United States Senate

WASHINGTON, DC 20510

March 21, 2019

The Honorable William Barr
Attorney General
Department of Justice
950 Pennsylvania Avenue Northwest
Washington, D.C. 20530

Dear Attorney General Barr:

We are writing to determine how the government's treatment of metadata in national security cases has changed in light of the Supreme Court's decision in Carpenter v. United States.

The Fourth Amendment's prohibition against unreasonable searches and seizures is often implicated during the course of the government's duty to ensure the country's national security. Courts have long wrestled with applying the Fourth Amendment in light of innovations in surveillance tools and our ever-increasing reliance on digital technologies that store and track detailed information about all aspects of a person's life.

In its decision in Carpenter last year, the Supreme Court addressed the application of the Fourth Amendment to cell-site location information (CSLI)—the location records created and stored by wireless providers as a result of a user's cell phone interacting with cell towers. In Carpenter, the Court recognized that because CSLI "provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations," the collection of these records of Americans' movements is a search under the Fourth Amendment, and thus is subject to constitutional scrutiny.

During your confirmation hearing, and later in written questions for the record, Senator Leahy asked you about your views on the Carpenter decision. You stated that it represented a narrow carve out to the longstanding third-party doctrine for cell-site location information, but did not speculate as to whether the broad collection of metadata might require a search warrant. Now that you have been confirmed as Attorney General, it is important to understand not only your views, but also how the Justice Department's policies have changed in response to the outcome of the case.

Last year, Glenn Gerstell, General Counsel for the NSA similarly echoed the Court's finding that such information, when aggregated may "provide a composite picture of that person that is qualitatively deeper and more insightful than any individual piece of information." In light of the Carpenter decision and the recognition of Americans' legitimate interest in privacy around CSLI, the American public deserves to know how the intelligence community treats these records and other sensitive metadata in national security cases. We therefore request that you provide us with responses to the following questions by March 30, 2019:

1. Intelligence community officials have previously stated publicly that the government does not collect CSLI as part of the call detail record program conducted under Section 215. Are there any other legal authorities under which the intelligence community collects CSLI or other data revealing the location of Americans or their phones? If yes, please describe which type of court order or other legal process the intelligence community uses to obtain the following types of location data:
   a. Historical CSLI for targets in the United States.
   b. Real-time or prospective CSLI for targets in the United States.
   c. Real-time or prospective GPS "pings" for targets in the United States.

d. Real-time location data collected with a cell-site simulator or "Stingray."
e. Cell tower dumps, revealing every subscriber in the vicinity of one or more cell sites for a given period of time, for targets in the United States.
f. CSLI or other location data associated with U.S. persons located outside the United States.

2. Intelligence community leaders previously stated publicly that NSA has not collected bulk location data using Section 215. Has the intelligence community engaged in the bulk, domestic collection of CSLI or other data revealing the location of Americans or their phones, using any other legal authority? If yes, please describe the type of court order or other legal process that authorized such bulk collection.

3. Has the Department of Justice (DOJ) promulgated guidance regarding how the Carpenter decision should be interpreted? If so, please provide us with any relevant memorandums or guidance, including any relevant changes made to the Federal Bureau of Investigation's Domestic Investigations and Operations Guide.

4. Has the intelligence community altered any aspect of its collection of call detail records (which do not include CSLI) under Section 215, in light of the Supreme Court's recognition in Carpenter that certain records held by third party companies deserve 4th amendment protection? If so, please provide a description with how such collection was altered.

5. Has the intelligence community altered any other collection programs or its use of any type of data, including collection pursuant to the Patriot Act, FISA, or under Executive Order 12333, in light of the Carpenter decision? If so, please provide a description with how such collection or use was altered.

6. Has DOJ determined whether or not Carpenter should be applied only in criminal investigations as opposed to in national security or foreign surveillance cases? If so, what is the basis for that conclusion? Please provide all relevant memoranda, legal analysis, or guidance related to how the DOJ reached this interpretation.

7. Has DOJ interpreted Carpenter to mean that it is not a Fourth Amendment search for the government to obtain large quantities of call detail records (rather than CSLI)?

We appreciate your attention to this important matter.

Sincerely,

Ron Wyden
United States Senator

Rand Paul
United States Senator

Patrick Leahy
United States Senator

Steve Daines
United States Senator