

FLOOR STATEMENT ON WILLIAM BARR

January 16, 2019

Mr. President, I have come to the floor today to discuss the nomination of William Barr to be Attorney General. I am firmly opposed to the nomination for many reasons, from his past attacks on the Mueller investigation to his endorsement of torture. More generally, I am deeply concerned about his view that the President is effectively royalty, that he is unaccountable to the laws of our country or to the constraints imposed by the U.S. Congress.

That brings me to the topic I want to focus on today, which is Mr. Barr's dangerous views on surveillance and his contempt for surveillance laws and the Fourth Amendment. This is not a partisan issue. There is a bipartisan coalition in the Congress

that has fought to protect the privacy and constitutional rights of Americans. But Mr. Barr's views, once I have laid them out today, should frighten every member of this body. Because what Mr. Barr has said is that, whether Congress supports broader or narrower surveillance authorities and regardless of whether Congress votes for more checks and balances and oversight, it doesn't matter. Because Mr. Barr has made it crystal clear that the president can do what he wants.

This nominee poses a unique threat to the rule of law and the Fourth Amendment. His long-held views, which presumably he will put into practice if he is confirmed, threaten the very notion that Congress or the courts have any say on who in America gets spied on. If he is confirmed as attorney general, Mr. Barr could take us back, and not just twelve years to an era of warrantless wiretapping. As Mr. Barr himself has made clear, he would take

us back forty years, to an era before the Church Committee when neither Congress nor the courts had any role at all in checking or overseeing an abusive, out-of-control government.

Back before the reforms of the 1970s, the government committed one horrific abuse after another. It spied on hundreds of thousands of innocent Americans. It spied on activists. It spied on Dr. Martin Luther King, Jr. It spied on Congress.

When these abuses came to light, Congress acted by passing the Foreign Intelligence Surveillance Act, or FISA, which established a secret court to issue warrants against spies and terrorists.

Unfortunately, the government violated the law when it implemented its warrantless wiretapping program in 2001. The program included warrantless collection of the content of private

communications, including through warrantless targeting of phone numbers and email addresses of people here in the United States. The program also included the bulk collection of telephone and email records of enormous numbers of innocent, law-abiding Americans. All of this occurred, in secret, without warrants or any court oversight at all. And almost no one in Congress, not even the members of the intelligence committees, knew about it.

The secrecy didn't even end when the bulk phone and email record programs were moved under FISA. The Obama Administration, just like the Bush Administration, kept this abusive program, and the secret legal interpretations behind it, from the American people, even lying about it in public testimony.

How did these abusive and illegal programs get their start?

With secret determinations made at the Department of Justice that the law didn't matter and that the President can do what he wants.

And that brings me back to William Barr.

Mr. Barr's dangerous views on executive power have been consistent throughout his career, from his writings at the Department of Justice in the late 1980s to the present. But in October 2003, he laid out in public testimony his position that the president is not accountable to surveillance laws and that the president enjoys giant loopholes in the Fourth Amendment.

October 2003 was shortly after Congress had passed the PATRIOT Act, legislation that many in Congress have come to view as granting too much authority with too little oversight. But from Mr. Barr's perspective, the PATRIOT was too constraining. And that's not even the most troubling part of his testimony. Right up front, he asked himself the question of whether the law was adequate to fight terrorism. And here's what he said. He said he wasn't worried about the law because – and this is a direct quote – “the critical legal powers are granted directly by the Constitution itself, not by Congressional enactments.” In other words, William Barr's view of surveillance is that the laws passed by Congress do not matter. If the President wants to violate those laws, it is Mr. Barr's position that he can somehow claim some constitutional authority to do so.

Here's another direct quote from Mr. Barr's testimony. Talking about laws going back to the 1970s, he said:

“Numerous statutes were passed, such as FISA, that purported to supplant Presidential discretion with Congressionally crafted schemes whereby judges become the arbiter of national security decisions.”

Let's unpack that sentence. From Mr. Barr's perspective, decades of laws passed by the U.S. Congress are nothing but schemes. *Schemes*. He's talking about FISA, which is the fundamental framework of checks and balances that Congress has relied on for four decades to ensure congressional and judicial oversight of surveillance. And he's talking about every modification of FISA, from the PATRIOT Act, to Section 702, which Congress reauthorized last year, to the USA FREEDOM

Act, which was intended to stop the collection of millions of innocent Americans' phone records. Whatever you think of these statutes, they are how Congress determines the extent of the government's surveillance powers and exercises its responsibility to protect the rights of Americans. They are not mere "schemes."

Worse still, it is William Barr's contention that all those laws only purport to have any effect. The President, says Mr. Barr, has the discretion to ignore them. By definition, this is an argument in favor of tyranny. This is as dangerous a position as I have heard in congressional testimony. It is very similar to the language that was concocted in the Department of Justice to justify warrantless wiretapping. And it is coming from the man who might be attorney general of the United States.

Mr. Barr is correct that FISA gives judges some say in when the government can spy on Americans. It is a secret system that greatly advantages the government and almost always precludes challenges from those being spied on. FISA has been abused through secret interpretations of law. But FISA does involve judges considering the Fourth Amendment rights of Americans. And that's where Mr. Barr objects.

Based on his own testimony, it is clear that Mr. Barr has fundamental problems with the Fourth Amendment, or at least its application to anything that the President might unilaterally decide involves national security. He believes that if the government determines that there is a threat, there's no need to ask a judge for a warrant.

The Fourth Amendment protects the right of the people to be secure against unreasonable searches and seizures unless there is a probable cause warrant. That's what the Constitution says.

But William Barr has found two giant loopholes in the Fourth Amendment. First, he insists that if the government decides that a foreigner in the United States is – and this is a quote from Mr. Barr – “apparently acting as a terrorist” – then he or she is not one of the “people,” and the government can just throw out the Fourth Amendment. And, second, Mr. Barr argues that, so long as the government says there is a threat, a warrantless search is not unreasonable and the warrant requirement of the Fourth Amendment simply doesn't apply.

At the core of Mr. Barr's philosophy is that no one – not Congress and certainly not judges -- has any business assessing the government's assertions about threats. Here is another direct

quote from Mr. Barr -- these are “assessments judges are not competent to make or responsible for making under the Constitution.”

Mr. President, for forty years, the judges of the FISA court have been making these determinations. But, from Mr. Barr’s perspective, the courts are not competent to decide who gets spied on; only the president gets to decide.

Some might ask whether Mr. Barr has had a change of heart, particularly since Congress has passed additional surveillance authorities in the years since his testimony. I hope he is asked whether he now believes that spying on Americans and people in the United States has to be consistent with the laws passed by Congress. But his 2003 testimony suggests that even the sweeping new laws that have passed wouldn’t satisfy him.

A little over a decade ago, Congress created Section 702 of FISA, which allows for warrantless spying on foreigners overseas. I have had serious concerns about the number of innocent Americans whose communications are swept up under 702 collection. But at least the targets of the surveillance are overseas. Mr. Barr, though, would go much further – in his testimony, he called for the warrantless targeting of people inside the United States. According to Mr. Barr, there are individuals right here in the United States who have no Fourth Amendment rights.

Then there is the collection of business records – sensitive information about Americans that are in the possession of a third party. That’s your purchases. It’s who you are communicating with. It’s where you are located at any time of the day. Mr.

Barr believes that the Fourth Amendment does not apply to any records held by a company or other third party, no matter how sensitive that information is. This view was recently rejected by the Supreme Court, which held that the Fourth Amendment did apply to government's collection of location data from wireless carriers. Yesterday, Mr. Barr said he had not read that Supreme Court decision, which I find deeply troubling.

The government's collection of business records is authorized by Section 215 of FISA, which was part of the PATRIOT Act. There are serious concerns about Section 215. It was abused for years to carry out a secret program that swept up the phone records of millions of innocent, law-abiding Americans. Even after the USA FREEDOM Act, which was intended to end bulk collection, it has been used to collect hundreds of millions of phone records. And all the government needs to collect these

records is to show the FISA Court that the records are relevant to an investigation. There is no requirement for a probable cause warrant.

Section 215 sunsets this year, so Congress will have a debate about whether these authorities are too broad or whether there is a need for more checks and balances. But today we are talking about the dangerous views of William Barr. And what Mr. Barr believes is that the government shouldn't have any court oversight at all when it comes to collecting these records on Americans. He thinks that government should just unilaterally issue a subpoena and collect those records with no oversight whatsoever.

The foundation of Mr. Barr's beliefs when it comes to surveillance is that the president can do what he wants whenever

he decides that national security is at stake. What would that mean if Mr. Barr were confirmed as Donald Trump's attorney general? The president is right now openly considering declaring that he has emergency powers to override the will of the Congress, and he is doing this while relying on a baseless assertion that there is a national security crisis. Until he was fact-checked, he was making wild claims about terrorists coming over the border. He also regularly calls journalists "enemies of the people" and calls for investigations of his political enemies. I would oppose the nomination of anyone with William Barr's views on executive power regardless of who was president, but the immediate threat right now is too serious to ignore.

Donald Trump has also openly said how much he would enjoy unchecked surveillance powers. During the 2016 campaign,

when the Russians were hacking his opponents, he said,
“honestly, I wish I had that power. I’d love to have that power.”

So if Donald Trump decides that national security is at stake and William Barr is his attorney general, it would be Mr. Barr who might give him that power – power he could use with no oversight from the courts and without regard to what Mr. Barr has dismissed as the “schemes” of the Congress. And, in case anyone thinks that Mr. Barr would himself serve as a check on the president, he has also written that that is not the job of the attorney general. Just last year, he wrote that all executive power rests in one and only one person – the president – and the president does not have to convince his attorney general that his orders are legal.

Fears about Mr. Barr's views on surveillance are not conjecture. They are based on Mr. Barr's own testimony. I ask every member of this body to read it and consider what is at stake.

There are members of both parties who have long been concerned about expansive surveillance authorities under FISA or the possible abuse of FISA. But those concerns are small potatoes compared to what Mr. Barr has proposed – which is that the law need not constrain the president at all. For example, some members of this body have expressed concern about FISA warrants in connection with the Russia investigation and whether all relevant information has been provided to the FISA court. Now consider a world in which the government doesn't need a warrant and doesn't have to justify its surveillance to any court. Consider the possibility of abuse in that world. That is the world that William Barr wants.

I would also appeal to my colleagues with whom I have had spirited debates over the years about surveillance and who may have no concerns about the current FISA framework. We have sometimes disagreed about how to write the law. But we agree that the laws passed by Congress have meaning and that they are binding. Congress cannot allow the law to be dismissed as mere “schemes” that the president can ignore when he wants.

William Barr has been more than clear about where he stands. He believes that the president alone decides when there’s a threat and, when he does, he doesn’t have to worry about Congress, judges, the laws or the Constitution. That is a recipe for more abuses, which Congress may or may not even be told about. We have all been warned.

Finally, Mr. President. I have concerns about Mr. Barr that relate to classified matters. I am currently seeking declassification of those matters and hope that this will be resolved prior to any votes on the nominee.

Thank you. I yield the floor.