January 27, 2014

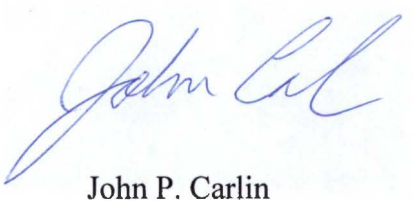
The Honorable Patrick Leahy
Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Charles Grassley
Ranking Member
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

Thank you again for giving me the opportunity to appear before the Committee on January 8, 2014. I enclose my responses to the Questions for the Record that I received from Ranking Member Grassley.

Sincerely,



John P. Carlin

Enclosure

Senator Chuck Grassley
Questions for the Record

John Carlin
Nominee, Assistant Attorney General for National Security

1. A recent article about your nomination in Foreign Policy magazine raised concerns about whether, given your close relationships with some officials in the White House, as a Department of Justice appointee you can be appropriately independent from them. The article also suggested that you had asked your colleagues not to copy you on email about sensitive policy issues in advance of your hearing. Did you ask colleagues not to email you about sensitive policy issues in advance of your hearing? If so, why?

Answer

I did not ask my colleagues to withhold from me, in advance of my hearing or at any other time, any information, communicated by email or otherwise, that I would need to fulfill the responsibilities of Acting Assistant Attorney General (AAG) for National Security. As part of those responsibilities, I am an active participant in discussions and decisions about many sensitive national security policy matters. In addition, as a career public servant with the Department of Justice, and in my time spent as Chief of Staff of the Federal Bureau of Investigation under Robert S. Mueller, III, I understand the critical importance of appropriate independence in matters under the supervision of the AAG for National Security.

2. The National Security Division made a significant policy change last year with respect to material collected under Section 702 of FISA. Before last summer, defendants were not notified if material collected under FISA Section 702 was used as the basis to obtain a traditional FISA warrant against them. If these defendants were not notified, they could not challenge the use of the 702 provision in any way.

   In February, however, the Solicitor General represented to the Supreme Court in a case challenging the statute that defendants were being notified, which turned out not to be true. A debate within the Department of Justice ensued.

   According to the New York Times, the debate stretched through the summer, with "dueling memorandums by lawyers in the Solicitor General's office and in the National Security Division." Eventually, the Department adopted the Solicitor General's view. According to news reports, the Department has begun providing additional notice to certain defendants.

a. Do you know how many defendants are going to be affected by this change of policy, and when do you expect all the additional notices to be provided?

Answer

The Department has publicly stated that it is conducting a review of criminal cases in a variety of stages. To date, pursuant to that review, the government has provided notice concerning Section 702-derived information in two criminal cases. The defendants in those cases will thus have the opportunity to challenge the constitutionality of Section 702 and the lawfulness of the acquisitions.

The Department also anticipates that notice will be provided to additional defendants; however, because determinations regarding whether a defendant should be provided notice of Section 702-derived information are fact-dependent, and the cases reviewed are at varying stages of pendency, I am unable to specify the number of cases in which notice may be provided at this time.

b. Do you believe that under your leadership the National Security Division was complying with its legal and ethical obligations when it didn't provide these notices? If so, why was the policy changed?

Answer

The employees of the National Security Division take their legal and ethical obligations seriously and have sought in good faith to comply with them. Under my leadership, and if I am confirmed, the Division will continue to do so. My understanding is that DOJ's practice has always been to provide notice to aggrieved parties when the government intends to use at trial evidence that it understands to be obtained or derived from FISA surveillance.

The focus of our review of existing practice was whether and under what circumstances information obtained through surveillance under Title I of FISA or physical search under Title III of FISA could also be considered derived from other surveillance under Title VII of FISA (the FISA Amendments Act). The Department has determined that, consistent with practice under Title III of the Wiretap Act, information obtained or derived from Title I FISA collection may, in particular cases, also be derived from prior Title VII FISA collection, such that notice concerning both Title I and Title VII should be given in appropriate cases with respect to the same information. The Department will continue to comply with its legal obligations to notify aggrieved persons of the use of information obtained or derived from an acquisition under Section 702 in judicial or administrative proceedings against such person.

3. If confirmed one of the matters you would be supervising is the investigation and possible prosecution of Edward Snowden. There have been calls for leniency or clemency for Snowden, perhaps in exchange for returning documents that he took from the government. Do you believe it is appropriate for the United States to consider some degree of leniency for Snowden?

Answer

Mr. Snowden is charged by criminal complaint with the unauthorized disclosure of national defense information, the unauthorized communication of classified communication intelligence information, and theft of government property. The Department of Justice takes unauthorized disclosures of classified information seriously, and is committed to vigorously prosecuting those disclosures when they occur. Because this is a pending criminal investigation, I cannot comment further on the matter.

4. Are you aware of a 2010 EEOC complaint regarding a DOJ attorney in the National Security Division, Joshua Nesbitt, who alleged that he was the victim of race-based discrimination?

Answer

Yes.

5. This matter, *Nesbitt v. Holder*, is currently being litigated in the U.S. District Court for the District of Columbia. What role, if any, have you played in the litigation of this matter?

Answer

This case is being handled by the U.S. Attorney's Office for the District of Columbia, and is in active litigation. As the acting head of a component of the Department of Justice, however, I have been briefed on the status of the case.

6. The plaintiff in *Nesbitt v. Holder* alleged that he was denied promotion to the position of Deputy Chief of Litigation in the National Security Division's Office of Intelligence because of his race. He points to the selectee's "failure to comply with the application requirements contained in the vacancy announcement, and that the application process was corrupted in order to avoid promoting the African-American applicant." What measures have you put in place, or will you put in place, in order to ensure that the application and review processes in hiring decisions will be clear to all involved?

Answer

Setting aside Mr. Nesbitt's specific case, which the Department is actively litigating, it is critically important to me that the application and review process in NSD's hiring decisions be clear to all involved. To that end, I have directed NSD's newly hired Director of Training and Workforce Development and NSD's Human Resources Chief to develop a management training curriculum that covers, in detail, standards for ensuring fair and transparent hiring. The full curriculum is still under development, but as a start, this past fall, we held NSD's first Division-wide mandatory training for individuals involved in the hiring process, covering fairness in interviewing, diversity, disability outreach, veterans' preference, reference checking, and other fair employment issues. I am also meeting with our Diversity Hiring Committee this month to review hiring practices.

In addition, I have directed our Executive Office to develop other resources for our hiring teams, capturing comprehensive hiring policies and best practices, which will be incorporated into our annual management training upon completion.

7. Does the Department of Justice and the National Security Division still believe that export licenses and documents are useful to the Department's investigations and enforcement of the export control statutes and to creating incentives on sellers and exporters to conduct due diligence on their buyers and other parties to exports of arms, munitions, and dual use goods?

Answer:

Yes. Export control documents, including license applications and attachments, export licenses, Automated Export System records, bills of lading, and other documents are important evidence for prosecutors to prove criminal violations of the export control laws.

In the course of our investigations, we routinely see that the requirements imposed under current licensing processes encourage sellers and manufacturers to conduct due diligence on their buyers and to seek information about the nature of a particular transaction in order to ensure that the transaction is consistent with U.S. export control laws and regulations. In many cases, sellers and manufacturers who identify suspicious buyers or exporters will refuse to sell export controlled items to these individuals, preventing those items from being obtained from illegal procurement networks and other actors.

8. Have recent decontrols over military aircraft, naval vessels, and other military technology once controlled under the Arms Export Control Act (AECA) and International Traffic in Arms Regulations (ITAR) of the Department of State and now controlled under the

Export Administration Regulations (EAR) of the Department of Commerce weakened the ability of the Department of Justice to obtain international assistance against the unlawful proliferation, diversion, and transfer of military items and military technology?

Answer:

The Department vigorously investigates and prosecutes unlawful proliferation, diversion and transfer of military items and technology. The transfer of previously ITAR-controlled commodities to the EAR may further complicate the ability to obtain extradition to the United States of defendants located overseas in certain cases. For example, most extradition treaties require the defendant's conduct to be unlawful in both countries in order to extradite individuals to the United States (i.e., dual criminality). While most countries around the world regulate the export and import of munitions, fewer countries also control them as dual use items and technology. By moving certain items to the EAR that were formerly designated as defense articles in the ITAR, we could face challenges in obtaining the extradition of defendants in those countries that do not maintain export controls on such items.

9. The technical and manufacturing specifications for many parts of the F-4. F-5, F-14 and F-16 are no longer AECA/ITAR controlled according to the recent revisions of the ITAR. Does that adversely affect in any manner the Justice Department's ability to investigate and prosecute AECA violations or sanctions involving Iran and efforts to obtain military aviation parts? In light of public reports of Chinese assistance to the radar and other avionics of Iranian fighter jets including the F-4, will efforts to investigate and disrupt schemes by Chinese actors to obtain such military aviation technology be impeded given that such aviation parts, components and their associated technical specifications will no longer subject to the Chinese arms embargo under Public Law 101-246, § 902(a)(3)?

Answer:

The Department will continue aggressively to investigate and prosecute violations of the AECA or sanctions provisions involving Iran and China. Without addressing the specific controls and sanctions referenced, if prohibitions were lifted, the Department would not be in a position to investigate or disrupt conduct that is no longer unlawful. The scope of such controls and sanctions is determined by other agencies.

10. Is it more difficult to secure international cooperation, email search warrants, extradition of indicted defendants, or other steps in investigating AECA violations resulting from any Iranian efforts to obtain U.S. military parts through initial shipments through a third

country as a result of the ongoing transfer or military parts and components from ITAR control to EAR control?

Answer:

See answer to #8 above.

11. If the definition of "specially designed" now adopted for the ITAR and EAR had been in place at the time of the prosecution of *United States v. Lachman*, 387 F.3d 42 (1st Cir. 2004), could the defendant have been charged with a violation of the EAR as charged in that case?

Answer:

The definition of "specially designed" now adopted for the ITAR and EAR contains certain specific exceptions and requirements for meeting those exceptions that were not present in the definition adopted by the court in *Lachman*. Whether the item at issue in *Lachman* falls within the new definition depends on facts not set forth in the opinion.

12. Does the Department of Justice or National Security Division support the narrowing of the scope of firearms and ammunition covered by Categories I, II, and III of the U.S. Munitions List (USML) and the transfer of firearms, semi-automatic rifles, and associated ammunition to the EAR and regulation by the Commerce Department?

Answer:

The Department believes that any transfer of those items from the ITAR to the Commerce Control List (CCL) must be subject to appropriate safeguards, comparable to the safeguards that apply under the ITAR.

13. If firearms, semi-automatic rifles, and associated ammunition were no longer considered "defense articles" by the Department of State under the AECA, is it your opinion that the AECA would allow the ATF and the Attorney General to continue to treat firearms, semi-automatic weapons, and associated ammunition as "defense articles" to control their import under the AECA?

Answer:

Yes. The President confirmed this authority as part of Executive Order 13637 of March 8, 2013, which updates the administration of U.S. export and import controls under the AECA. The Bureau of Alcohol, Tobacco, Firearms, and Explosives of the Department of Justice issued an implementing regulation last year confirming that the Attorney General has the authority to designate defense articles and defense services for purposes of permanent import controls, with the concurrence of the Secretary of State and the Secretary of Defense and with notice to the Secretary of Commerce, regardless of whether the Secretary of State controls such defense articles or defense services for purposes of export and temporary import. *See* Importation of Defense Articles and Defense Services—U.S. Munitions Import List, 78 Fed. Reg. 23675 (Apr. 22, 2013) (codified at 27 C.F.R. pt. 447).

14. Is there a provision in the EAR which requires the mandatory reporting to the Commerce Department of cyber intrusions involving the unlawful export of military "technical data" or technology to China as required by the mandatory reporting provision of the ITAR, 22 C.F.R. § 126.1(e) to the State Department?

Answer:

I am not aware of a reporting requirement in the EAR analogous to 22 C.F.R. § 126.1(e)(1).

15. Will the Department of State's proposed narrowing of the definition of "defense services" under the ITAR potentially adversely affect the FBI's ability to obtain FISA orders against U.S. persons providing technical assistance to the Chinese military, intelligence services, or military-research/industrial companies?

Answer:

In the context of clandestine intelligence activities, the Foreign Intelligence Surveillance Act (FISA) requires a showing of probable cause that the relevant activities "involve," "may involve," or "are about to involve" "a violation of the criminal statutes of the United States." 50 U.S.C. § 1801(b)(2)(A) & (B). My understanding is that the proposed action, with certain limited exceptions, would make it lawful to provide a defense service without a license if the service is based solely on public information. The proposed definition would accordingly limit the types of conduct that would support obtaining a FISA order pursuant to § 1801 in the context of clandestine intelligence activities.

16. Do you support the letter to the U.S. Sentencing Commission of the former Assistant Attorney General, Lisa Monaco, advocating a limited and measured mandatory minimum sentence for some criminal offenses relating to certain Iranian sanctions violations or violations involving transactions with certain Specially Designated Nations or nations under arms embargo depending upon the nature of the goods or services involved or the foreign parties involved?

Answer:

Yes, I support the limited and measured approach set forth in the letter, which appropriately addresses the seriousness of such offenses.