

September 14, 2020

Dear Speaker Pelosi, Leader McCarthy, Majority Leader McConnell, and Leader Schumer:

We urge you not to include a reauthorization of any expired Foreign Intelligence Surveillance Act (FISA) authorities — specifically the lone wolf, roving wiretap, and business records authorities¹ — in any Continuing Resolution or other must-pass legislation. In circumstances where Congress wishes to consider reauthorization of such controversial provisions, any such measures should be handled through traditional authorizing legislation.

We have deep concerns regarding the possible dragnet surveillance of domestic internet activity conducted under these provisions, in particular Section 215 of the USA PATRIOT Act (the business records provision), as well as the possibility that such surveillance is continuing founded upon secret claims of inherent executive authority. Those concerns have been deepened by a lack of transparency from the intelligence agencies.

Further, since Representatives voted on these authorities in March, members of Congress and the public have learned of widespread misuse of the government's FISA authorities. Adding to widely reported problems with FISA surveillance over the past year, two weeks ago the 9th Circuit Court of Appeals concluded that the National Security Agency's bulk telephone metadata program was unlawful, likely unconstitutional, and that the government had made untrue public assertions, including during Congressional oversight hearings, regarding the usefulness of the program as it related to the prosecution of Basaaly Moalin.² Senators Lee and Leahy requested in June but still have not received answers from Attorney General Barr and Director of National Intelligence Ratcliffe on whether the Executive Branch is relying on secret claims of inherent executive power to continue surveillance in the absence of statutory authorization, which they concluded would be illegal.³ Government witnesses, meanwhile, have refused to substantively answer similar questions from Representative Lofgren,⁴ Senator Wyden, and Ranking

¹ 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.

² *Compare* United States v. Moalin, No. 13-50572 (9th Cir. 2020), <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/09/02/13-50572.pdf> (“[W]e would conclude, based on our careful review of the classified FISA applications and related information, that the FISA wiretap evidence was not the fruit of the unlawful metadata collection. Again, if the statements of public officials created a contrary impression, that impression is inconsistent with the facts presented in the classified record”), *with* Hearing of the Senate Judiciary Committee on Strengthening Privacy Rights and National Security: Oversight of Foreign Intelligence Surveillance Act (FISA) Surveillance Programs, 113rd Cong. (2013) (statements of John C. Inglis, Deputy Director, National Security Agency, that “There is an example amongst those 13 that comes close to a but-for example and that’s the case of Basaaly Moalin,” and Sean M. Joyce, Deputy Director, Federal Bureau of Investigation, that “We identified Basaaly Moalin” through the bulk telephone metadata program, in response to questions from Senators Patrick Leahy and Chuck Grassley), available at <https://icontherecord.tumblr.com/post/57811913209/hearing-of-the-senate-judiciary-committee-on>.

³ Letter to Attorney General Barr and Director of National Intelligence Ratcliffe from Sens. Leahy and Lee on July 21, 2020,

https://www.leahy.senate.gov/imo/media/doc/Leahy_Lee-Letter_to_Barr_and_Ratcliffe_re_FISA-072120.pdf.

⁴ Oversight of the Department of Justice Before the House Committee on the Judiciary, 116th Cong. (2020)

Member Feinstein.⁵

Any extension of these expired FISA authorities is controversial and more appropriately considered under traditional authorizing legislation, not a Continuing Resolution, a COVID emergency bill, or any other comparable legislative vehicle.

Sincerely,

American Civil Liberties Union
American-Arab Anti-Discrimination Committee (ADC)
Center for Biological Diversity
Constitutional Alliance
Courage California
Defending Rights & Dissent
Demand Progress
Due Process Institute
Fight for the Future
Freedom of the Press Foundation
FreedomWorks
Government Information Watch
NAACP
National Coalition Against Censorship
New America's Open Technology Institute
People For the American Way
Project for Privacy and Surveillance Accountability (PPSA)
Project on Government Oversight
Restore The Fourth
Revolutionary Love Project
RootsAction.org
S.T.O.P - The Surveillance Technology Oversight Project
TechFreedom
X-Lab

cc: House of Representatives
U.S. Senate

(statement of William Barr, Attorney General, Department of Justice in response to question from Representative Zoe Lofgren), video available at <https://www.youtube.com/watch?v=VBCDIZ-c8pQ>.

⁵ 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>.