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## THE FOURTH AMENDMENT

*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

Senate Judiciary Committee  
224 Dirksen Senate Office Building  
50 Constitution Ave NE  
Washington, DC 20002

January 14, 2020

Dear Chairman Graham, Ranking Member Feinstein, and members of the Senate Judiciary Committee:

The Inspector-General's report into the mishandled Carter Page case shows vividly that FBI agents engage in serious abuses with respect to domestic surveillance, and misuse powers intended for foreign intelligence to conduct surveillance of American citizens,<sup>1</sup> despite prior efforts by Congress to rein in FBI domestic surveillance dating back to the 1970s. This report, and the delay in consideration of the expiring PATRIOT Act Section 215 to March 2020, create an opportunity for hearings into abusive FBI practices with respect to domestic surveillance.

To help inform this debate, we are writing to inform the Committee that as a result of inconsistent responses received during a recent Freedom of Information Act request, appeal and response process, we are concerned that the FBI may have targeted for domestic surveillance a number of both left-leaning and right-leaning organizations interested in the topics of privacy, government surveillance and immigration:

- Access Now, an international nonprofit that defends and extends the digital rights of users at risk around the world;
- The Calyx Institute, a nonprofit that develops privacy and encryption tools;
- Campaign for Liberty, a nationwide non-profit advocacy group founded by former Congressman Ron Paul;
- Colectiva Legal Del Pueblo, which "builds community power for migrant justice through legal services, advocacy and education;"
- Indivisible for Immigration, an informal group that favors migration and community based alternatives to detention;
- Indivisible Sausalito, a progressive civic organization that advocates around climate, criminal justice reform, and immigration issues;
- Reason Foundation, the nonprofit foundation that publishes *Reason* magazine, a libertarian publication; and
- Restore The Fourth, a nonpartisan 501c4 nonprofit organization that campaigns against government surveillance.

Previous FOIA work during 2019 by former CIA whistleblower Mr. Pat Eddington has revealed a further set of organizations that may have also been targeted:

- Fight for the Future
- Fight for the Future Action Fund
- Free Press Action Fund
- Jewish Voice for Peace
- Kids In Need of Defense
- National Association of Black Journalists
- Pangea Legal Services

<sup>1</sup> See USDOJ Office of the Inspector General, "Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation", December 2019, <https://www.justice.gov/storage/120919-examination.pdf>.

- Radio Television Digital Network Association
- Reason.com
- The American Conservative

We attach copies of the relevant FOIA responses to support this allegation.<sup>2</sup>

The responses received by Mr. Eddington were “Glomar” responses, indicating that the FBI could “*neither confirm nor deny*”, with respect to the organizations above, “*the existence of any national security or foreign intelligence records responsive to your request because the existence or nonexistence of any such responsive records is currently and properly classified.*”<sup>3</sup>

Out of over 200 organizations for whom Mr. Eddington submitted requests, only eight organizations in the first list above were identified as being subject to the “Glomar” response; this was in response to his appeal of the adequacy of an initial response. The response relating to the remaining organizations was simply that there were “no responsive records.”

The difference between these responses is alarming, and raises the question of whether this inconsistency is due to these groups having been targeted for surveillance. We urge the committee to investigate why the FBI appears to be treating these groups differently, including the extent to which the groups cited above have been targeted for surveillance, or have been the subject of an FBI assessment or investigation.

There is also other evidence that the FBI is targeting groups involved in immigrant advocacy. For example, a Yahoo! News story from September 4, 2019, analyzed an “External Intelligence Note” from the FBI Phoenix field office from May 30, 2019; the Note referred inaccurately to non-violent pro-immigrant groups as “anarchist extremists.”<sup>4</sup>

Techniques the FBI has employed in past instances of domestic surveillance have included dipping into databases of NSA-derived foreign intelligence for information on organizations’ associations and activities;<sup>5</sup> opening an “assessment” on them, which under current law requires no predicate facts indicating that they have engaged in, or intend to engage in, any illegal activity; paying confidential informants to infiltrate them and report on their activities to the FBI; or opening an “investigation” and directly engaging FBI agents to spy on them.

The Ninth Circuit ruled in a recent case that the FBI maintained records of First Amendment-protected activity in violation of the Privacy Act, and ordered the records destroyed. The memos were about the editors of the libertarian website Antiwar.com who were unlawfully targeted by the FBI based on First Amendment-protected political statements and articles.<sup>6</sup>

<sup>2</sup> Mr. Eddington reported his findings on domestic surveillance of those organizations for whom he had received a “Glomar” FOIA response by September here: “Constitution Day 2019: The Hidden Domestic Surveillance Crisis” September 17, 2019, available at <https://www.justsecurity.org/66201/constitution-day-2019-the-hidden-domestic-surveillance-crisis/>

<sup>3</sup> A “Glomar” response refers to a 1981 FOIA case (Phillippi v. CIA, 655 F.2d 1325, 1327 (D.C. Cir. 1981), in which the D.C. Circuit Court of Appeals ruled that the CIA could refuse to confirm or deny even the very existence of information on a topic if the fact of its existence was itself deemed classified.

<sup>4</sup> See Winter, J. and Walker, H., “Exclusive: Document reveals the FBI is tracking border protest groups as extremist organizations”, *Yahoo! News*, September 4, 2019, available at <https://news.yahoo.com/exclusive-document-reveals-the-fbi-is-tracking-border-protest-groups-as-extremist-organizations-170050594.html>.

<sup>5</sup> See Goitein, L., “The FISA Court’s Section 702 Opinions, Part II: Improper Queries and Echoes of “Bulk Collection”, *Just Security*, October 16, 2019, available at <https://www.justsecurity.org/66605/the-fisa-courts-section-702-opinions-part-ii-improper-queries-and-echoes-of-bulk-collection/>.

<sup>6</sup> See <https://www.antiwar.com/fbi-case/9th-circuit-decision.pdf>

We would expect that any records relating to any of our organizations ought to be similarly expunged. If, by asserting a “national security” or (b)(1) exemption in a *Glomar* context, the FBI is trying to hide domestic surveillance of peaceful organizations, that would mean that the FBI has effectively defined several kinds of First Amendment-protected activity as threats to national security that are appropriate objects of FBI interest: Reporting (Reason magazine, National Association of Black Journalists); client services in immigration cases (Pangea, Colectiva Legal del Pueblo, Kids In Need of Defense and others); advocacy for due process for immigrants (Indivisible for Immigration, Indivisible Sausalito, Restore The Fourth); advocacy for encryption (Calyx, Access Now); and advocacy from right and left against mass government surveillance (Restore The Fourth, Fight for the Future, Campaign for Liberty).

We call on the Judiciary Committee to investigate whether the FBI is targeting these organizations in the absence of a legitimate criminal investigative predicate and is using the *Glomar* exception, or other dubious FOIA evasion tactics, to conceal that activity from the public and the courts.

For the Constitution to have meaning and force, the public — including the Congress, the courts, and the press — must be able to establish what the executive branch is doing in our name and with our tax dollars, particularly when it comes to the use — or misuse — of federal surveillance powers. In the US, it has been a long-held legal principle that, unlike in less free countries, we have a right to know whether the FBI is conducting surveillance on us. Congress should act to make sure that that right still applies today, and that the FBI is not manipulating existing law to avoid disclosing domestic surveillance. Otherwise, we are no different from authoritarian states around the world that eagerly engage in domestic repression.

Sincerely,



Alex Marthews, National Chair, Restore The Fourth, on behalf of:

#### **ORGANIZATIONS AFFECTED [6]**

Access Now  
The Calyx Institute  
Campaign for Liberty  
Indivisible for Immigration  
Indivisible Sausalito  
Restore The Fourth, Inc.

#### **SUPPORTING ORGANIZATIONS [12]**

American-Arab Anti-Discrimination Committee  
Council on American-Islamic Relations  
Defending Rights & Dissent  
The Due Process Institute  
FreedomWorks  
National Coalition Against Censorship  
National Immigration Project of the National Lawyers Guild  
Project for Privacy and Surveillance Accountability  
RootsAction.org  
TechFreedom  
UnidosUS  
X-Lab