

January 28, 2022

Chairman Gary Peters
U.S. Senate Committee on Homeland Security & Governmental Affairs
340 Dirksen Senate Office Building
Washington, DC, 20510

Dear Chairman Peters and Members of the Senate Homeland Security and Governmental Affairs Committee,

The undersigned civil rights and immigrants' rights organizations write to express our concerns regarding the nomination of Mr. Kenneth Wainstein for the position of Under Secretary for Intelligence and Analysis at the Department of Homeland Security. We believe Mr. Wainstein's past history and previous roles in key government positions raise serious questions about his ability to serve as a leader at an agency that requires thoughtful change, not a repetition of past mistakes.

As part of the Bush administration, Mr. Wainstein served as FBI General Counsel and Chief of Staff to the FBI Director, during which time the administration and the FBI engaged in failed policies that singled out Americans and immigrants, particularly of Muslim, Arab, and South Asian backgrounds, as part of the government's post 9/11 dragnet investigations. This included questioning and detaining thousands of immigrants and others as the government hurriedly attempted to establish links between those inside the country and the 9/11 attackers. As a GAO report noted in 2003, however, [these individuals were mostly questioned because of their shared ethnicity or religious identity with the 9/11 attackers, with nothing else connecting them otherwise](#), and the interviews and detentions did not lead to a single terrorism-related conviction. Mr. Wainstein also helped lead the FBI while the government implemented one of the most widely recognized failed policies in the aftermath of 9/11: the National Security Entry-Exit Registration System (NSEERS). NSEERS required the registration of nationals of 25 countries, 24 of which were majority-Muslim. Under NSEERS, the federal government marked 80,000 foreign nationals for fingerprinting, photographing and special registration. In 2016, however, [DHS determined that NSEERS was "redundant, inefficient and provided no increase in security" as it hastily worked to dismantle the program](#).

Our concerns with Mr. Wainstein's past roles in perpetuating discriminatory federal policies were further compounded when we witnessed Mr. Wainstein provide less than satisfactory answers to questions at his January 12 hearing before the Senate Intelligence Committee. In particular, Mr. Wainstein testified that section 215 of the PATRIOT Act, which was used to secretly collect Americans' phone records, provided sufficient protections for civil liberties, when in fact that secret bulk collection violated the law, as multiple federal courts have held since, and gave the NSA warrantless access to some of Americans' most sensitive information for years. Mr. Wainstein also [authored a November 2007 memo regarding the NSA's mass collection](#) in which he "assumed" that the NSA mass collected the telephony metadata of Americans legally and made a brief, cursory attempt to discuss FISA implications (dismissing any concerns on the basis that "the data that the NSA wishes to analyze already exists in its database"). Additionally, Mr. Wainstein would not definitively say that he would not permit the collection of dossiers of Americans,

including journalists, a deeply disturbing exercise engaged in during the 2020 protests in Portland, Oregon by the office he has been nominated to lead.

Agencies like the Department of Homeland Security and its core offices such as the Office of Intelligence and Analysis are at a critical juncture after over two decades of questionable policies and practices that have harmed the American public and eroded their civil rights and civil liberties. Mr. Wainstein's past history raises a number of questions for the undersigned groups. Mr. Wainstein must be questioned regarding his previous roles in government while the aforementioned failed policies were being devised and implemented, particularly as he served in multiple leadership roles at the FBI, DOJ, and White House, roles presumably important enough to indicate that he was at least aware of, and had discussions regarding, these policies.

As the Biden administration has made clear, the Undersecretary for Intelligence and Analysis is expected to focus on threats like domestic terrorism, particularly white supremacy. Protecting vulnerable communities targeted by such violence requires a leader with an unblemished record as to the civil rights of those communities. We have serious reservations as to whether Mr. Wainstein is that leader.

We ask that you hold a hearing on this nomination and, among other critical questions, we request that the Committee ask Mr. Wainstein about the following:

- Did Mr. Wainstein have any role or involvement in developing or executing the NSEERS program, or was he asked to provide any legal or policy opinions or conclusions about the program?
- What is Mr. Wainstein's opinion regarding the propriety of the questioning of thousands of Americans and immigrants following the 9/11 attacks based on little more than the interviewees' ethnic or religious affinity with the 9/11 attackers?
- Did Mr. Wainstein have any role in dragnet surveillance operations conducted by the FBI and focused on Muslim communities in America during his time in government (such as those that are now the subject of litigation before the U.S. Supreme Court in *FBI v. Fazaga*)?
- What are Mr. Wainstein's opinions regarding the scope of authority, and the extent to which that authority runs, that federal agencies have to conduct metadata analysis of information and datasets containing US persons' information, the subject of a 2007 memo authored by Mr. Wainstein while he was at the Department of Justice?
- When Mr. Wainstein learned about the NSA's Stellar Wind Program, did he have any concerns? If so, how did he communicate them, to whom, and how did they impact any work he had before the FISA Courts?
- In his response to Intelligence Committee members, Mr. Wainstein stated that he believed Operational Background Reports were appropriate when they are "based on a reasonable nexus to one or more of I&A's defined collection categories". What does he mean by this? Does he believe that there should be a stricter standard when compiling intelligence on U.S. persons?
- Mr. Wainstein indicated that he had "concerns about the techniques" used by the CIA's enhanced interrogation program, and that he participated in discussions which resulted in FBI personnel not participating in interviews of detainees who were subjected to those techniques. What level of participation did FBI personnel have prior to this decision by Director Mueller?

- Did Mr. Wainstein ever read the relevant Office of Legal Counsel opinions regarding the CIA's enhanced interrogation program? He has previously indicated that he "[does] not recall" reading such opinions, but as an Assistant Attorney General for National Security this would appear to fall squarely within his purview.
- With regards to public reports that FBI personnel were ["detailed" to the CIA in order to participate in such interrogations](#), what role did Mr. Wainstein play in detailing agents for this purpose?
- What role does Mr. Wainstein believe the Chief Intelligence Officer for the Department of Homeland Security plays with regards to declassification reform? What changes would he recommend be instituted to ensure that community outcry, legal challenges, and Inspector General investigations are not required for violations of civil rights to come to light?

Thank you for your time and consideration, and we look forward to engaging with you regarding this impactful nomination.

Signed,

Asian Americans Advancing Justice-Asian Law Caucus (ALC)
 American-Arab Anti-Discrimination Committee (ADC)
 Asian Americans Advancing Justice | AAJC
 Asian Americans Advancing Justice - Los Angeles
 Council on American-Islamic Relations (CAIR)
 Center for Constitutional Rights
 Defending Rights & Dissent
 Engage Action
 Islamophobia Studies Center
 Massachusetts Jobs with Justice
 Muslim Justice League
 Muslim Advocates
 National Lawyers Guild Bay Area Chapter
 National Immigration Law Center (NILC)
 Partnership for the Advancement of New Americans (PANA)
 Restore The Fourth
 Vigilant Love

CC:

Senator Thomas Carper
 Senator Margaret Hassan
 Senator Kyrsten Sinema
 Senator Jacky Rosen
 Senator Alex Padilla
 Senator Jon Ossoff

Senator Rob Portman
 Senator Ron Johnson
 Senator Rand Paul
 Senator James Lankford
 Senator Mitt Romney
 Senator Rick Scott
 Senator Josh Hawley