RON WYDEN
OREGON

RANKING MEMBER 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 BUDGET
COMMITTEE ON ENERGY & NATURAL RESOURCES
SELECT COMMITTEE ON INTELLIGENCE
JOINT COMMITTEE ON TAXATION

August 21, 2018

The Honorable Jefferson B. Sessions III
Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Sessions:

I write today to urge the Department of Justice (DOJ) to be more forthright with federal courts about the disruptive nature of cell-site simulators.

Cell-site simulators, commonly described in the media as "Stingrays" or "IMSI catchers," mimic mobile telephone towers to locate and identify nearby mobile devices. In recent years, cell-site simulators have become standard tools for federal, state, and local law enforcement, which deploy them for a broad range of purposes.

In 2015, DOJ issued policy guidance for the use of cell-site simulators in criminal investigations by DOJ law enforcement components, like the Federal Bureau of Investigation. This guidance outlines the cell-site simulator application process and establishes for the first time a warrant requirement in most cases. While the guidance was a much-needed first step to create accountability over federal agencies' use of cell-site simulators, the guidance still does not require that the government provide courts with sufficient information for them to exercise their constitutionally-mandated oversight role.

The DOJ guidance requires that when seeking a warrant to use a cell-site simulator, the government must inform a court that that the target's cell phone, as well the phones used by other, non-targeted individuals in the vicinity, "might experience a temporary disruption of service." Publicly-available DOJ cell-site simulator warrant applications submitted to courts after the guidance went into effect include just a single sentence addressing disruption of the target's communications, noting that a cell-site simulator "may interrupt cellular service of phones or other cellular devices within its immediate vicinity." This statement significantly underplays both the likelihood and impact of the jamming caused by cell-site simulators.

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

HTTP://WYDEN.SENATE.GOV

Senior officials from the Harris Corporation–the manufacturer of the cell-site simulators used most frequently by U.S. law enforcement agencies–have confirmed to my office that Harris' cell-site simulators completely disrupt the communications of targeted phones for as long as the surveillance is ongoing. According to Harris, targeted phones cannot make or receive calls, send or receive text messages, or send or receive any data over the Internet. Moreover, while the company claims its cell-site simulators include a feature that detects and permits the delivery of emergency calls to 9-1-1, its officials admitted to my office that this feature has not been independently tested as part of the Federal Communication Commission's certification process, nor were they able to confirm this feature is capable of detecting and passing-through 9-1-1 emergency communications made by people who are deaf, hard of hearing, or speech disabled using Real-Time Text technology.

Harris' acknowledgement that its cell-site simulators totally disrupt a target telephone's communications raise serious questions including whether that disruption fails the reasonableness requirements of the Fourth Amendment or violates provisions of the Communications Act of 1934. However, the government's warrant applications focus almost entirely on the Fourth Amendment question of whether there is probable cause supporting the warrant and largely gloss over other important issues.

Courts will only consider the facts and questions that come before them, and they rely on the honest disclosure of interested parties rather than on their own fact-finding missions, particularly in an *ex-parte* proceeding like a surveillance application, where the court only hears from the government. The government has a duty of candor to describe relevant information when presenting a warrant application. DOJ knows far more about cell-site simulators than the courts. It has an obligation to be candid, forthright, and to fully disclose to courts the true impact of this surveillance technology.

It is important that courts understand that the surveillance operations they are being asked to authorize will incidentally rob Americans of the means to communicate. While some courts may find this restraint justifiable, such as during investigations into crimes that pose a significant threat to public safety, this is a question that courts should decide, not DOJ. To this end, I ask that you update the DOJ cell-site simulator guidance to 1) require additional, clear disclosure to the courts regarding this technology's disruptive side effects and 2) require that the use of cell-site simulators minimize interference with both target and non-target communications. I also ask that you provide me with complete answers to the following questions by September 14, 2018:

1. The Communications Act of 1934 prohibits willful or malicious interference with licensed radio communications. How is a federal law enforcement agency's use of a cell-site simulator not authorized by a court order consistent with the prohibition on interference with radio communications in 47 U.S.C. § 333?

2. Is it the position of DOJ that a search warrant authorizing a federal law enforcement agency to use a cell-site simulator overrides the statutory prohibition on interference in 47 U.S.C. § 333? If yes, please explain why.
3. Does DOJ believe that it has an obligation under the duty of candor to notify federal courts considering an application for the use of a cell-site simulator that federal law prohibits interference with cellular communications? If not, please explain why.
4. Is it the position of DOJ that it is lawful, with or without a court order, for a federal law enforcement agency to interfere with licensed radio communications such that it disrupts a surveillance target's emergency cellular communications with 9-1-1? If yes, please explain why.

If you have any questions about this request, please contact Chris Soghoian in my office.

Sincerely,

Ron Wyden
United States Senator