

Nomination of Loretta E. Lynch to be Attorney General of the United States
Questions for the Record
Submitted February 9, 2015

QUESTIONS FROM SENATOR FRANKEN

Question 1. The Computer Fraud and Abuse Act (CFAA) has received attention for its potentially harsh penalties. In 2013, I wrote a letter to the Department of Justice expressing my concern about the way in which Aaron Swartz was aggressively prosecuted under the CFAA, and associating myself with a similar letter by Senator Cornyn. The Department’s response was, in short, that the prosecution of Swartz was consistent with the Act. Since then we have heard many people – from all over the political spectrum – call for reform of the CFAA. Recently, the White House announced a proposal to amend the Act. Some have characterized the proposal as a step in the wrong direction, noting – for example – that it would increase certain sentences. What is your assessment of these criticisms, and what is your opinion of the proposal?

RESPONSE: I believe that the Department of Justice has a responsibility to protect Americans from invasions of their privacy and security by prosecuting and deterring computer crimes. Accordingly, we must ensure that the CFAA, like all of our tools, remains up-to-date and reflects the changes in the way that cybercrimes are committed, changes that have occurred in the decades since it was first enacted. For example, I understand that the Administration’s proposals include provisions designed to facilitate the prosecution of those who traffic in stolen American credit cards overseas, to enable the Department to dismantle botnets that victimize hundreds of thousands of computers at a time, and to deter the sale of criminal “spyware.”

With respect to the sentencing provisions contained in those proposals, I believe it is appropriate to ensure that, in the event a defendant is convicted of a hacking offense, the sentencing court has the authority to impose a sentence that fits the crime. For example, the enormous harm caused by the massive thefts of Americans’ personal financial data from retailers illustrates the need to ensure that the maximum sentences available are adequate to deter the worst offenders. As the level of harm caused by the worst cybercrimes increases, I support increasing the maximum penalties available to punish those crimes to a level commensurate with similar crimes, such as mail fraud or wire fraud.

It is also important to understand that these statutory *maximum* sentences do not control what sentence is appropriate for less significant offenses under the CFAA. In many criminal prosecutions, including prosecutions under the CFAA of all but the most serious offenses, the statutory maximum penalty has little or no impact on the sentencing of convicted defendants. Instead, in each case, prosecutors make individualized sentencing recommendations, and judges make individualized decisions, based on such factors as the facts of the case, the offender’s history, and the U.S. Sentencing Guidelines.

Finally, I note that the Administration’s 2015 proposal does not include any new mandatory *minimum* sentences, and I support the decision not to seek any such new sentences in the CFAA at this time.

Question 2. Last year, President Obama announced several reforms to the NSA's surveillance programs. This included a new policy that permits companies to release certain, limited information about the number of National Security Letters they receive annually. The Attorney General was authorized to set guidelines on this new transparency provision. I was pleased to see transparency measures included in the reforms. As I have often noted, I believe increased transparency is needed so that the public has the information it needs to make informed judgments about these programs.

Unfortunately, the guidelines that were issued only allow companies to disclose broad ranges of the number of National Security Letters they have received, and do not allow companies to say if they have received no letters whatsoever.

Last Congress, we failed by a close vote to reach cloture on the motion to proceed to the USA FREEDOM Act, a major NSA surveillance reform bill. The bill included strong government transparency provisions, which I was proud to write with Senator Heller. Those provisions promised to give the American people important information about the numbers of Americans who had their information collected by the government under the different surveillance laws, and they would have allowed companies to make more significant public disclosures. Will you commit to reviewing DOJ's transparency policies governing surveillance programs and consider issuing more robust guidelines?

RESPONSE: Although I have not had occasion as a United States Attorney to consider these questions, it is my understanding that the Administration supported the USA Freedom Act, and that the Department of Justice has played a significant role in enhancing the ability of companies to provide additional transparency. Should I be confirmed as Attorney General, I look forward to continuing the Department's efforts to enhance transparency to the greatest extent possible consistent with protecting our national security and to work with the Intelligence Community and Congress.