

August 5, 2020

Speaker Pelosi, Leader McCarthy, Majority Leader McConnell, Leader Schumer, Chairman Nadler, Ranking Member Jordan, Chairman Graham, and Ranking Member Feinstein:

The undersigned organizations write to alert you to our urgent concerns about possible unauthorized dragnet surveillance of people in the United States, based on alarming statements and actions by leaders of the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence.

On March 15, 2020, three Foreign Intelligence Surveillance Act (FISA) authorities expired — specifically the lone wolf, roving wiretap, and business records authorities.<sup>1</sup> The latter, commonly known as Section 215 of the PATRIOT Act, has been repeatedly abused by the government to conduct illegal surveillance of millions of Americans.<sup>2</sup>

Throughout the 2020 debate in Congress about whether and how to reauthorize these authorities, activity by the House and Senate intelligence committees has spurred critical questions as to what surveillance of people in the United States occurred under Section 215 and may still be occurring despite the sunset of these authorities, on the basis of secret claims of inherent executive power or through the misuse of other authorities.

Senators Patrick Leahy and Mike Lee asked several critical questions in a July 21 letter to Attorney General Barr and Director of National Intelligence Ratcliffe.<sup>3</sup> We endorse their questions and agree that clear, publicly available answers are necessary. Without such answers, Congress cannot know if it is unknowingly consenting to, for instance, dragnet surveillance of Americans, or if warrantless dragnet surveillance is already occurring. Congress and the public have a fundamental right to know what forms of surveillance are operating, and any and all legal umbrellas under which each program is operating.

A detailed timeline of the reauthorization debate is hereto appended because it contextualizes the following two particularly salient exchanges — which underscore the urgent need for answers to Senators Leahy and Lee’s questions as well as the need for clarity regarding which surveillance practices the government may continue to justify under alternate legal theories:

1. In an effort to prevent votes on amendments to the USA FREEDOM Reauthorization Act in the Senate, then-Chairman of the Senate Select Committee on Intelligence Richard Burr claimed that in the absence of the expired authorities, the President “can do all of this, without Congress’s

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<sup>1</sup> 50 U.S.C. § 1861; § 1862; § 1863 See also USA PATRIOT Improvement and Reauthorization Act of 2005, H.R. 3199, 109th Cong. § 102 (2006).

<sup>2</sup> Demand Progress Education Fund and FreedomWorks Foundation, *Section 215: A Brief History of Violations*, Demand Progress and FreedomWorks (September 2019), <https://www.section215.org/section-215-history-violations>.

<sup>3</sup> Letter from Senator Patrick Leahy and Senator Mike Lee to Attorney General William Barr and Director of National Intelligence John Ratcliffe (July 21, 2020), available at [https://www.leahy.senate.gov/imo/media/doc/Leahy\\_Lee-Letter\\_to\\_Barr\\_and\\_Ratcliffe\\_re\\_FISA-072120.pdf](https://www.leahy.senate.gov/imo/media/doc/Leahy_Lee-Letter_to_Barr_and_Ratcliffe_re_FISA-072120.pdf).

permission, with no guardrails [...] that authority exists” under claimed inherent executive authority.<sup>4</sup> This is a remarkably sweeping assertion that provides for illegal and even unconstitutional surveillance, including the collection of literally all of the information that companies’ growing databases hold about people in the United States.

2. Subsequently, Chairman of the House Permanent Select Committee on Intelligence Schiff told *The New York Times* that despite the plain language of an amendment that ostensibly would have prohibited the use of Section 215 for the warrantless surveillance of United States persons’ internet browsing and search histories, the amendment would not, in fact, accomplish that goal.<sup>5</sup> The amendment Chairman Schiff was discussing with the *Times* was, on its surface, a slightly modified version of the Daines-Wyden amendment, which had just failed the Senate while securing 59 votes. Directly responding to Schiff’s interpretation of the modification, Senator Wyden told the *Times*: “It is now clear that there is no agreement with the House Intelligence Committee to enact true protections for Americans’ rights against dragnet collection of online activity.”<sup>6</sup>

Senator Burr’s comments during the first exchange share disturbing similarities to justifications for two precursor programs: an unlawful Drug Enforcement Administration bulk collection program that began in 1992, and operated for over twenty years before the public learned of it; and Stellarwind, initiated in 2001.<sup>7</sup> The latter program relied on the same legal theory espoused by Senator Burr on the floor in March, when he was the Senate’s chief overseer of intelligence agencies, in particular that the executive branch does not need Congressional authorization to conduct mass surveillance of domestic records and that there are no limits to that power.<sup>8</sup> Under Stellarwind, the government conducted mass surveillance of

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<sup>4</sup> 166 Cong. Rec. S1726, 48 (daily ed. March 12, 2020) (statement of Sen. Burr), video available at <https://www.c-span.org/video/?c4860932/user-clip-sen-burr-claims-eo-12333-permits-mass-surveillance-without-congresss-permission>

<sup>5</sup> Charlie Savage, *House to Vote on Limiting F.B.I. Power to Collect Americans’ Internet Data*, *New York Times* (May 26, 2020), <https://www.nytimes.com/2020/05/26/us/politics/fisa-bill-amendment.html>.

<sup>6</sup> The significance of these exchanges is staggering. In 1992, during Bill Barr’s first tenure as Attorney General, he authorized a Drug Enforcement Administration (DEA) surveillance program, the “first known effort to gather records on Americans in bulk” — and did so without legal review, founded on the DEA’s administrative subpoena power. That unlawful program operated for over 20 years, secretly collecting billions of records, and was ultimately shuttered before the public first learned of it in 2015. The impact of this mass surveillance on the civil liberties of people in the United States cannot be known due to the program’s secrecy, exacerbated by the DEA’s work pioneering “parallel construction,” a process through which evidentiary trails are recreated to disguise investigations’ true origins. See 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/>

<sup>7</sup> Office of the Inspector General of the Department of Defense, et al., *Report on the President’s Surveillance Program*. (July 10, 2019) <https://oig.justice.gov/reports/2015/PSP-09-18-15-full.pdf>; 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>8</sup> Though the DEA program was publicly revealed more recently than Stellarwind, and many questions remain unanswered, the agency based this surveillance on its administrative subpoena power in 21 U.S.C. §. 876(a). See 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>.

people in the United States without a warrant in direct contradiction to FISA and the Constitution for most of a decade. Like the DEA program, we have vanishingly little insight into how the government used that information.

The second exchange suggests something disturbingly concrete: dragnet surveillance of web activity. Such surveillance could deliver information about countless people in the United States to the FBI or NSA on the mere basis that they visited a website or watched a video. This possible use of Section 215 has never been considered by Congress and likely would not be illuminated by Section 215's fundamentally broken transparency provisions, meaning this practice could be occurring in secret already. In May, Senator Wyden sent a letter to the Director of National Intelligence specifically identifying this as a potential issue — to which he has not received a response as far as we are aware.<sup>9</sup> Further, these dragnets could be deployed even in the absence of any suspicion of wrongdoing, which Section 215 does not require. No such use of Section 215 has been litigated, as the government has never acknowledged this practice, and claims it bears no responsibility to provide notice to defendants whose information is swept up by any kind of surveillance under Section 215.

Senator Wyden's statement to *The New York Times* raises concerns that the difference between the House version of the amendment, once made to encompass Chairman Schiff's changes, and the Senate version that enjoys the support of at least 61 senators (59 who voted for it and two who were absent) is that the House language fails to prohibit "dragnet collection of online activity" of Americans while the Senate language bans it.

Moreover, when the Senate considered the Daines-Wyden amendment, leadership talking points claimed the amendment would stop an investigation from using "Internet data as a starting point" for investigations, raising red flags that the government may already be misusing Section 215 to surveil people, en masse, about whom the government harbors no suspicion of wrongdoing.<sup>10</sup> The operative difference between the language of the Daines-Wyden amendment and the House version of the amendment was the addition of "of United States persons" to narrow the prohibition, seemingly limiting the reform as described, at the expense of the privacy of non-United States persons located in the United States — for instance, recipients of Deferred Action for Childhood Arrivals.

However, the interpretation Chairman Schiff gave to the *Times* suggests the government may have secretly contorted the law to justify dragnet surveillance of the internet activity of people in the United States, regardless of their United States personhood.<sup>11</sup> Specifically, adding language that appears to constrain the potential reforms to only United States persons could be used by the government as a false justification to conduct surveillance of anyone it does not specifically know to be a United States person.

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<sup>9</sup> Letter from Ron Wyden, Senator, United States Senate to Richard Grenell, Acting Director, Office of the Director of National Intelligence (May 20, 2020), available at <https://www.wyden.senate.gov/imo/media/doc/052020%20Wyden%20Letter%20to%20Acting%20DNI%20Grenell%20RE%20Web%20Browsing%20Surveillance.pdf>.

<sup>10</sup> Dell Cameron, *Leaked Senate Talking Points Say Internet Surveillance Warrants Would Force FBI to Let Terrorists Bomb Things*, Gizmodo (May 22, 2020), <https://gizmodo.com/leaked-senate-talking-points-say-internet-surveillance-1843612179>.

<sup>11</sup> Charlie Savage, *House to Vote on Limiting F.B.I. Power to Collect Americans' Internet Data*, The New York Times (May 26, 2020), <https://www.nytimes.com/2020/05/26/us/politics/fisa-bill-amendment.html>.

Without a clear answer as to whether the government treats domestic information this way, Congress and the public can have no confidence that Chairman Schiff's amended language would, in fact, protect United States persons from dragnet surveillance of online activity. It would, for instance, be consistent with Schiff's understanding of the House amendment language if the agencies do not interpret an IP address or other identifier that indicates presence within the United States to be inherently indicative of the United States personhood of the user associated with said identifier — even if the user is in fact a citizen or long-term permanent resident.

If there is an operational opinion from the Foreign Intelligence Surveillance Court, Office of Legal Counsel, or other entity that permits domestic identifiers to be treated as presumptively foreign or as presumptively not belonging to a United States person, it is unlikely any members of Congress outside of the intelligence committees would know, or even have reliable access to, that information.

Treating domestic information and identifiers as presumptively foreign or as presumptively not belonging to a United States person would obliterate critical protections carefully negotiated by Congress to protect Americans. It would also — *once again* — embody a reprehensible abuse of the government's surveillance powers. Such a legal theory may not be limited to Section 215, but could touch on all of FISA. It could further invite the domestic deployment of the President's inestimable foreign surveillance tools, pursuant to Executive Order 12333 or otherwise. This would be consistent with former Chairman Burr's claim. It would also be consistent with Attorney General Barr's long-held views of executive power.

It is possible that a counterintuitive legal interpretation or abuse of authorities other than that outlined above might account for the language difference between the Daines-Wyden amendment and the House version (as altered and interpreted by Chairman Schiff) being tantamount to the difference between banning and allowing dragnet surveillance of people in the United States. Whatever the answer, this must be clarified prior to any new or continued surveillance authorization.

As Senators Leahy and Lee's letter explains, misuse of Section 215's sunset carveout, secret claims of inherent executive power, and replication under other authorities could be misused to continue this surveillance in secret.

We urge you to join us in defending your constituents' right to privacy, as well as Congress's Constitutionally mandated role overseeing federal agencies' activity, by calling for a public explanation of what surveillance the federal government considers legal and on what authorities it relies to conduct it.

Sincerely,

Americans for Prosperity  
Demand Progress Education Fund  
Defending Rights & Dissent  
Due Process Institute  
Fight for the Future  
Free Press Action

FreedomWorks  
Project for Privacy and Surveillance  
Accountability (PPSA)  
Restore the Fourth  
X-Lab

## Appendix

The following timeline provides context for the exchanges referenced above:

- **February 26, 2020:** In order to prevent the USA FREEDOM Reauthorization Act (USAFRA) from being amended with additional privacy protections, the House Committee on the Judiciary’s markup of the bill is canceled 65 minutes before it was scheduled to begin.<sup>12</sup> The Committee on the Judiciary has primary jurisdiction over the Foreign Intelligence Surveillance Act (FISA). A prohibition on the use of Section 215 for the warrantless surveillance of internet browsing and search history was among the reforms to be offered during the committee markup.<sup>13</sup> A copy of USAFRA as it existed on February 24, when it was first revealed, is still available on the committee’s website.<sup>14</sup>
- **March 10:** A new version of USAFRA is debuted in the Rules Committee, announced with a same-day Rules Committee meeting on the bill.<sup>15</sup> USAFRA now (and still) includes a new Title II, including Section 203, which would give the Attorney General — a political appointee — the exclusive authority to approve investigations into candidates for federal office, a protection exclusively for politicians. Chairman Schiff, to this day the only cosponsor of USAFRA other than Chairman Nadler, signed onto the bill the same day.<sup>16</sup> Though Chairman Schiff did not speak in favor of the bill, Ranking Member Jordan did on the basis that it now addressed concerns related to Carter Page. Both Chairman Nadler and Ranking Member Jordan expressed support for a stronger bill during the hearing.<sup>17</sup>
  - Statements to *The Hill* by Chairman Schiff and subsequent reporting make clear Chairman Schiff agreed to these changes at the expense of ongoing negotiations with privacy advocates, including over a prohibition on using Section 215 for warrantless surveillance of internet browsing and search histories.<sup>18</sup>
- **March 12:** Senator Lee offers a 45-day, “clean” reauthorization of the expiring authorities on the

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<sup>12</sup> Nicholas Fandos and Charlie Savage, *Push for More Privacy Protections Throws Surveillance Bill Talks Into Disarray*, *The New York Times* (Feb. 26, 2020),

<https://www.nytimes.com/2020/02/26/us/politics/congress-surveillance-bill-expiring.html>.

<sup>13</sup> *Id.*

<sup>14</sup> House Committee on the Judiciary, *H.R. \_\_\_\_, the USA FREEDOM Reauthorization Act of 2020; H.R. 2733, the Savannas Act; H.R. 2438, the Not Invisible Act of 2019; and H.R. \_\_\_\_, the Strengthening the Opposition to Female Genital Mutilation Act or the STOP FGM Act: Markup Hearing Before the House Committee on the Judiciary*, House Committee on the Judiciary (Feb. 21, 2020),

<https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2823> (access to documents for canceled markup).

<sup>15</sup> 166 Cong. Rec. H1585, 46 (daily ed. March 10, 2020) (Report on Resolution Providing for Consideration of S.J. Res. 68), legislation text available at <https://rules.house.gov/bill/116/hr-6172>.

<sup>16</sup> United States Congress, Cosponsors: H.R. 6172, United States Congress (March 10, 2020),

<https://www.congress.gov/bill/116th-congress/house-bill/6172/cosponsors?searchResultViewType=expanded>.

<sup>17</sup> 166 Cong. Rec. H1585, 46 (daily ed. March 10, 2020) (Report on Resolution Providing for Consideration of S.J. Res. 68), video available at

<https://rules.house.gov/video/rules-committee-meeting-senate-amendment-hr-2486-sj-res-68-and-hr-6172>.

<sup>18</sup> Melanie Zanona, et al., *House leaders near deal to renew federal surveillance powers*, *Politico* (March 9, 2020),

<https://www.politico.com/news/2020/03/09/house-surveillance-powers-124837>; Olivia Beavers, *Schiff says Democrats are negotiating to include more privacy protections in key surveillance bill*, *The Hill* (March 3, 2020), <https://thehill.com/policy/national-security/485782-schiff-says-democrats-are-negotiating-to-include-more-privacy>.

last legislative day before the sunset, contingent on the opportunity to vote on at least one amendment. Then-Chairman Burr objects, saying he would “let us go dark” rather than allow votes on amendments, which he did.<sup>19</sup> He also asserts that in the absence of these authorities, the President “can do all of this, without Congress’s permission, with no guardrails [...] that authority exists” under claimed inherent executive authority.<sup>20</sup>

- **March 15:** Section 215, the lone wolf authority, and the roving wiretap authority sunset.
- **March 16:** As Congress races to leave DC amid the escalating COVID-19 pandemic, the Senate agrees that it will consider amendments at a later date and passes a short-term “straight” reauthorization of the authorities, which is then sent to the House. Senators Daines and Wyden choose to offer the Daines-Wyden amendment, which would prohibit the use of Section 215 for the warrantless collection of internet browsing and search histories.
- **March 16 - May 30:** The House chooses not to consider Majority Leader McConnell’s 77-day reauthorization of the expired authorities, which passed by voice vote in the Senate.<sup>21</sup> A spokesman for Speaker Pelosi calls the agreement a “risky delay deal in order to appease Senator Lee,” while Senator Cramer and a spokesman for Majority Leader McConnell call the Speaker’s decision “reckless.”<sup>22</sup>
- **Before May 13,** when the Senate voted on the Daines-Wyden amendment: Senate leadership circulates talking points that claim the Daines-Wyden amendment “hamstrings the Government from pursuing the bomb-builder with the Internet data as a starting point.”<sup>23</sup>
- **May 13:** The Daines-Wyden amendment garners 59 votes on the Senate floor, falling one Senator short of a 60-vote threshold.<sup>24</sup> Two Senators who supported the amendment were among four who were unable to vote in person.<sup>25</sup> According to a HuffPost reporter, Senator Carper says “he voted along with 9 other Dems to reject amendment limiting warrantless surveillance of Internet searches because of concerns expressed by House leaders that it would kill FISA entirely.”<sup>26</sup>
- **May 20:** Senator Wyden sends a letter to the Acting Director of National Intelligence raising questions about whether public reporting would reflect “[i]f the government were to collect web browsing information about everyone who visited a particular website.”<sup>27</sup> There has been no public response.

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<sup>19</sup> 166 Cong. Rec. S1726, *supra* note 4.

<sup>20</sup> 166 Cong. Rec. S1726, *supra* note 4.

<sup>21</sup> See S. 3501, 116th Cong. (2020).

<sup>22</sup> Marianne Levine and Martin Matishak, *Senators slam 'reckless' House over surveillance debacle*, Politico (March 31, 2020), <https://www.politico.com/news/2020/03/31/fisa-senate-surveillance-157832>.

<sup>23</sup> Cameron, *supra* note 10.

<sup>24</sup> 166 Cong. Rec. S2399, 90 (daily ed. March 13, 2020) (Vote on Amendment No. 1583).

<sup>25</sup> Jeremy Herb and David Shortell, *Senate votes to increase legal protections to targets of surveillance court*, CNN (May 13, 2020), <https://www.cnn.com/2020/05/13/politics/senate-vote-fisa-authorities/index.html>.

<sup>26</sup> The Week, *Senate rejects amendment limiting warrantless government internet searches*, The Week (May 13, 2020), <https://theweek.com/speedreads/914350/senate-rejects-amendment-limiting-warrantless-government-internet-searches>.

<sup>27</sup> Letter from Ron Wyden, Senator, United States Senate to Richard Grenell, Acting Director, Office of the Director of National Intelligence (Mat 20, 2020), available at <https://www.wyden.senate.gov/imo/media/doc/052020%20Wyden%20Letter%20to%20Acting%20DNI%20Grenell%20RE%20Web%20Browsing%20Surveillance.pdf>.

- **May 26:** A left-right coalition of members of Congress, 82 organizations,<sup>28</sup> and thousands of activists pressure the House to allow consideration of the Daines-Wyden amendment, as the strong Senate showing made it clear that the reform has majority support in both chambers. The House companion to the Daines-Wyden amendment is made public after language negotiations with Chairman Schiff. The amendment has been altered to include an oversight provision — and the prohibition has been changed to limit the protection to web browsing and search histories “of United States persons,” which is discussed in more detail in the above letter.<sup>29</sup> Representatives Davidson and Lofgren emphasize that the plain reading of the amendment would prohibit the use of Section 215 for the warrantless collection of internet activity of United States persons.<sup>30</sup>
- **Afternoon of May 26:** Chairman Schiff tells *The New York Times* that the amendment would only prohibit such use of Section 215 orders when they “seek to obtain” a United States person’s internet activity. In response, Senator Wyden announces his opposition to the altered amendment, saying “[i]t is now clear that there is no agreement with the House Intelligence Committee to enact true protections for Americans’ rights against dragnet collection of online activity.”<sup>31</sup> Ultimately, neither the Senate-passed version of USAFRA nor any amendments to it are brought up for a floor vote in the House.
- **July 21:** Senators Lee and Leahy ask Attorney General Barr and Director of National Intelligence Ratcliffe whether Section 215 surveillance is continuing in the absence of statutory authority, including pursuant to Executive Order 12333 or the purchasing of information that would require a court order under Section 215.<sup>32</sup>
- **July 22:** Pre-hearing questions asked of the nominee for General Counsel of the Office of the Director of National Intelligence are released. Senator Wyden asked nominee Patrick Hovakimian: “Does the government collect web browsing and internet search history pursuant to Section 215?” The nominee responded: “I believe it is important for the IC to use its authorities appropriately against valid intelligence targets. The amendments to Title V of FISA made by Section 215 of the USA PATRIOT Act expired on March 15, 2020 and, to date, have not been reauthorized.”<sup>33</sup>

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<sup>28</sup> Letter from Demand Progress, et al. to Nancy Pelosi, et al. (May 26, 2020), available at [https://s3.amazonaws.com/demandprogress/letters/Wyden-Daines\\_House\\_Amendment.pdf](https://s3.amazonaws.com/demandprogress/letters/Wyden-Daines_House_Amendment.pdf).

<sup>29</sup> House Committee on Rules, Amendment to Senate Amendment to H.R. 6172, House Committee on Rules (May 26, 2020), [https://amendments-rules.house.gov/amendments/H6172amd\\_Sen\\_xml526201638323832.pdf](https://amendments-rules.house.gov/amendments/H6172amd_Sen_xml526201638323832.pdf).

<sup>30</sup> Office of United States Congresswoman Zoe Lofgren, Lofgren Announces FISA Amendment Agreement that Protects Americans’ Privacy, Office of United States Congresswoman Zoe Lofgren (May 26, 2020), <https://lofgren.house.gov/media/press-releases/lofgren-announces-fisa-amendment-agreement-protects-americans-privacy>.

<sup>31</sup> Savage, *supra* note 11.

<sup>32</sup> Letter from Senator Patrick Leahy and Senator Mike Lee to Attorney General William Barr and Director of National Intelligence John Ratcliffe (July 21, 2020), available at [https://www.leahy.senate.gov/imo/media/doc/Leahy\\_Lee-Letter\\_to\\_Barr\\_and\\_Ratcliffe\\_re\\_FISA-072120.pdf](https://www.leahy.senate.gov/imo/media/doc/Leahy_Lee-Letter_to_Barr_and_Ratcliffe_re_FISA-072120.pdf).

<sup>33</sup> Select Committee on Intelligence, Additional Pre-Hearing Questions for Mr. Patrick Hovakimian upon his nomination to be General Counsel for the Office of the Director of National Intelligence, United States Senate (July 22, 2020), <https://www.intelligence.senate.gov/sites/default/files/documents/aphq-phovakimian-072220.pdf>.