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OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
WASHINGTON, DC 20511

The Honorable Ron Wyden
United States Senate
Washington, D.C. 20510

Dear Senator Wyden:

I write in response to your letter of July 30, 2019, to former Director of National Intelligence Daniel Coats in connection with the reauthorization of the provisions of the Foreign Intelligence Surveillance Act of 1978 (FISA), as amended, that are currently set to expire in December. This response has been coordinated with the Department of Justice. We apologize for the delay in responding to your letter.

One of the important, long-standing national security authorities reauthorized by the USA FREEDOM Act of 2015 is the authority for the government to acquire tangible things via the so-called “traditional” use of Title V of FISA. “Traditional” use of Title V allows for the acquisition of a wide variety of tangible things that are relevant to authorized national security investigations, provided that those tangible things could otherwise be obtained using a grand jury subpoena or court order. In addition, the Act separately established a mechanism for the government to obtain pursuant to Title V of FISA certain telephone metadata records from U.S. telecommunications providers to help identify contacts of suspected terrorists. That mechanism applies to the acquisition of certain business records referred to as “call detail records,” but not to the content of telephone calls.

Your letter asks whether the Intelligence Community may obtain cell-site location information (CSLI) under Title V, following the Supreme Court’s decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). In *Carpenter*, the Supreme Court held that in the context of a criminal investigation, the government’s acquisition of seven days of historical CSLI from a cell phone company constituted a Fourth Amendment “search” subject to the warrant requirement. However, the *Carpenter* opinion explicitly “does not consider other collection techniques involving foreign affairs or national security.” *Id.* at 2220. Moreover, the Court stated that “we need not decide whether there is a limited period for which the Government may obtain an individual’s historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be.” *Id.* at 2217 n.3. Finally, the Court noted that “[w]e do not express a view on matters not before us: real-time CSLI or “tower dumps” (a download of information on all devices that connected to a particular cell site during a particular interval).” *Id.* at 2220.

The Department of Justice and the Intelligence Community carefully consider all Supreme Court precedent, including *Carpenter*, when evaluating how and whether the Fourth Amendment applies to a proposed intelligence activity. While neither the Department of Justice nor the Intelligence Community has reached a legal conclusion as to whether the “traditional” Title V provision may be used to obtain CSLI in light of *Carpenter*, given the significant constitutional and statutory issues the decision raises for use of that authority to obtain such data, the Intelligence Community has not sought CSLI records or global positioning system (GPS)

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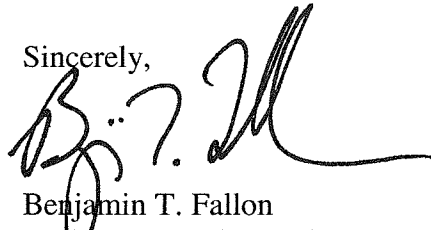
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records pursuant to Title V of FISA since *Carpenter* was decided. The current practice of the government under FISA is to obtain historical and/or prospective CSLI or GPS-based location information for intelligence purposes pursuant to Titles I and/or III of FISA, based upon a showing of probable cause.

Finally, with respect to an application under Title V for the production on an ongoing basis of call detail records relating to an authorized counterterrorism investigation, the statute expressly provides that the term “call detail record” does not include “cell site location or global positioning system information.” 50 U.S.C. § 1861(k)(3). Thus the government may not obtain CSLI or GPS-based location information in the case of such applications under Title V of FISA.

Thank you for your interest in this matter, and I look forward to working with you and the Congress on the reauthorization of the expiring provisions of FISA.

Sincerely,

A handwritten signature in black ink, appearing to read "B. T. Fallon", with a long horizontal flourish extending to the right.

Benjamin T. Fallon
Assistant DNI for Legislative Affairs