

RON WYDEN
OREGON

CHAIRMAN OF COMMITTEE ON
FINANCE

221 DIRKSEN SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-5244

United States Senate
WASHINGTON, DC 20510-3703

COMMITTEES:
COMMITTEE ON FINANCE
COMMITTEE ON THE BUDGET
COMMITTEE ON ENERGY AND NATURAL RESOURCES
SELECT COMMITTEE ON INTELLIGENCE
JOINT COMMITTEE ON TAXATION

May 13, 2021

The Honorable Lloyd J. Austin III
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Secretary Austin:

I write to urge you to release to the public information about the Department of Defense's (DoD) warrantless surveillance of Americans.

In February 2020, media reports revealed that U.S. government agencies are buying location data obtained from apps on Americans' phones and are doing so without any kind of legal process, such as a court order. I have spent the last year investigating the shady, unregulated data brokers that are selling this data and the government agencies that are buying it. My investigation confirmed the warrantless purchase of Americans' location data by the Internal Revenue Service, Customs and Border Protection, the Drug Enforcement Administration, and the Defense Intelligence Agency (DIA).

As part of my investigation, I sent a set of questions to the Under Secretary of Defense for Intelligence and Security in February 2021, asking about DoD's warrantless surveillance of Americans. The questions were:

1. DIA recently informed my office that they have adopted the position that the Fourth Amendment, and the Supreme Court's holding in the Carpenter case, do not apply to data about Americans that the government buys, and only apply to data that the government acquires via compulsion. Which other components of DoD, if any, have adopted this or a similar interpretation of the law?
2. Has the DoD General Counsel's office signed off on this legal theory and the supporting legal analysis?
3. Please provide me with a copy of the legal analysis supporting this theory. If individual DoD components have drafted their own legal analysis, please provide me with a copy of each component's analysis.
4. Please identify the DoD components that are, without a court order, buying and using data acquired about Americans. If the DoD components do not know the identities (and citizenship) of the individuals whose information the DoD component has acquired, this question also covers the purchase and use of data about individuals / electronic devices used by individuals located in the United States.

911 NE 11TH AVENUE
SUITE 630
PORTLAND, OR 97232
(503) 326-7525

405 EAST 8TH AVE
SUITE 2020
EUGENE, OR 97401
(541) 431-0229

SAC ANNEX BUILDING
105 FIR ST
SUITE 201
LA GRANDE, OR 97850
(541) 962-7691

U.S. COURTHOUSE
310 WEST 6TH ST
ROOM 118
MEDFORD, OR 97501
(541) 858-5122

THE JAMISON BUILDING
131 NW HAWTHORNE AVE
SUITE 107
BEND, OR 97701
(541) 330-9142

707 13TH ST SE
SUITE 285
SALEM, OR 97301
(503) 589-4555

[HTTPS://WYDEN.SENATE.GOV](https://wyden.senate.gov)

PRINTED ON RECYCLED PAPER

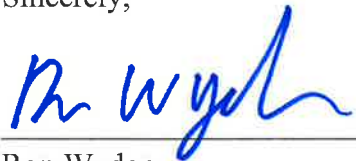
5. Other than DIA, are any DoD components buying and using without a court order location data collected from phones located in the United States? If yes, please identify which components.
6. Are any DoD components buying and using without a court order location data collected from automobile telematics systems (i.e. internet connected cars) from vehicles located in the United States? If yes, please identify which components.
7. Are any DoD components buying and using without a court order internet metadata, including “netflow” and Domain Name System (DNS) records, about:
 - a. domestic internet communications (where the sender and recipient are both U.S. IP addresses).
 - b. internet communications where one side of the communication is a U.S. IP address and the other side is located abroad.
8. If the answers to questions five, six, or seven are yes, have these activities been reviewed by the DoD Inspector General? If not, has DoD notified the Inspector General that they are taking place?

On March 13, 2021, DoD provided answers to the first three questions, without any restrictions. I have attached a copy of those answers to this letter. On April 21, 2021, DoD provided answers to the remaining questions. However, four of the answers were designated Controlled Unclassified Information and one was provided in classified form. Information should only be classified if its unauthorized disclosure would cause damage to national security. The information provided by DoD in response to my questions does not meet that bar.

As Congress debates important legislation to close the loopholes exploited by these data brokers and their government customers, the American people have a right to know the answers to these questions. Accordingly, I request that you clear this information for release to the public by June 15, 2021.

Thank you for your attention to this important matter. Please contact Chris Soghoian in my office if you have any questions about this request.

Sincerely,



Ron Wyden
United States Senator

Q1. DIA recently informed Sen. Wyden's office that they have adopted the position that the 4th amendment, and the Supreme Court's holding in the *Carpenter* case, do not apply to data about Americans that the government buys, and only apply to data that the government acquires via compulsion. Which other components of DoD, if any, have adopted this or a similar interpretation of the law?

ANSWER: If a DoD Intelligence Component purchases data in connection with an intelligence activity, the Component is responsible to ensure that the purchase is in accordance with existing law, regulation, and policy, including the Fourth Amendment (as understood through the *Carpenter* opinion and other relevant case law) and the Attorney General-approved procedures in DoD Manual (DoDM) 5240.01, "Procedures Governing the Conduct Of DoD Intelligence Activities."

Q2. Has the DoD General Counsel's office signed off on this legal theory and the supporting legal analysis?

ANSWER: Each DoD Intelligence Component, supported by its respective legal counsel, is responsible for ensuring that the Component's intelligence activities are carried out in accordance with existing law (including the Fourth Amendment as understood through the *Carpenter* opinion and other relevant case law), regulation, and policy. In this case, DIA's Office of General Counsel provided the legal support for the DIA activity.

Q3. Please provide us with a copy of the legal analysis supporting this theory. If individual DoD components have drafted their own legal analysis, please provide us a copy of each components' analysis.

ANSWER: In general, the collection and retention of data by Defense Intelligence Components enable the conduct of authorized intelligence activities (specifically, foreign intelligence and counterintelligence activities), which are subject to applicable law, regulation, and policy, including the Fourth Amendment (as understood through the *Carpenter* opinion and other relevant case law) and the Attorney General-approved procedures in DoDM 5240.01. We understand that DIA has already provided Senator Wyden's staff with a document that states DIA's legal conclusions as regards the DIA activity in question. We have no other analyses to provide in response to this question.