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March 26, 2010

SSCI #2010-1452

The Honorable Eric Holder
Attorney General
United States Department of Justice
Washington, DC 20530

Dear Attorney General Holder:

(U) Thank you for the January 5 response to the letter that I and several other senators sent to you and Director Blair in June 2009. While I strongly disagree with many of the decisions that have been made regarding the program it discusses, I appreciate the candid and straightforward nature of the reply.

~~(TS//NF)~~ The response states that "the Intelligence Community has determined that information that would confirm or suggest that the United States engages in bulk records collection under Section 215 [of the USA PATRIOT Act], including that the Foreign Intelligence Surveillance Court (FISC) permits the collection of 'large amounts of information' that includes 'significant amounts of information about U.S. persons,' must remain classified." It goes on to argue that public discussion of this information would expose intelligence sources and collection methods and harm national security.

(U) The response goes on to outline a proposal for informing all members of Congress about the details of these activities. I certainly think that all members of Congress need to understand how the Patriot Act is being interpreted and used in practice before they vote to reauthorize it, so I would support any efforts to share more details with the full membership of the House of Representatives and the Senate. In my judgment, however, this proposal does not go nearly far enough.

~~(TS//NF)~~ I believe that the fact that the FISC has ruled that Section 215 of the Patriot Act permits the collection of very large amounts of information, much of which pertains to law-abiding Americans who are unconnected to any suspicious activity, must be made public. In my view, continuing to hide this fact from the public is both unacceptable and untenable.

(U) Over the past few years, I have raised my concerns about these activities in numerous classified letters that I have written or cosigned, as well as in private meetings with senior officials (most recently including my December discussion with Vice President Biden). I will explain them again here so that they are as clear as possible.

(U) The American people have a legitimate expectation to know as much as possible about the activities of their government, with very few exceptions. As a society, we have chosen to make a carefully limited exception for intelligence and national security activities. Americans generally accept that their government will sometimes rely on clandestine methods to collect

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national security information, and that government agencies will often be more effective at collecting this information if details about how it is collected are kept secret. But Americans nevertheless expect that intelligence collection will be conducted in accordance with public law and public policy, as they are commonly known and understood, and that officials in all three branches of government will conduct careful oversight to ensure that this is the case.

~~(TS//NF)~~ With regard to the bulk collection of records, I believe that there is a significant gap between the public understanding of the law and how it is being interpreted in secret. This has led to a significant discrepancy between what most Americans think is legal and what the government is actually doing. This situation has been exacerbated by statements from former executive branch officials implying that Section 215 authorities have been used in a much more limited way. The public is aware that a relatively low number of Section 215 applications have been approved by the FISC, but does not understand that secret interpretations of the law permit applications that cover a very large amount of records. Limitations on access to these records can mitigate, but not negate, the privacy impact of collecting them.

(U) To be blunt, I believe that the level of secrecy surrounding the official interpretation of the law violates the trust that the American people place in their government. Policymakers (including the two of us) can have legitimate disagreements about exactly how broad intelligence collection authorities should be, and individual citizens do not expect to know every detail about how intelligence collection is carried out. But voters have a need and a right to understand the boundaries of what is and is not permitted under the law, so that they can ratify or reject decisions made on their behalf.

~~(S//NF)~~ I understand the intelligence community's concern that public discussion of bulk collection programs may jeopardize their effectiveness, and I take this concern seriously. But this risk must also be balanced with the public's right to understand the legal limits on intelligence collection activities, particularly when those activities involve gathering information about large numbers of law-abiding citizens. I was disappointed that the January 5 response simply referenced the intelligence community's determination as if it were dispositive. It did not mention the need to weigh national security interests against the public's right to know, or acknowledge the privacy impact of relying on legal authorities that are being interpreted much more broadly than most Americans realize.

~~(S//NF)~~ It is clear from the January 5 response and other conversations I have had that senior policymakers are generally deferring to intelligence officials on the handling of this issue. I certainly respect our nation's intelligence professionals, and I believe it is often appropriate to defer to them on questions regarding the best way to maximize the amount of information the government collects. But most intelligence officials are specialists; they are not charged with the responsibility to balance intelligence collection priorities with the public's right to know. That responsibility rests with policy officials, and it should not be delegated lightly.

(U) I am aware that as a member of Congress I could conceivably go down to the floor of the U.S. Senate and make public whatever information I see fit, but I believe it would be

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irresponsible of me to unilaterally disclose classified information in this manner. Therefore, I plan to continue engaging with the executive branch and attempting to reach agreement on a way to make this information public, and I hope that you will re-examine the executive branch's position on this issue.

(U) Thank you for your attention to this important issue, and for your responsiveness to date.

Sincerely,

Ron Wyden

Ron Wyden
United States Senator

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