

The Honorable Dick Durbin
Chair, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Mark Warner
Chair, Senate Intelligence Committee
211 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Marco Rubio
Ranking Member, Senate Intelligence Committee
211 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Jerry Nadler
Chair, House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Jim Jordan
Ranking Member, House Judiciary Committee
2142 Rayburn House Office Building
Washington, DC 20515

The Honorable Adam Schiff
Chair, House Intelligence Committee
Capitol Visitor Center HVC-304
Washington, DC 20515

The Honorable Michael Turner
Ranking Member, House Intelligence Committee
Capitol Visitor Center HVC-304
Washington, DC 20515

Re: Secret Bulk Surveillance of Americans And Others Conducted By The Central Intelligence Agency Without Congressional Authorization Or Court Oversight

Dear Chairmen and Ranking Members:

The undersigned organizations write to express our urgent concerns regarding recently declassified documents that confirm the Central Intelligence Agency (CIA) currently operates at least two bulk collection programs, both with significant impacts on the privacy of U.S. persons and other people in the United States.

The disclosure of these programs represents the first public acknowledgement by the U.S. government that U.S. intelligence agencies are conducting bulk collection activities that result in the acquisition of Americans' data, outside of the laws enacted by Congress. This potentially sweeping surveillance is conducted under Executive Order 12333, pursuant to a claim of the President's "inherent constitutional authority."¹ Critically, such surveillance takes place without the protections of the Foreign Intelligence Surveillance Act (FISA) or other privacy statutes, and is not authorized or supervised by any court. Congressional action is urgently needed to address this gap in the critical safeguards that protect Americans' privacy.

We urge the Senate and House Judiciary Committees to investigate the CIA's bulk collection programs and to pass legislation protecting Americans from this type of spying.

¹ CIA, Release Statement on Declassification of Privacy and Civil Liberties Oversight Board (PCLOB) para. 5 (Feb. 10, 2022), <https://www.cia.gov/static/b535156788e6443d89d0eaf6b004796e/OPCL-CIA-Public-Release-Statement-Deep-Dives.pdf>.

We specifically urge you to advance the Fourth Amendment Is Not For Sale Act (S.1265/H.R.2738), legislation that establishes the “exclusive means” pursuant to which the government may acquire certain types of records pertaining to Americans from certain entities, and to identify other areas where legislation is needed to ensure congressional and judicial oversight over surveillance activities that affect Americans’ rights. We also ask that the intelligence committees work to further declassify records related to these programs, to assist Congress with its oversight duties.

Background

On February 10, 2022, the CIA released documents pertaining to two reports authored by the Privacy and Civil Liberties Oversight Board (PCLOB), titled “Deep Dive I”² and “Deep Dive II.”³ Both reports reveal CIA activities that involve bulk collection, result in the acquisition of U.S. person information, and have been operational for years.⁴ According to the CIA, the programs are directed at the activities of foreign governments and foreign nationals, but PCLOB’s reporting and recommendations show that they significantly affect Americans. The surveillance described in Deep Dive I includes the bulk acquisition of financial transactions involving Americans and others. For Deep Dive II, however, the CIA has disclosed neither what type of information it is collecting in bulk nor for what purpose. Instead, it released only two pages of PCLOB staff recommendations, which reveal that:

- CIA analysts query the data acquired under this program for information about US persons, yet they do not record the justifications for those queries, making it impossible to adequately audit how this surveillance is being used to investigate people in the United States;
- PCLOB staff urged the CIA to routinely assess the volume of US Person information acquired under this program and whether the program “provides continuing value”; and
- As of PCLOB’s investigation, the CIA still had not implemented the rules and procedures for this program that are required by the Attorney General Guidelines issued in 2017.⁵

Though the CIA has refused to disclose what information it is collecting in bulk with respect to Deep Dive II, its statements to numerous media outlets⁶ indicate that the collection sweeps up “Americans who are in contact with foreign nationals”—which suggests that this program involves bulk collection *related to communications records*.

These disclosures represent the first time since Congress enacted FISA in 1978 that the government has acknowledged ongoing bulk collection involving Americans’ data based on a presidential claim of “inherent constitutional authority.” There is no indication that the CIA

² <https://www.cia.gov/static/63f697addbbd30a4d64432ff28bbc6d6/OPCL-PCLOB-Report-on-CIA-Activities.pdf>.

³ <https://www.cia.gov/static/f61ca00cbcda9b5d46a04e0b53b5f2b9/OPCL-Recommendations-from-PCLOB-Staff.pdf>

⁴ https://www.wyden.senate.gov/imo/media/doc/HainesBurns_WydenHeinrich_13APR21%20-FINAL.pdf.

⁵ <https://www.cia.gov/static/54871453e089a4bd7cb144ec615312a3/CIA-AG-Guidelines-Signed.pdf>.

⁶ <https://www.cnn.com/2022/02/10/politics/cia-data-collection-americans/index.html>; the CIA’s full, updated statement is available at <https://twitter.com/dnvolz/status/1492247130760790028/photo/1>.

intends to move this program under a statutory authority.⁷ Congressional inaction here would allow the executive branch to police its own collection of data on Americans. Congress has worked to design and reform the government's statutory surveillance authorities, but such efforts provide only incomplete protection so long as the executive branch is conducting bulk collection affecting Americans outside of Congress's laws. Senator Richard Burr indicated in 2020 that collection of Americans' data "under 12333 authority" has "no guard rails."⁸ It needs "guard rails" now.

The CIA Programs Undermine Congress's And The Public's Desire To Halt Bulk Surveillance That Collects Americans' Private Records

Congress advanced and passed the USA Freedom Act in 2015 in historically bipartisan votes.⁹ At the time, current Chairman Jerry Nadler said "[t]his bill ends bulk collection of data,"¹⁰ and added, "bulk collection of data is not authorized under the law and is not accepted by the American people."¹¹ Similar statements were echoed by then-Chairman Bob Goodlatte.¹² Chairman Dick Durbin similarly said the USA Freedom Act "will make critical reforms to the government's bulk collection of Americans' telephone and internet records," while Senator Richard Blumenthal said the bill would "ban unnecessary bulk collection of Americans' phone records."¹³

With the expiration of Section 215 of the USA PATRIOT Act in 2020, the CIA's bulk surveillance represents an even more extreme departure from Congress's legislative design. Congress chose not to reauthorize Section 215, which permitted intelligence agencies to obtain many financial and communications records for foreign intelligence purposes with the FISA Court's approval and supervision. During and after the Congressional debates concerning reauthorization, intelligence agencies refused to answer questions from lawmakers about whether they were

⁷ Even the phone records collection under the notorious Stellar Wind program, which was initially justified by a claim of "inherent authority," was moving under the FISA Court's supervision as its existence became publicly known.

⁸ Recording available at:

<https://www.c-span.org/video/?c4860932/user-clip-sen-burr-claims-eo-12333-permits-mass-surveillance-without-congress-esss-permission>.

⁹ The USA Freedom Act passed with 338 House votes and 87 Senate votes (<https://clerk.house.gov/Votes/2015224>), and many of the votes opposing it came from legislators who have stated that they would have supported even stronger reforms: <https://s3.amazonaws.com/demandprogress/letters/Amash-Lewis-Letter-to-the-Senate.pdf>

¹⁰ <https://nadler.house.gov/news/documentsingle.aspx?DocumentID=391771>

¹¹ <https://nadler.house.gov/news/documentsingle.aspx?DocumentID=391771>

¹² <https://www.gop.gov/5-things-to-know-about-the-usa-freedom-act/>

¹³

<https://www.leahy.senate.gov/press/bipartisan-coalition-led-by-senators-lee-and-leahy-introduce-legislation-to-ban-bulk-collection-under-section-215>

collecting similar information about US persons outside of Section 215.¹⁴ In light of what is now known about Deep Dive II, the CIA seems neither to be honoring Congress's intent, nor answering reasonable questions from Congress or advocacy organizations about the agency's activities.

The courts have also spoken on bulk surveillance during this time. Most recently, in 2020, the Ninth Circuit held that bulk collection of Americans' telephone records violated Section 215 and expressed serious doubts about the constitutionality of that surveillance.¹⁵ The CIA's bulk collection programs under EO 12333 could raise similar constitutional concerns. However, because defendants typically are not notified if evidence against them is obtained or derived from EO 12333 surveillance, the courts have rarely had the opportunity to address these concerns. As a result, the CIA's unconstitutional collection practices could continue indefinitely without either judicial review or Congressional action.

Congress Must Act To Investigate The CIA's Unsupervised And Unaccountable Surveillance Programs

The CIA's bulk spying programs show that current law does not adequately protect Americans from bulk surveillance. Given the breadth of this type of surveillance and its roots in an unaccountable claim of inherent presidential power, Congress must act now or risk diminishing its own power to conduct intelligence oversight and to establish the rules governing intelligence surveillance of Americans.

Congress should begin with a robust investigation into the CIA's bulk collection activities. It is critical that lawmakers have a full picture of what records are being obtained and how; what rules have been put in place to govern the use of these records, and whether these rules have been followed; and how often Americans' records have been collected and searched, and for what purpose. Lawmakers should also demand answers about why this program has been shrouded in secrecy and critical details withheld even from the congressional intelligence committees, as Senators Ron Wyden and Martin Heinrich have stated. To ensure that the government's activities are accountable to the American people as well as members of Congress, Congress should press the Director of National Intelligence to declassify more information about the program, and should be ready to assert its own authority to declassify documents pertinent

¹⁴ Shortly after Congress refused to reauthorize Section 215, dozens of Senators and Representatives, led by Representatives Davidson and Jayapal, demanded transparency around Executive Order 12333. Their questions included a particular focus on bulk surveillance; requested information about how the government treats US persons' information acquired under "inherent executive authority" and asked if the government "claim[s] inherent executive power to purchase records that would require a court order to compel the production of ... under Section 215." These members further asked if "the executive branch independently concluded that it has inherent authority, in the absence of an express statutory prohibition, to acquire domestic records?" As we now know, full answers to these questions would have revealed the CIA's programs, and perhaps others that have not yet been disclosed. Letter from Representatives:

https://s3.amazonaws.com/demandprogress/letters/Davidson_Jayapal_Letter_9.24.20.pdf; Letter from Senators: <https://www.lee.senate.gov/services/files/f719aab0-0b85-4f1a-a252-1e0bae0083af>. Civil society echoed the same concerns and questions here:

https://s3.amazonaws.com/demandprogress/letters/Surveillance_fact-finding_letter_Aug2020.pdf.

¹⁵ <https://www.politico.com/news/2020/09/02/court-rules-nsa-phone-snooping-illegal-407727>

to its oversight responsibilities. The CIA's determination that not a single word of the "Deep Dive II" report could be declassified (other than PCLOB staff recommendations, which do not describe the program itself) defies credulity, and is reminiscent of the intelligence community's lack of transparency in the pre-Snowden era before the Principles of Intelligence Transparency were adopted.¹⁶

Congress Must Act To Pass The Fourth Amendment Is Not For Sale Act (S.1265/H.R.2738)

Congress must also enact legislation to ensure that any surveillance resulting in the collection of Americans' personal data is subject to statutory limits and judicial review. The only way to accomplish this is to set forth specific rules that are the "exclusive means" by which the government may acquire the information of U.S. persons.

Many of our organizations wrote to your committees weeks ago urging you to hold hearings on the Fourth Amendment Is Not For Sale Act.¹⁷ This bill aims to bar federal agencies from purchasing, without a warrant, sensitive data that if acquired directly would require the government to first obtain a court order. It is the only pending legislation that includes "exclusive means" language.

Without more information about the CIA's programs, it is unclear whether this bill would put a stop to the collection in question. However, at a minimum, it would protect Americans' location records and internet search histories from acquisition outside existing statutory frameworks; and it would protect against the purchase of communications records, as well as any acquisition of such records under EO 12333 from providers of electronic communication or remote computing services. Accordingly, we urge you to advance the Fourth Amendment Is Not For Sale Act as part of your investigation into this oversight-free surveillance.

We also urge you to identify any other statutory gaps that enable surveillance of Americans to take place under EO 12333. In particular, Congress should obtain from the intelligence community a complete accounting of surveillance programs and activities conducted under EO 12333 that result in the collection of U.S. person information that would otherwise require a court order or subpoena if conducted pursuant to statutory frameworks. This will allow Congress to devise legislative fixes that can fully close those loopholes.

Conclusion

The bulk collection of Americans' records is precisely the type of mass surveillance that your offices individually, and Congress as a whole, expressly sought to ban in 2015. We urge you to defend that effort by conducting thorough public hearings.

¹⁶ <https://www.dni.gov/index.php/ic-legal-reference-book/the-principles-of-intelligence-transparency-for-the-ic>

¹⁷ https://www.freepress.net/sites/default/files/2022-01/final_-_fanfsa_sign-on_letter_january_2022.pdf

SIGNING ORGANIZATIONS

1. Restore The Fourth
2. Access Now
3. American Civil Liberties Union
4. Americans for Prosperity
5. Asian Americans Advancing Justice - Asian Law Caucus
6. Brennan Center for Justice
7. Center for Democracy & Technology
8. Center for Human Rights and Privacy
9. Constitutional Alliance
10. Defending Rights & Dissent
11. Demand Progress
12. Due Process Institute
13. Electronic Privacy Information Center (EPIC)
14. Emgage
15. Fight For The Future
16. Filipina Women's Network
17. Free Press
18. FreedomWorks
19. Government Accountability Project
20. Government Information Watch
21. Japanese American Citizens League
22. Just Foreign Policy
23. Just Futures Law
24. Libyan American Alliance
25. MediaJustice
26. Mijente
27. Muslims for Just Futures
28. Muslim Justice League
29. National Action Network
30. New America's Open Technology Institute
31. Oakland Privacy
32. OCA Greater Chicago
33. OpenMedia
34. Open The Government
35. People For the American Way
36. Poligon Education Fund
37. the Project for Privacy and Surveillance Accountability
38. the Project On Government Oversight
39. Project South
40. RootsAction.org
41. Secure Justice
42. S.T.O.P. - Surveillance Technology Oversight Project
43. TechFreedom
44. Women Watch Afrika
45. X-Lab