

April 9, 2019

The Honorable Jerry Moran, Chairman
The Honorable Jeanne Shaheen, Ranking Member
U.S. Senate Committee on Appropriations
Subcommittee on Commerce, Justice, Science, and Related Agencies
S-128, The Capitol
Washington, DC 20510

Dear Chairman Moran and Ranking Member Shaheen:

We write to you regarding the FY2020 budget hearing for the Department of Justice (“DOJ”).¹ Americans are rightly concerned about the scope of government surveillance, the impact of new technologies, and the protection of Constitutional freedoms.² The DOJ must improve reporting on its surveillance orders.

For over twenty years, the Electronic Privacy Information Center (EPIC)³ has reviewed the annual reports produced by the Administrative Office of the US Courts on the use of federal wiretap authority as well as the letter provided each year by the Attorney General to the Congress regarding the use of the FISA authority.⁴ EPIC routinely posts these reports when they are made available and notes any significant changes or developments.⁵

The annual report prepared by the Administrative Office of the U.S. Courts provides a basis to evaluate the effectiveness of wiretap authority, to measure the cost, and even to determine the percentage of communications captured that were relevant to an investigation. These reporting requirements ensure that law enforcement resources are appropriately and efficiently used while safeguarding important constitutional privacy interests.

¹ *Review of the FY2020 Budget Request for DOJ*, U.S. Senate Comm. on Appropriations (Apr. 10, 2019), <https://www.appropriations.senate.gov/hearings/review-of-the-fy2020-budget-request-for-doj>.

² Abigail Geiger, *How Americans Have Viewed Government Surveillance and Privacy Since Snowden Leaks*, Pew Research Center (June 4, 2018), <http://www.pewresearch.org/fact-tank/2018/06/04/how-americans-have-viewed-government-surveillance-and-privacy-since-snowden-leaks/>.

³ *About EPIC*, EPIC, <https://epic.org/epic/about.html>.

⁴ *See, e.g.*, Administrative Office of the US Courts, *Wiretap Report 2017*, <https://www.uscourts.gov/statistics-reports/wiretap-report-2017>; Letter from Assistant Attorney General Stephen E. Boyd to the Honorable Michael Pence, President, U.S. Senate, et al., Apr. 30, 2018, <https://fas.org/irp/agency/doj/fisa/2017rept.pdf>.

⁵ *See Title III Wiretap Orders: 1968-2017*, EPIC, http://epic.org/privacy/wiretap/stats/wiretap_stats.html; *Foreign Intelligence Surveillance Act*, EPIC, <http://epic.org/privacy/terrorism/fisa/>; *Foreign Intelligence Surveillance Court (FISC)*, EPIC, <https://epic.org/privacy/terrorism/fisa/fisc.html>.

By way of contrast, the Attorney General’s annual FISA report provides virtually no meaningful information about the use of FISA authority other than the applications made by the government to the Foreign Intelligence Surveillance Court.⁶ There is no information about cost, purposes, effectiveness, or even the number of non-incriminating communications of US persons that are collected by the government. Similarly, The Department of Justice has never released to the public any comprehensive reports concerning the collection and use of cell site location information. In 2017, EPIC submitted two Freedom of Information Act requests to DOJ seeking the release of reports on the collect and use of cell site location information.⁷ EPIC has since sued DOJ for failure to respond to our FOIA requests.⁸

Even after the Supreme Court’s decision in *Carpenter*, which held that law enforcement must get a warrant to obtain cell site location information, there is little to no information available to Congress or the public about how frequently the government is seeking this location data.

The use of aggregate statistical reports has provided much needed public accountability of federal wiretap practices. These reports allow Congress and interested groups to evaluate the effectiveness of Government programs and to ensure that important civil rights are protected. Such reports do not reveal sensitive information about particular investigations, but rather provide aggregate data about the Government’s surveillance activities. That is the approach that should be followed now for FISA and CSLI, particularly after the Supreme Court’s decision in *Carpenter*.

The Appropriations Committee should halt funding for wiretap programs until DOJ publicly reports statistics on FISA and CSLI orders.

We appreciate your consideration of EPIC’s views, and we would welcome the opportunity to provide additional information to the Committee. We ask that this statement be entered in the hearing record.

Sincerely,

/s/ Marc Rotenberg
Marc Rotenberg
EPIC President

/s/ Alan Butler
Alan Butler
EPIC Senior Counsel

/s/ Caitriona Fitzgerald
Caitriona Fitzgerald
EPIC Policy Director

⁶ It is clear from the Attorney General’s annual reports that FISC applications are routinely approved with very rare exceptions. See *Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 140 (2d Cir. 2011) (“Empirical evidence supports this expectation: in 2008, the government sought 2,082 surveillance orders, and the FISC approved 2,081 of them.”). Of the Government’s 1,499 requests to the FISC for surveillance authority in 2015, none were denied in whole or in part. See 2011 FISA Annual Report to Congress, *supra*, note 3.

⁷ EPIC, *EPIC v. DOJ (CSLI Section 2703(d) Orders)*, <https://epic.org/foia/doj/location-data/>.

⁸ *EPIC v. DOJ*, No. 18-1814 (D.D.C. Aug. 1, 2018).