has it been replaced with?
- 14) Has the agency increased reliance on the FISA Pen Register and Trap and Trace authority since the expiration of the Patriot Act authorities?
- 15) Does the DOJ seek to obtain U.S.-person internet browsing history—specifically, URLs—through:
- a) Section 2703(d) orders;
- b) Subpoenas (including grand jury subpoenas);
- c) NSLs; and/or
- d) PR/TT orders?

Thank you for your attention to this important matter.

Sincerely,

Warren Davidson
Member of Congress

Pramila Jayapal
Member of Congress

Andy Biggs
Member of Congress

Zoe Lofgren
Member of Congress

Matt Gaetz
Member of Congress

Peter A. DeFazio
Member of Congress

Raúl M. Grijalva
Member of Congress

Deb Haaland
Member of Congress

Ro Khanna
Member of Congress

Barbara Lee
Member of Congress

Ted W. Lieu
Member of Congress

Alan Lowenthal
Member of Congress

James P. McGovern
Member of Congress

Ralph Norman
Member of Congress

Eleanor Holmes Norton
Member of Congress

Earl Blumenauer
Member of Congress

Scott Perry
Member of Congress

Mark Pocan
Member of Congress

Mary Gay Scanlon
Member of Congress

Jason Smith
Member of Congress

Bonnie Watson Coleman
Member of Congress

Peter Welch
Member of Congress

Ed Case
Member of Congress

Paul A. Gosar, D.D.S.
Member of Congress

H. Morgan Griffith
Member of Congress

Russ Fulcher
Member of Congress

Tulsi Gabbard
Member of Congress

Jared Huffman
Member of Congress

Suzan DelBene
Member of Congress

Grace Meng
Member of Congress

Jamie Raskin
Member of Congress

Jesús G. "Chuy" García
Member of Congress

Michael F.Q. San Nicolas
Member of Congress

Alex X. Mooney
Member of Congress

Mo Brooks
Member of Congress

Jan Schakowsky
Member of Congress

Ilhan Omar
Member of Congress

Nydia M. Velázquez
Member of Congress

Ben Cline
Member of Congress