SELECT COMMITTEE ON INTELLIGENCE

UNITED STATES SENATE

Post-hearing Questions for

Mr. Matthew Olsen upon his nomination to be Assistant Attorney General for the National Security Division, Department of Justice

[From Senator Wyden]

1. In a November 6, 2020, letter, then-DNI Ratcliffe wrote that, "with respect to the use of Title V [of FISA] to obtain records from ISPs, the FBI does not request and obtain pursuant to Title V the content of any communication, to include search terms submitted to an online search engine." You testified that "the collection of search terms or browser history raises serious privacy concerns." Do you believe, as then-DNI Ratcliffe wrote, that search terms submitted to an online search engine constitute content?

RESPONSE: I have not had an opportunity to review DNI Ratcliffe's letter and therefore I am not in a position to assess his statement. The USA PATRIOT Act of 2001 amended Title V to authorize the government to obtain a court order to acquire "tangible things" for foreign intelligence purposes. That provision expired in 2020. If it is reauthorized and if I am confirmed, I will seek to understand how Title V will be applied.

To the extent your question encompasses government access to search terms in contexts other than Title V of FISA, I am not aware of how courts have ruled on the government's authority to obtain search terms in other contexts. In my experience, the answer is likely to turn on the particular facts of an investigation and the applicable tools and authorities. If confirmed, I will work with others in the Justice Department and Intelligence Community to make sure there is appropriate guidance and oversight related to this issue.

2. At your confirmation hearing, you, along with the nominees to be Principal Deputy DNI and Intelligence Community Inspector General, testified that the law requires that a whistleblower complaint determined by the inspector general to be an urgent concern must be transmitted to Congress. The DNI and DNI General Counsel have also testified to that effect. This consensus runs counter to a September 3, 2019, Memorandum Opinion of the Office of Legal Counsel, which 67 inspectors general have likewise described as "wrong as a matter of law and policy." The inspectors general further warned that "the OLC opinion, if not withdrawn or modified, could seriously undermine the critical role whistleblowers play in coming forward to report waste, fraud, abuse, and misconduct across the federal government." Moreover, according to the inspectors general, the OLC's interpretation of the law "has the potential to undermine IG independence across the federal government" and "creates a chilling effect on effective oversight." If you are confirmed, will you review the OLC opinion to determine whether to make a formal request of the OLC to modify or withdraw it?

RESPONSE: Because I am not in the Department, I am not aware of what process the Attorney General or OLC might have for reviewing prior OLC opinions. I understand the Committee's interest in and concern about the referenced opinion, and as the Department's primary liaison to the Director of National Intelligence, I believe the Assistant Attorney General for National Security would be expected to play a role in questions directly related to the intelligence community. If confirmed, I commit to working within the Department in an effort to ensure that the intelligence community now and in the future is fully and appropriately complying with whistleblower laws.

3. In 2007 and 2008, you participated on behalf of the National Security Division in the case of *In Re Directives to Yahoo Inc. Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, a challenge by Yahoo!, Inc. to the Protect America Act.

    - The government's FISA Court motion for an order of civil contempt requested that, if the Court denied Yahoo's motion for a stay, the Court should impose a "coercive fine of a minimum of $250,000 for each additional day that Yahoo fails to comply, with the fine to double for each successive week that Yahoo fails to comply with the Court's April 25, 2008, Order." Is there a public interest in a constitutional challenge to a novel and controversial collection authority, particularly when the public is unaware of how that authority is being implemented? If so, is there a point at which coercive fines against the challenger undermine that public interest?

RESPONSE: Yes, I believe there is a public interest in recipients of FISA process being able to bring constitutional challenges to the law. It is my understanding that the fine requested by the government was not intended to deter Yahoo! from asserting its legal rights. Rather, the government filed a motion requesting the above-referenced fine after the FISA Court had ruled that the directives issued to Yahoo! complied with applicable statutes and the Constitution. Because the FISA Court denied a stay pending Yahoo!'s appeal to the FISA Court of Review, Yahoo! was legally obligated to begin complying with the directives issued to it during the pendency of that appeal. As such, the government requested that the FISA Court impose a penalty in the event of the company's failure to comply.

    - The government's ex parte brief to the FISA Court of Review took the position that "Yahoo may not vicariously invoke the constitutional rights of third parties not before the Court, i.e. U.S. persons whose communications are acquired pursuant to the directives." In cases in which such U.S. persons are unaware that their communications are collected, who, if not the providers receiving the directives, can submit a constitutional challenge to the collection?

RESPONSE: In the above-referenced case, the FISA Court of Review held that Yahoo! had standing to challenge the directives it had received based on the Fourth Amendment rights of its customers. Similarly situated providers may therefore bring such challenges in analogous circumstances.