

Testimony of Jake Laperruque, Senior Counsel
The Constitution Project at the Project On Government Oversight
before the House Committee on Appropriations, Subcommittee on Defense
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In Support of Research and Reporting on the Disparate Use and Impact of FISA

Thank you for the opportunity to submit testimony on the importance of examining the impact of foreign intelligence surveillance, and in particular on the need for increased oversight of and public reporting about whether and how foreign intelligence surveillance disproportionately targets and impacts protected classes. In its funding of the Department of Defense and intelligence agencies, we believe the Subcommittee should require reporting by the National Security Agency (NSA) Inspector General on disparate use and impact of the Foreign Intelligence Surveillance Act (FISA) on certain racial and religious groups.

Founded in 1981, the Project On Government Oversight (POGO) is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

We encourage the Committee to support research and reporting by the NSA Inspector General on any potential discrimination and disparate impact stemming from surveillance activities conducted pursuant to FISA. The government justifies FISA surveillance—which includes Section 215 of the PATRIOT Act and warrantless Section 702 surveillance—as a national security necessity, but its impact on Americans remains significantly shrouded from public view. We need greater transparency on how FISA surveillance impacts individuals, including examination of discrimination and disparate impact.

I. There are significant instances of surveillance abuse focused on certain racial and religious groups under the guise of guarding national security.

There are many examples of national security focused surveillance—often absent necessary checks and independent oversight—improperly targeting individuals on the basis of race or religion. In the 1960s, the FBI monitored Dr. Martin Luther King, Jr. under its “Racial Matters Program,” and targeted him and many other civil rights leaders through the notorious COINTELPRO, or Counterintelligence Program.¹ The government justified this racially motivated surveillance at the time by baselessly alleging threats to national security.² Extensive surveillance of civil rights leaders and activists led to collection of

¹ The Martin Luther King, Jr. Research and Education Institute, “Federal Bureau of Investigation (FBI),” <https://kinginstitute.stanford.edu/encyclopedia/federal-bureau-investigation-fbi> (Downloaded April 3, 2019) (Hereinafter, MLK Research Institute on FBI); see also, Jeffrey O.G. Ogbar, “The FBI’s War on Civil Rights Leaders,” *The Daily Beast*, January 16, 2017. <https://www.thedailybeast.com/the-fbis-war-on-civil-rights-leaders> (Downloaded April 3, 2019) (Hereinafter, The FBI’s War on Civil Rights Leaders)

² MLK Research Institute on FBI; The FBI’s War on Civil Rights Leaders

sensitive personal information about surveilled individuals, as well as serious abuses.³ Most infamous is the incident in which the FBI anonymously sent Dr. King a compromising tape and letter that apparently encouraged him to commit suicide to avoid the embarrassment of the tape's contents.⁴ This was just one act in a prolonged and sustained effort by the FBI to use the fruits of surveillance to "neutralize" the Southern Christian Leadership Conference as it organized non-violent protests across the South to end segregation.⁵

According to the 1976 U.S. Senate Select Committee to Study Government Operations with Respect to Intelligence Activities (commonly known as the Church Committee) report, "While the declared purposes of these programs were to protect the 'national security' or prevent violence, Bureau witnesses admit that many of the targets were nonviolent and most had no connections with a foreign power. Indeed, nonviolent organizations and individuals were targeted because the Bureau believed they represented a 'potential' for violence."⁶ These nefarious efforts harmed many, and involved the use of surveillance information obtained under the auspices of national security to "break up marriages, disrupt meetings, ostracize persons from their professions, and provoke target groups into rivalries that might result in deaths,"⁷ according to the Committee.

Unfortunately, public knowledge of this type of improper surveillance has not swept it into the dustbin of history. We still face troubling instances of racially or religiously focused surveillance being justified on the basis of national security. For more than a decade after the September 11 attacks, the New York Police Department operated a surveillance unit focused on monitoring Muslim communities, with assistance from the Central Intelligence Agency.⁸ The program engaged in extensive surveillance of the normal daily lives of entire Muslim communities, using informants colloquially called "Mosque Crawlers" to stockpile personal information.⁹ The

³ U.S. Senate, Select Committee to Study Government Operations with Respect to Intelligence Activities, *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate: together with additional, supplemental, and separate views*, April 26, 1976. (Hereinafter, Church Committee Report)

⁴ "MLK Research Institute on FBI." See also, Alvaro M. Bedoya, "The Color of Surveillance: What an infamous abuse of power teaches us about the modern spy era," *Slate*, January 18, 2016. <https://slate.com/technology/2016/01/what-the-fbis-surveillance-of-martin-luther-king-says-about-modern-spying.html> (Downloaded April 3, 2019) (Hereinafter, "The Color of Surveillance")

⁵ MLK Research Institute on FBI; see also, "The Color of Surveillance"

⁶ Church Committee Report

⁷ Church Committee Report

⁸ The American Civil Liberties Union, "Factsheet: The NYPD Muslim Surveillance Program."

<https://www.aclu.org/other/factsheet-nypd-muslim-surveillance-program> (Downloaded April 3, 2019); Adam Goldman and Matt Apuzzo, "With cameras, informants, NYPD eyed mosques," *Associated Press*, February 23, 2012, <https://www.ap.org/ap-in-the-news/2012/with-cameras-informants-nypd-eyed-mosques> (Downloaded April 3, 2019) (Hereinafter, "With cameras, informants, NYPD eyed mosques."); Matt Apuzzo and Joseph Goldstein, "New York Drops Unit That Spied on Muslims," *New York Times*, April 15, 2014. <https://www.nytimes.com/2014/04/16/nyregion/police-unit-that-spied-on-muslims-is-disbanded.html> (Downloaded April 3, 2019)

⁹ "With cameras, informants, NYPD eyed mosques"

government also used FISA to monitor American Muslims, including the executive director of a prominent Muslim civil rights organization.¹⁰

A recently released Department of Justice Inspector General report also revealed that the Drug Enforcement Administration swept up the phone records of Americans making international calls for nearly two decades.^{11,12} Because the program was targeted at calls to and from countries including “Mexico and most of Central and South America,” it likely disproportionately impacted immigrants, and Latino immigrants in particular.¹³ And currently the FBI’s counterintelligence activities focused on “Black Identity Extremists” is shrouded in secrecy,¹⁴ but leaked documents show that the program has targeted black activists with no connection to violent activity.¹⁵

II. The risk of improper targeting or disparate impact on certain racial and religious groups is augmented by the secrecy of FISA.

It is important to maintain vigilance against this type of impropriety for all government surveillance activities, but the area that most urgently needs additional scrutiny is surveillance pursuant to FISA. To a higher degree than any other Congressionally authorized surveillance, surveillance pursuant to FISA faces less judicial scrutiny, affects individuals that are not suspected of wrongdoing, and receives limited exposure in criminal proceedings. These factors significantly increase the risk that improper targeting or disparate impact could be occurring undetected, and limits Congress’s and the public’s ability to effectively weigh the harms and benefits when certain FISA authorities are set to expire.

We currently lack some of the most basic information about the impact of FISA surveillance programs on Americans in general, let alone whether these programs improperly target or disproportionately impact certain racial or religious groups. Notably:

- The NSA has failed to disclose the number of “unique identifiers” (unique accounts, persons, or devices) impacted by the call detail records program—authorized in 2015 by the USA FREEDOM Act as a replacement for the NSA’s nationwide bulk

¹⁰ Charlie Savage and Matt Apuzzo “U.S. Spied on 5 American Muslims, Report Says,” *The New York Times*, July 9, 2014. <https://www.nytimes.com/2014/07/10/us/politics/nsa-snowden-records-glenn-greenwald-first-look.html> (Downloaded April 3, 2019)

¹¹ Office of the Inspector General, U.S. Department of Justice, *A Review of the Drug Enforcement Administration's Use of Administrative Subpoenas to Collect or Exploit Bulk Data*, March 2019, p. 15-18. <https://oig.justice.gov/reports/2019/o1901.pdf> (Downloaded April 3, 2019)

¹² This program served as a precursor to the nationwide telephony metadata bulk collection program that was operated for a decade pursuant to Section 215 of the PATRIOT Act, and in turn was replaced by the current Call Detail Records program authorized by the reformed version of Section 215, set to expire this December.

¹³ 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/> (Downloaded April 3, 2019)

¹⁴ Janie Har, “ACLU sues FBI for records related to black extremists report,” *Associated Press*, March 21, 2019. <https://www.apnews.com/cc88c8ea4a4d47be81883dd4d0a9cc52> (Downloaded April 8, 2019)

¹⁵ See, FBI Intelligence Assessment, *Black Identity Extremists Likely Motivated to Target Law Enforcement Officers*, August 3, 2017, p. 7. <https://www.documentcloud.org/documents/4067711-BIE-Redacted.html> (Downloaded April 3, 2019).

collection program pursuant to Section 215 of the PATRIOT Act—in spite of a statutory requirement to do so.¹⁶

- In 2017, the Director of National Intelligence reneged on a promise his predecessor made to the House Judiciary Committee to provide an estimate of the number of Americans affected by FISA Section 702 warrantless surveillance.¹⁷
- The FBI does not disclose how often all queries for a U.S. person returns private communications obtained via Section 702, despite the fact that pursuant to FISA Court requirements the FBI already reports this information for the subset of queries conducted solely for law enforcement purposes.¹⁸

As Congress evaluates whether to reauthorize several sections of the PATRIOT Act that expire this December, it is critical that lawmakers have a clear picture of whether and how the government’s use of these and other FISA authorities disproportionately targets or impacts certain racial and religious groups. This will both inform public discourse on the utility of current surveillance practices, and help address the chilling effect that communities subject to overbroad surveillance often experience.

III. Congress should support additional oversight to guard against improper targeting or disparate impacts on certain racial and religious groups.

To support Congressional and public knowledge on this issue, we believe the National Security Agency Inspector General should report on the use and impact of surveillance activities conducted pursuant to FISA—especially surveillance authorities where public knowledge is most restrained such as Section 215 of the PATRIOT Act, Section 702 of FISA, and National Security Letter authorities¹⁹—with particular focus on:

- Whether targeting under these authorities is influenced by factors such as race or participation in activities protected by the First Amendment, such as the exercise of political speech or religion;
- Whether surveillance and data collection under these authorities has a disparate impact on certain racial or religious groups; and
- Whether the fruits of these surveillance authorities are used in a manner that selectively targets individuals on the basis of factors such as race or participation in activities protected by the First Amendment, such as political speech or the exercise of religion, or disproportionately impacts certain racial or religious groups.

¹⁶ Office of the Director of National Intelligence, Office of Civil Liberties, Privacy, and Transparency, *Statistical Transparency Report Regarding Use of National Security Authorities Calendar Year 2017*, April 2018, p. 35. <https://www.dni.gov/files/documents/icotr/2018-ASTR---CY2017---FINAL-for-Release-5.4.18.pdf> (Downloaded April 3, 2019) (Hereinafter, ODNI Transparency Report)

¹⁷ Dustin Volz, “NSA backtracks on sharing number of Americans caught in warrant-less spying,” *Reuters*, June 9, 2017. <https://www.reuters.com/article/us-usa-intelligence/nsa-backtracks-on-sharing-number-of-americans-caught-in-warrant-less-spying-idUSKBN19031B> (Downloaded April 3, 2019)

¹⁸ ODNI Transparency Report, p. 18-19.

¹⁹ National Security Letter authorities allow the government to demand private records absent any court oversight or approval, and do so with an accompanying gag order that largely prevents entities such as email providers that receive National Security Letters from discussing how it affects them and their customers. See, The Electronic Frontier Foundation, “National Security Letters.” <https://www.eff.org/issues/national-security-letters> (Downloaded April 8, 2019)

Thank you for considering our requests and allowing us to submit testimony to the Subcommittee. We believe bipartisan oversight and efforts to enact substantive reform of FISA surveillance have aided civil rights, civil liberties, public safety, and government transparency and accountability, and will continue to do so in the future.