

# United States Senate

WASHINGTON, DC 20510

July 21, 2020

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

The Honorable John Ratcliffe  
Director of National Intelligence  
Office of the Director of National Intelligence  
Washington, DC 20511

Dear Attorney General Barr and Director Ratcliffe:

We write to confirm that federal agencies have terminated surveillance operations authorized by now-expired Foreign Intelligence Surveillance Act (FISA) provisions under the USA FREEDOM Act.<sup>1</sup> With the expiration of these statutory authorities—commonly referred to as lone wolf, roving wiretap, and Section 215 authorities—the executive branch is now limited to conducting relevant surveillance under pre-USA PATRIOT Act authorities.

At times the executive branch has tenuously relied on Executive Order 12333, issued in 1981, to conduct surveillance operations wholly independent of any statutory authorization. This poses an extremely concerning and constitutionally suspect scenario where, as is the case now, Congress' duly-passed statutory surveillance authorities have expired, but the executive branch may be secretly relying on its alleged inherent power to continue its intelligence collection efforts without congressional authorization and outside of the statutory framework. This would constitute a system of surveillance with no congressional oversight potentially resulting in programmatic Fourth Amendment violations at tremendous scale. This is especially concerning on the heels of IG Horowitz's report highlighting consistent errors in approved FISA warrants.

We strongly believe that such reliance on Executive Order 12333 would be plainly illegal.

Government agencies have further relied on faulty interpretations of federal statutes to authorize or continue surveillance. For example, the Drug Enforcement Administration used its general subpoena power<sup>2</sup> to collect bulk telephone call records from the early 1990s to 2013—without an appropriate legal review. As explained by a 2019 Department of Justice Inspector General report into the activity, “[s]everal published court decisions have clearly suggested potential challenges

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<sup>1</sup> Expired authorities include those authorized in Section 102(b)(1) of the USA PATRIOT Improvement and Reauthorization Act of 2005 and Section 6001(b)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004.

<sup>2</sup> Under 21 U.S.C. § 876(a).

to the validity of the DEA's use of its statutory subpoena power in this expansive, non-targeted manner."<sup>3</sup> The government's similar reliance on secret legal interpretations of Section 215 reflects a pattern of obscuring the true contours of the executive's surveillance activities.

Congress and the American people have a right to know if this or any other administration is spying on people in the United States outside of express congressional approval, with no or diminished guardrails. We ask that you respond to the following by August 7, 2020:

1. Provide documentation of the guidance issued to relevant federal agencies and procedures enacted to ensure that surveillance activities under the expired USA FREEDOM authorities have halted.
  - a. Please detail whether and how such guidance distinguishes among investigations that were ongoing when authorities lapsed on March 15, 2020; investigations into conduct that occurred before the lapse in authorities, including whether such agencies may add targets or additional identifiers in enterprise investigations that predate the lapse; and enterprise investigations into conduct that occurred before the lapse.
2. Provide a detailed explanation of this administration's interpretation of Executive Order 12333 in terms of any claimed inherent surveillance powers.
  - a. Please explain whether the Department of Justice considers domestic records surveillance and surveillance involving records collection from domestic records holders lawful when conducted in the absence of statutory authority.
3. Provide a detailed explanation of any other authority that this administration believes grants it inherent surveillance powers.
4. Confirm whether any federal agencies or investigations are relying on Executive Order 12333 or other claimed inherent surveillance powers to conduct surveillance in lieu of expired authorities under the USA FREEDOM Act.
5. On March 11, 2004, the executive branch secretly claimed the power to surveil records in bulk—in particular telephone and Internet metadata. The executive branch claimed that executive authority “displace[s]” FISA when the two conflict; and that the government may presumptively treat records as foreign unless a “party to such communication is known to be a citizen of the United States.” Explain which, if any, of these legal theories are relied upon as the basis, in whole or in part, for any ongoing surveillance programs.
6. Provide a detailed explanation of the extent to which the government is purchasing or may purchase information that would require a court order to acquire under Section 215 or any other expired USA FREEDOM authority.

To be clear, we support reauthorizing the expired USA FREEDOM authorities. After our amendment to strengthen the amici process and improve the disclosure of exculpatory evidence was approved in the Senate, we both voted for H.R. 6172, the USA FREEDOM Reauthorization Act of 2020. That legislation, with our amendment included, passed the Senate by an overwhelming vote of 80-16.

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<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/o1901.pdf>.

But the rights of all Americans depend on their government exercising its power responsibly, adhering to the rule of law, and upholding its duty to act transparently. And any surveillance conducted in the absence of statutory authorities and congressional oversight would be extraordinarily concerning and illegal.

Thank you for your attention to this matter. If you have any questions, or if any of the above responses involve classified information that must be transmitted in a secure manner, please contact [REDACTED] with Senator Leahy's staff at [REDACTED] or [REDACTED] with Senator Lee's staff at [REDACTED].

Sincerely,



Patrick Leahy  
United States Senator



Mike Lee  
United States Senator