SELECT COMMITTEE ON INTELLIGENCE

UNITED STATES SENATE

Post-hearing Questions for

Mr. Kenneth Wainstein upon his nomination to be the Under Secretary for Intelligence and Analysis, Department of Homeland Security

[From Vice Chairman Rubio]

1. In May 2021, Secretary Mayorkas announced a "new, dedicated domestic terrorism branch within the Department's Office of Intelligence & Analysis (I&A) to ensure DHS develops the expertise necessary to produce the sound, timely intelligence needed to combat threats posed by domestic terrorism and targeted violence."

   Recently, I&A issued a two-page unclassified assessment ahead of the January 6 anniversary. Parts of the assessment recite the circumstances surrounding the January 6, 2021 chaos and lawlessness at the Capitol and another part refers to media reports indicating that some groups had applied for permits to demonstrate on the anniversary.

   The assessment – apparently widely accessed by the media – generally noted that there was not a specific or credible threat on January 6, 2022. An unclassified "For Official Use Only" IC product widely accessed by the media – yet not actually available to the public – circularly citing media reports to support the assessment, is arguably inherently not the "sound, timely intelligence" Secretary Mayorkas presumes of the I&A domestic terrorism branch.

   a. Are you familiar with this product?

   While I have not seen the product, I am generally aware of it based on media reporting. I have no knowledge about the sources that informed the analysis in the product or the decision-making process behind its issuance.

   b. Do you think this type of product useful? If so, to whom?

   As stated in my answer to Question a above, I have not seen the product, so I am unable to assess the value of the product or the soundness of its sources. With that said, I know that there is often concern that the anniversary of an infamous violent event – such as the Oklahoma City bombing or the 9/11 attacks – might inspire other violent acts. This type of product could presumably be useful to law enforcement agencies at all levels of government that are on the front lines of protecting facilities and individuals that could be targeted by violent actors upon such an anniversary. Conversely, if the analysis suggests that anniversary-style threats are not anticipated, such products could be useful for state, local, and other law enforcement actors that are making resource allocations based on their assessment of the existence and severity of a potential threat.

   With that said, it is important in generating such an intelligence product to recognize the possibility of press attention and ensure that it is phrased in a measured way that mitigates the possibility the press could amplify it in a manner that is inconsistent with its analytical conclusions. It is furthermore critically important that I&A, like every IC component, regularly evaluate the utility of its intelligence products. If confirmed, I will examine whether there are robust consumer feedback mechanisms in place to measure and improve the utility of I&A's products. I will also examine

how products are distributed to protect them as much as possible from improper disclosure.

c. What would you assess the value to I&A's customers to be?

I have not reviewed this product so I cannot assess its value. Moreover, I am not privy to any of the preceding requests made to I&A from their partners, so I cannot evaluate whether this specific product was a response to such requests and whether it satisfied the intelligence needs behind those requests. With that said, if confirmed, I commit to examining this episode in my effort to ensure that I&A's products provide actionable intelligence and are responsive to its customers' needs.

d. If confirmed, what is your vision for the I&A domestic terrorism branch?

I understand that the domestic terrorism branch was established last year, consists of a small group of analysts within the Counterterrorism Mission Center at I&A, and is focused on strategic intelligence analysis of the domestic violent extremism threat. Given the current threat landscape and DHS's statutory mission as it relates to terrorism, I think it makes sense for I&A to focus on such analysis that provides customers – especially their state, local, territorial, tribal and private sector partners – with a strategic understanding of the threat, the tactics used by these threat actors, and the motivations behind their actions. If confirmed, I will assess how I&A is currently producing intelligence on this topic and seek feedback from I&A's customers to identify where I&A can address intelligence gaps and better produce sound, timely intelligence in a manner that is appropriate and consistent with the protection of the privacy and civil liberties of individual Americans.

e. How does the I&A domestic terrorism branch differ from the domestic terrorism work of the FBI and the Department of Justice's new "Domestic Terrorism Unit"?

I understand that I&A's domestic terrorism branch is focused on intelligence analysis and the sharing of that analysis with federal, state, local, tribal, territorial, and private sector partners. By contrast, the domestic terrorism work of the FBI is primarily focused on investigating acts of domestic terrorism, and the new domestic terrorism unit at DOJ is apparently focused on prosecuting those domestic terrorism crimes investigated by federal law enforcement agencies like the FBI. If confirmed, I would work to ensure that both Departments stay coordinated as appropriate on these issues so that unnecessary duplication is avoided and their efforts are complementary.

2. Your views on the contribution of DHS I&A and what role you believe it has played – or should play – in the Intelligence Community and the authorities under which it operates are important to understanding how it will be managed under your leadership, should you be confirmed.

a. In your view, when is I&A most impactful?

I believe I&A is most impactful when it provides quality and timely intelligence to DHS leadership and serves as an effective intelligence conduit between the federal government and its, state, local, tribal, territorial, and private sector partners.

b. What critical function does I&A perform that other Intelligence Community elements, such as the FBI, for example, cannot or will not do?

Unlike other Intelligence Community elements, I&A is statutorily required to work across government at all levels and with the private sector to conduct intelligence activities supporting both national and departmental missions. I&A integrates intelligence into operations across DHS components, its partners in state and local government and the private sector to identify, mitigate and respond to threats. This mission is unlike that of the FBI, which is charged with the domestic law enforcement mission for terrorism and counterintelligence and, in my experience, focuses more on investigation than on information sharing.

c. Why is I&A necessary?

The Department of Homeland Security was created following the terrorist attacks of 9/11 to protect our borders from national security threats, to secure modes of transportation and critical infrastructure, and to partner with government at all levels and the private sector to strengthen sharing of information and intelligence. That mission could only be accomplished if there was an entity within DHS that could serve as the driving force behind this intelligence sharing. I&A provides that driving force. It was established to improve the coordination, sharing, and analysis of information and intelligence across all levels of government; to ensure inclusion of DHS needs in the U.S. Intelligence Community's determination of the nation's intelligence collection priorities; to analyze the intelligence-related information already being collected by DHS; and to facilitate greater access to and cross-mission coordination of information collected by federal, state, and local intelligence, law enforcement, and other agencies.

d. Does I&A have a role in monitoring the activities of U.S. persons? If so, what is that role, under what circumstances, and under what authorities?

The vigorous protection of privacy, and civil rights and civil liberties of U.S. persons is paramount to I&A's success as a member of the U.S. Intelligence Community. I understand that I&A can collect and analyze information on U.S. persons pursuant to statute, including the Homeland Security Act of 2002, only under very limited, prescribed conditions. I&A is limited to intelligence activities in support of national and departmental missions, and its collection activities are limited to information collected overtly or through publicly available sources. I&A is further prohibited from conducting intelligence activities regarding U.S. persons solely for the purpose of monitoring activities protected by the First Amendment. Finally, I&A's

intelligence oversight guidelines allow for collection of U.S. person information only where there is a reasonable belief of a nexus between the subject and one or more of I&A's defined collection categories that support a national or departmental mission (such as terrorism information, counterintelligence, or cybersecurity), and where the information is necessary for the conduct of an authorized I&A mission.

e. Does DHS I&A monitor the social media activity of U.S. persons? If so, under what authorities?

As I understand it, I&A can collect specific information on U.S. persons from publicly available social media pursuant to Title II of the Homeland Security Act of 2002, as amended, which authorizes I&A to "integrate relevant information, analysis, and vulnerability assessments" to address threats to homeland security. However, that collection must be strictly in support of specified national and departmental missions and keep to the limitations summarized in my answer to the previous question.

If confirmed, I will ensure that all activities conducted by I&A are done in a manner that is protective of privacy, and civil rights and civil liberties. I will work very closely with the DHS Office of Civil Rights and Civil Liberties (CRCL) and the DHS Chief Privacy Officer. I will ensure that the CRCL and the Chief Privacy Officer are appropriately consulted and empowered in their critical oversight role. In addition, I commit to working closely with members of this Committee, as well as critical stakeholders outside the Department, to understand and address concerns relating to privacy and civil rights and civil liberties.

f. How do you view the threat to the homeland from domestic groups (mostly comprised of U.S. persons) lacking a clear foreign nexus? Is it greater than the other threats we face including from Islamic terrorism, homegrown violent extremism (inspired by foreign terrorists), and other threats like narcoterrorism?

From my awareness as a private citizen, I understand that the current threat from domestic violent extremists is significant. In May 2021, DHS and the FBI provided to this Committee a congressionally mandated Strategic Intelligence Assessment and Data on Domestic Terrorism report. This report concluded that the greatest terrorism threat we currently face is from lone offenders, often self-radicalized online, who attack soft targets with easily accessible weapons.

At the same time, we are facing a myriad of significant threats that have a foreign nexus, including from Islamic terrorism, foreign-inspired homegrown extremists, narcoterrorists, nation-states such as China and Russia, malicious cyber actors and transnational criminal organizations. It is clear, for example, that attacks directed or inspired by foreign terrorist organizations of the type we saw at Fort Hood and San Bernardino remain a top homeland security threat that the Department must vigilantly defend against.

If confirmed, I will ensure that I&A continues to enhance its ability to analyze, produce, and disseminate products that address all threats to the Homeland and that it does not get tunnel vision on one threat at the expense of paying attention to all the others.

3. In questions you answered for this Committee prior to your confirmation hearing you noted that, "The Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004 redefined the National Foreign Intelligence Program as the National Intelligence Program and established a new definition of 'national intelligence' in statute." While this is certainly true, the IRTPA did not change the definition of "intelligence" in Title 50, which remains the same today: "The term 'intelligence' includes foreign intelligence and counterintelligence."

    a. Do you believe that intelligence, as defined in Title 50 Section 3003, encompasses anything beyond foreign intelligence and counterintelligence (as also defined in Title 50, Section 3003)? If so, what else does this definition encompass?

    As you note in your question, the National Security Act of 1947 specifies that the term "intelligence" *includes* foreign intelligence and counterintelligence; however, it is my understanding that the use of the word "includes" in a statute typically connotes that the items that follow constitute a less than exhaustive list of the items that are covered by that provision. (As a relevant example, the oversight provision of the National Security Act which requires that Congress be kept fully and currently informed of "intelligence activities" specifies only that intelligence activities "include" covert actions and financial intelligence activities, but it is widely understood that agencies' responsibility to inform Congress extends well beyond those two categories.) As such, that definition of "intelligence" in Section 3003 may well encompass activities beyond the two listed in the statute.

    With that said, if confirmed, I would seek to work closely and proactively with your committee, and with agency and Department counsel, to ensure I&A's intelligence activities comport with Congressional intent and that funding is used only for authorized activities, while ensuring that I&A has the resources and authorities needed to produce timely, actionable intelligence regarding current and evolving threats, consistent with its mission.

    b. Is there a difference between "national intelligence" and "intelligence," or are they one in the same?

    As you note in your previous question, the Intelligence Reform and Terrorism Prevention Act of 2004 added a definition of "national intelligence" to the National Security Act of 1947, stating that the term "national intelligence" refers to "all intelligence, regardless of the source from which derived and including information gathered within or outside the United States, that (A) pertains, as determined

consistent with any guidance issued by the President, to more than one United States Government agency; and (B) that involves (i) threats to the United States, its people, property, or interests; (ii) the development, proliferation, or use of weapons of mass destruction; or (iii) any other matter bearing on United States national or homeland security." However, that definition did not replace the existing definition of "intelligence" in Title 50, Section 3003. My understanding is that Congress's intent in creating this new definition was to make clear that homeland security is a part of our national intelligence effort. With that said, the law and the Constitution place stricter limits on the domestic collection on U.S. persons than on foreign intelligence collection. To the extent that I&A collects such domestic information, those stricter limits must be scrupulously respected – and on my watch they will be scrupulously respected -- regardless which definition of "intelligence" is applied to its operations. As noted above, my mission if confirmed will be to ensure that I&A is operating effectively, lawfully and with full respect for privacy and civil liberties. I look forward to working with you and this Committee in our joint pursuit of that mission.

4. You noted that, "National intelligence includes all intelligence, regardless of source, that pertains to United States homeland security." Other components of the Department of Homeland Security, such as Customs and Border Protection and the Federal Emergency Management Agency, and U.S. Customs and Immigration Services, for example, collect "intelligence." While they are not members of the Intelligence Community, the information these agencies collect pertains to homeland security.

    a. Is the information that these non-Title 50 entities collect considered "national intelligence," and therefore within the jurisdiction of the House and Senate Committees on Intelligence?

    I am certainly no expert on Congressional jurisdiction and will defer to Congress as to which Committees have jurisdiction over specific activities. I certainly believe, however, that some information originally collected by the components you listed as part of their non-intelligence community mission sets (for example, law enforcement, border security, and criminal investigations) could serve a "national intelligence" purpose if shared with I&A. It is my understanding that such information, when shared with I&A, is handled in a manner consistent with the authorities provided by Congress and the Attorney General-approved intelligence oversight guidelines. If confirmed, I pledge to keep the congressional intelligence committees fully and currently informed of all I&A intelligence activities, including its receipt and use of intelligence from fellow DHS components.

5. In your responses to the Committee's questions, you stated that I&A and FBI "must be complementary and supportive of each other's respective missions" and "work together to maximize the intelligence support we provide to law enforcement personnel throughout the country." There remains the concern, however, with potential redundancy in efforts and resources used by DHS and FBI, especially regarding violent extremism.

a. If confirmed, how do you plan to address any overlap in DHS's and FBI's efforts and resources used to counter violent extremism?

Violent extremism presents a persistent and evolving threat to the U.S. homeland. If confirmed, I will ensure that I&A's capabilities related to countering violent extremism are used to meet the intelligence needs of I&A's customers, including the FBI, and that FBI's work on this topic supports our mission. As I understand it, I&A's production is tailored to threats that impact homeland security, and is designed for distribution to a broad customer base that requires production of intelligence at all levels of classification. If confirmed, I will work with the FBI to ensure that I&A's coordination with the FBI serves to bolster, and not unnecessarily duplicate, their efforts in the violent extremism space.

b. If confirmed, how will you ensure that I&A's role in countering violent extremism remains unique to I&A, and does not utilize National Intelligence Program resources for broader DHS components?

If confirmed, it will be my responsibility to ensure that funds appropriated to I&A by Congress are used only for activities authorized by statute. I&A plays a vital role in countering violent extremism by providing timely and actionable intelligence and information to policymakers and state and local partners at the lowest classification level possible. This includes generating intelligence products that provide situational awareness into evolving threats and help to inform the public safety, counterterrorism and security planning efforts of I&A's partners and fellow DHS components.

If confirmed, I will monitor I&A's operations to ensure that its efforts in this space are clearly in support of I&A's authorized activities and do not extend to purposes outside of its scope of authority.

6. Looking forward to your potential new role as Under Secretary for Intelligence and Analysis, what are the counterterrorism or other implications for U.S. national security due to the nature and circumstances surrounding the U.S. withdrawal from Afghanistan?

The long-term implications of the withdrawal of the United States from Afghanistan and subsequent fall of the Afghan government are still unknown. One concern is that the significant reduction of U.S. personnel in Afghanistan reduces our intelligence-collection capabilities in that country. Another overriding concern is that a Taliban-controlled Afghanistan could become a safe haven for foreign terrorists and a base for attack planning against the U.S. and our allies. As I understand from news reports, even though Al-Qaeda and ISIS have been diminished by longstanding pressure, their networks and affiliates have persisted. With the opportunity to establish a safe haven in Afghanistan, there is the danger that Al Qaeda and maybe even ISIS could develop into a more sustained, entrenched and dangerous terrorist threat. If confirmed, I will seek regular and detailed briefings and analysis on this topic and will ensure that I&A is doing its part in the broader all-of-government effort to prevent that from happening.

7. Is the homeland more or less safe following the U.S. withdrawal from Afghanistan?

As a private citizen, I do not have access to existing intelligence or any threat streams emanating from Afghanistan. Based on my analysis from public reports, it is clear that the security situation with respect to Afghanistan remains complex.

On one hand, ending the nearly two decades of U.S. troop presence and security investments in Afghanistan frees up resources for the U.S. to address aggression from China, Russia and other critical national security threats. On the other hand, the collapse of the Afghan government and our withdrawal of forces from the country likely reduces our ability to collect intelligence on the ground and raises the specter of Afghanistan being used as a base for terrorist attacks against us and our allies.

As explained above, we must be vigilant to ensure that Taliban control in Afghanistan does not result in the establishment of a terrorist safe haven. To that end, we must do everything possible to support the President's call for an over-the-horizon capability that will allow the United States and its partners to work together to suppress the terrorism threat in Afghanistan, just as we apparently have been doing in Syria, Yemen, Somalia, Libya, the Islamic Maghreb and other places around the world.

If confirmed, I will work tirelessly to ensure that I&A and the Department increases its ability to implement its multi-layered screening and vetting architecture to prevent terrorists and other bad actors from traveling to the U.S. by air, land and sea. Moreover, I will seek to ensure that I&A provides its customers with timely and actionable intelligence on all homeland security threats.

8. On December 11, 2021, Yahoo News published a story titled, "Operation Whistle Pig: Inside the secret CBP unit with no rules that investigates Americans." The story detailed how a CBP employee "used the country's most sensitive databases to obtain the travel records and financial and personal information of journalists, government officials, congressional members and their staff, NGO workers and others." One of I&A's missions is to "deliver access to data and systems, infrastructure and analytic expertise, mission readiness services and Intelligence Community (IC) capabilities to DHS Operational Components." While members of this Committee do not know whether I&A maintains the various databases this CBP employee reportedly accessed, given its mission it is possible that it does.

    a. If it is revealed that I&A – an IC element funded entirely with intelligence funds – maintains these databases that were used to improperly collect information on American citizens, what corrective actions will you take to prevent this abuse from recurring?

    I'm seeking to return to government service because of my commitment to protecting our national security and our values, which includes respect for the civil rights and civil liberties of my fellow Americans. As a private citizen with access only to public

information, it is not clear to me what role, if any, I&A or its resources played in Operation Whistle Pig. If confirmed, I will look into this specific incident to determine whether I&A resources were involved. I will also carefully examine how I&A manages data generally to ensure its practices are compliant with law and policy. If I identify any improper activities, I will immediately take action to stop them and put in place all necessary additional procedures. I will also work with the Congressional intelligence committees to ensure they fully understand and are comfortable with I&A's data retention practices.

9. During your confirmation hearing, you agreed with the need to prevent even the appearance of impropriety on the part of the Intelligence Community so as to protect the IC's important collection tools.

    a. **Does it concern you that an IC element funded entirely with intelligence funds delivers access to data and systems, infrastructure and analytic expertise, mission readiness services and IC capabilities to DHS Operational components such as CBP and USCIS? Should this activity be paid for outside of the IC?**

As noted above, as a private citizen, I have limited information regarding how I&A currently supports the operational components of DHS. With that said, my understanding is that one of I&A's core missions is to be a service provider not only to its state and local partners, but also to its fellow DHS components. For example, I&A is responsible for ensuring that a CBP officer encountering a foreign national at a port of entry has appropriate access to intelligence community information about that individual to inform that officer's screening and entry decisions in support of the agency's border security mission. As another example, I&A supports the Department's Cybersecurity and Infrastructure Security Agency by providing its operators access to some of the Intelligence Community's most sensitive intelligence to inform and equip that agency to carry out operational activities that protect U.S. critical infrastructure from cyber attacks. In my view, this type of intelligence support is critical to DHS's ability to effectively protect our Homeland from national security threats. With that said, I am agnostic as to how these programs should be funded and would defer to the Congress on that issue. If confirmed, I will work with the appropriate authorizing and appropriating committees in Congress to ensure that the activities conducted by I&A are authorized and funded in a manner that Congress considers appropriate.

10. During your confirmation hearing, you noted that "there are clear guidelines about what DHS I&A can and cannot do so for example, they can only collect information and distribute it if it's relevant to a departmental mission like protecting against terrorism." Safeguarding the homeland against terrorism is one of the missions of the Department of Homeland Security, but there are many others to include securing U.S. borders, managing the immigration process, preserving and upholding the country's prosperity, and strengthening preparedness and resilience across the country.

a. Can I&A collect information on U.S. persons and distribute it if it is relevant to any of the missions cited above, which DHS has noted on its website as some of its missions?

I&A's responsibility to respect Americans' right to privacy, including by safeguarding U.S. persons' information against inappropriate collection, is paramount to maintaining public trust in I&A. The response during my confirmation hearing was meant to serve as an example of one of the limitations on I&A's authority to collect information, not a comprehensive listing of all the conditions I&A must meet in order to collect intelligence.

If confirmed I will quickly gain a full understanding of the current Intelligence Oversight guidelines and other relevant policies which also govern collection on U.S. persons, and will work with this committee and stakeholders to address perceived or real gaps in civil rights and civil liberties protections. It is my view that such guidelines ought to be revisited regularly to ensure that agencies' activities live up to their responsibilities under the law, while supporting robust collection and analysis within the confines of the law in order to develop timely, actionable intelligence that provides the best information to policymakers and those on the front lines.

b. If not, will I&A differentiate which missions it can engage on, and which ones it cannot, if you are confirmed?

Yes, I&A will make that differentiation on an ongoing basis if I am confirmed. In doing so, it will refer to its authorized missions, as well as to other practical considerations, such as resource limitations, existing commitments, and whether I&A or another agency is best positioned to produce timely and actionable intelligence in any particular mission space.

11. Since leaving government service in 2009, you have been employed as a Partner at three major international law firms. As a Partner, have you ever declined a client or to engage in work on behalf of the firm's client for any reason other than a legal conflict? If so, when and for what reason?

Throughout my 13 years in private practice, I have met or consulted with scores of potential clients, and there have been many occasions when I opted not to represent certain individuals or entities. Aside from financial considerations, there have been a variety of reasons for those decisions. Those reasons have included, among others, my assessment of the client's character, of our personal compatibility, of the nature of the client's work, or of the likelihood that the representation will ultimately require me to take a position that does not align with my values and principles.

That assessment varies greatly depending on the specific task(s) that the potential representation would require of me, and the extent to which it will require me to advocate and stand behind the client and/or the client's conduct. If I am asked to perform a non-advocacy role – such as, for example, simply conducting and reporting out an investigation

into certain conduct – the assessment is different than if I am asked to advocate on behalf of the client and defend that client's conduct.

12. How do you assess the harm done to U.S. interests, if any – and however unintentionally – of American capital at the disposal of Chinese state-owned enterprises? What about American capital at the disposal of "private" companies in China?

As we all understand, American investment in Chinese companies has proven to be a double-edged sword. A decade or two ago, there was hope that increased integration and investment between western economies and the Chinese economy would serve to bring China closer into the world order and encourage more economic and political liberalization on the part of the Chinese government. As we discussed at my confirmation hearing, however, the conduct of the Chinese Communist Party (CCP) over recent years has shown that hope to be more illusory than real. Based on the CCP's continuing political repression and human rights violations, and its often lawless and zero-sum approach to international economic competition, there is dwindling reason to expect that we will see that hoped-for liberalization, at least not in the near future.

State-owned enterprises are at times used by the CCP to promote those practices and policies and to take actions that are contrary to U.S. national and economic security interests. As such, American companies and investors must think carefully before any involvement in the Chinese economy to ensure that their involvement does not encourage or facilitate the CCP's ability to engage in such conduct. As I committed during my confirmation hearing, I will not work for any CCP-affiliated enterprises after my time in government, if confirmed.

If confirmed, I believe there is more work I&A could do in this space through its Economic Security Mission Center and its responsibility to share CCP-related intelligence with our private sector partners.

13. You have disclosed a financial interest in a number of China-based companies, including Alibaba Group.

a. These are individual shares, correct?

Yes, I disclosed in my financial disclosure form that I had individual shares of the Alibaba Group, as well as several other Chinese companies, as part of a diverse portfolio of holdings that includes shares of stocks in companies located in a number of countries.

b. If so, why did you decide to invest in individuals shares of China-based companies?

Although I recognize that I am fully responsible for my stock holdings, my wife and I did not make a conscious decision to invest in China-based companies. To the extent that any China-based company stocks are in our portfolio, that is due to (1) our

financial advisers making the decision to invest in those companies (these are managed accounts in which the financial advisers buy and sell stocks without consulting us, and I have historically paid virtually no attention to the particular stocks in our portfolio) or (2) our having received such holdings as part of an inheritance that we received and that has been going through probate since late 2020.

There are several points about those holdings that I'd like to emphasize. First, we have now instructed our financial advisers to no longer purchase any stocks of China-based companies. Second, last year I made the decision as trustee to sell off any inherited stocks of all Chinese companies; that decision was carried out and they were sold in the summer of 2021. And finally, all stocks in foreign companies will be sold -- and the proceeds invested in diversified mutual funds -- upon my confirmation in accordance with the ethics agreement that I entered into with the Department of Homeland Security.

14. Do you commit to providing this committee your viewpoint on intelligence matters, even if your views may differ from others in the administration?

I commit to keep the Committee fully and currently informed about all intelligence activities and analysis on the part of the Office of Intelligence and Analysis. Pursuant to that commitment, I will provide the Committee my view on intelligence matters, no matter how much that view does or does not align with the views of others in the Administration.

[From Senator Wyden]

1. On February 26, 2002, when you served as the Director of the Executive Office for U.S. Attorneys at the Department of Justice, you sent a memo to the Attorney General regarding the Interview Project. The Project entailed the identification of approximately 5,000 non-immigrant aliens who came from countries "which have an Al Qaeda terrorist presence," among other criteria, of whom about half were interviewed. The memo stated that "very few arrests were made in connection with the interviews," and that those arrests were not connected to terrorism. It further stated that "most of the interviewees had no information relating to specific terrorists or terrorist attacks," but "some provided leads that may assist" in counterterrorism investigations. Finally, the memo acknowledged that the Project's success in disrupting terrorism was "impossible to measure."

    a. What lessons do you take from this experience, in terms of efficacy of counterterrorism measures and the risks of profiling?

    Please see Question 1b below.

b. Do you see the Interview Project as a model for future intelligence or law enforcement responses to terrorist attacks or other threats to the homeland?

The Interview Project was initiated by the Attorney General in the immediate aftermath of the 9/11 attacks, and it had two general purposes. It was first and foremost an attempt to solicit intelligence from those persons and communities that had a connection to the countries where Al Qaeda had a presence, on the theory that those persons might have information about potential terrorism-related activity that could help to prevent another "second-wave" terrorist attack. It was also seen as a means of enhancing the operational relationship and coordination between the federal government and its state and local partners in the counterterrorism effort. It was thought that teaming federal personnel and their state and local counterparts in this project would lay the groundwork for the enhanced and more regularized coordination between them that would be necessary for a national counterterrorism effort.

The Executive Office for United States Attorneys was tasked with providing guidance to the Anti-Terrorism Task Forces, which were the United States Attorney-led groups of federal, state and local authorities in each federal district that were assigned to conduct the interviews in that district. My colleagues and I drafted that guidance to ensure that the interviews were conducted in a proper and respectful manner and in full compliance with all laws and constitutional rights and to prevent the interview project from being – or being seen as – an effort to target law enforcement attention and resources against persons from a particular religion or region of the world.

It is difficult to assess the efficacy of the project as to the two objectives described in the first paragraph above in any concrete manner. While hazy after 20 years, my memory is that the project was somewhat helpful as a mechanism for building and exercising federal/state and local coordination but, as quoted above, did not generate much, if any, intelligence of true operational significance. Given that limited intelligence yield, it is a fair question whether the coordination and intelligence benefits of the program justified the heightened profiling concerns that it generated among some in the targeted communities, which already had an understandable feeling of increased vulnerability in the aftermath of 9/11.

It is also a fair question whether such a program should serve as a model in response to future attacks. Given that so much progress has been made in the relationship between federal homeland security entities and their state and local counterparts in the 20 years since 9/11 (albeit there remains much more progress to be made), there would arguably be less need for such a coordinating mechanism to mobilize and energize the federal/state and local operational relationship after a future terrorist attack.

As I have stated previously during this process, we can only be an effective organization if we are able to maintain the public's trust. It is my understanding that as a matter of policy, I&A personnel are not permitted to engage in intelligence

activities based solely on an individual's or group's race, ethnicity, gender, religion, sexual orientation, gender identity, country of birth, or nationality. If confirmed, I would work closely with the DHS Office of Civil Rights and Civil Liberties and the oversight mechanisms at I&A to ensure that this policy is faithfully and consistently followed at I&A.

2. On May 2, 2006, during your confirmation to be Assistant Attorney General, National Security Division, you testified with regard to the legality of the President's Surveillance Program (the warrantless wiretapping program also known as Stellar Wind). You stated that "I have found the 42-page white paper that was submitted by the [Bush] administration to provide a fairly compelling justification for the program." You were also asked whether you agreed with the administration that the 2001 Authorization for Use of Military Force (AUMF) justified the program. You responded that the authority to detain individuals under the AUMF "seemed to be an analogous situation and it seemed to apply here."

   a. Is it still your opinion that the arguments in favor of the program in the white paper are compelling?

   Please see question 2b below.

   b. Do you still believe that the AUMF provides a legal basis for conducting surveillance or other collection that would otherwise be governed by FISA? How does the passage of the "exclusive means" legislation (50 U.S.C. § 1812) affect your views?

   As we discussed previously, I had no involvement in the development of the President's Surveillance Program or of its legal justification. I did not assist with drafting the white paper or of any other legal guidance at DOJ justifying the legal reasons supporting the program. By the time of my confirmation process for the position of Assistant Attorney General for National Security, the existence of the program had been publicly disclosed and the Justice Department had issued a white paper explaining its conclusion that the President had the authority to conduct this surveillance program outside the authority of the FISA Court.

   As you note above, in my confirmation hearing in May 2006, I was asked by Senator Feingold about my opinion of the arguments in the white paper. Having reviewed the white paper, I told Senator Feingold that I felt it provided justifications for the program. However, I made clear that at the same time I had not reached my own definitive opinion on the legality of those justifications. I "ha[d] not gone beyond to look at the back-up materials, to look at the case law, read the cases cited [and] the variety of position papers that are at odds with [the white paper]" and had not "really noodled through it as I would before I felt comfortable as a responsible lawyer rendering an opinion on something." I further told Senator Feingold that upon confirmation to the AAG position, I would "take a look at the law and if I have an

opinion about the law and the legal justification for the program, I will voice that opinion."

I did, in fact, take a hard look at the law and the mechanics of the program once I joined the National Security Division in September 2006, and I voiced the opinion that the program should come to an end. My colleagues and I then worked with the Office of Legal Counsel to develop the legal theory and the filings to bring any continuing surveillances under FISA Court authority. In January 2007, within months of our start at NSD, the program as it existed outside of FISA Court authorization came to an end.

The legal arguments in the white paper were never fully tested in the courts before we ended the program. However, as you point out above, the legal AUMF argument – that was already quite an aggressive argument – would seemingly be foreclosed if made today, given how the FISA Amendments Act of 2008 tightened up the "exclusive means" provision to require an express statutory authorization before any new legislation could be used to justify surveillance outside the specified laws. With that provision, Congress has made perfectly clear its intent to limit the Executive's ability to operate outside the requirements of FISA.

As we discussed at length at the hearing and during our courtesy visit in regard to the 215 telephone metadata program, the legal analysis is only one element of the decision making process before the implementation of a surveillance program. The other element is whether that program, no matter whether technically lawful or not, is something that meets the civil liberties expectations of Congress and the American people. As with the 215 telephone metadata program, the warrantless wiretapping program was never measured against those expectations, and it should have been. Instead, it was classified at such a high level that its existence was kept from the American people and most of Congress until it was leaked to the press and became a matter of understandable controversy and concern over secret unilateral intelligence action by the executive branch. In hindsight, we should have done more to ensure that the American public better understood how the legal framework of FISA was being interpreted and used from both a national security and civil liberties perspective.

This episode – like the 215 telephone metadata episode – provided an object lesson about the need to maximize transparency and deliberation around our government's surveillance operations. That is the lesson that animated my efforts to advance issues of declassification as a member of the Public Interest Declassification Board in private practice, and that will encourage me to urge transparency over secrecy whenever humanly possible if I am confirmed to return to public service in this role.

3. As we have discussed, in September 2009 you testified that FISA Court orders under "Section 215 [are] significantly more protective of civil liberties than grand jury subpoenas," and that, if the government wanted to collect information about "an

obviously innocent day to day interaction, I think you're going to have some questions from the FISA court judge."

However, you have acknowledged that during your previous government service you were aware that the executive branch was secretly using Section 215 orders to obtain bulk phone metadata, including records of the innocent day to day interactions of millions of Americans. You were aware of how broadly the law had been secretly interpreted, and neither you nor any other witness at that 2009 hearing suggested that Section 215 could be used in this way.

Information about this massive bulk collection was available to members of Congress who knew how to ask for it. However, any members of the public who listened to your testimony would have received a grossly inaccurate impression of how U.S. surveillance law had been interpreted.

a. Do you genuinely not believe that your 2009 testimony was misleading? If you believe that it was misleading, do you regret that?

As we have discussed, it certainly was not my intention to be in any way misleading with my comments about the 215 authority during my 2009 testimony. I believed, and still believe, that from a process standpoint, it is always more protective to require judicial review and approval before issuing investigative process than to leave it up to the prosecutor's unilateral discretion, as happens in the grand jury subpoena context. My testimony on that point was consistent with the testimony of the then-Assistant Attorney General for National Security from the Obama Administration at the same hearing. Additionally, the Assistant Attorney General's statement for the record expressly acknowledged that 215 was being used to support a highly sensitive collection program and offered a briefing thereon to any Members.

As you point out, however, that reference and offer did not and could not remedy the incomplete understanding of the American public about the government's use of Section 215 for the collection of bulk data. I regret that our testimony that day contributed in any way to that incomplete understanding, and that in general we did not do more to inform the public about this and other classified programs that impacted the civil liberties of American in the aftermath of 9/11. As I have said, in retrospect, I agree that more could have – and should have – been disclosed about the 215 telephone bulk metadata program without doing any real damage to our national security.

Like the warrantless wiretapping episode referenced above, the 215 telephone bulk metadata episode provided us all an important lesson – a lesson that transparency advocates like yourself have constructively helped to elevate within the policymaking establishment and within the American consciousness. As I said above, that is the lesson that motivated my service on the Public Interest Declassification Board, and it is one that I will draw upon actively if I am confirmed by this Committee to return to work in the classified operations of the U.S. government.

4. During your hearing, you were asked about I&A's use of "dossiers" (also known as Operational Background Reports, or OBRs). You stated that there were clear guidelines governing DHS activities. Please elaborate on your understanding of the guidelines, how they apply to OBRs, and whether you believe those guidelines should be modified. Specifically, do the guidelines permit and should they permit I&A to include in OBRs:

a. U.S. persons' First Amendment-protected speech and on-line activity;

I understand that I&A personnel are prohibited under **all** circumstances from engaging in any intelligence activities for the sole purpose of monitoring activities protected by the First Amendment or the lawful exercise of other rights secured by the Constitution or laws of the United States. So, in my view, there would have to be some other clear purpose, tied to an authorized intelligence mission, to justify the collection, preparation or dissemination of such an OBR, which is hard to envision in the instance of individuals simply engaging in peaceful online speech. In addition, I note that not all illegal activity rises to the level of a national or departmental intelligence mission, and therefore information on some such activity would not be appropriate to include in an OBR.

b. Information on U.S. persons obtained by DHS through subscription or purchase; and

My understanding is that I&A collection authorities are limited to overt collection methods or collection from publicly available sources. Many publicly available sources that are relevant to I&A's work -- including a wide variety of periodicals, research tools such as LexisNexis, and online media such as newspapers behind a paywall -- are available only by paid subscription. In instances where it is appropriate for I&A to obtain such information through a paid subscription service or database access, I understand that there are important limitations on how I&A handles U.S. person information from these sources. For example, queries must be tailored to minimize the amount of USPI that each query returns; the dissemination of resulting USPI must be limited to those who have an operational need to receive it; and USPI is minimized to reduce the impact on privacy.

If confirmed, I would work very closely with the DHS Privacy Office and the DHS Office for Civil Rights and Civil Liberties. I will also take a close look at the current process and report my findings to the Committee in order to ensure that information sharing is being performed in a manner consistent with Congress's expectations.

c. Information on U.S. persons derived from Department data bases?

As I understand, I&A cannot, as either a legal, procedural or technological matter, simply avail itself of Departmental databases. Beyond that understanding, I am not fully aware of all the rules and regulations regarding I&A's ability to access

information held by other DHS components, but will examine such requirements if confirmed to the Under Secretary position.

With that said, I strongly believe that for I&A to be successful in preparing useful homeland security intelligence analysis for its federal, state, local, tribal, territorial, and private sector partners, it must have some access to information collected by the Department and its stakeholders. Any such access should absolutely be limited by existing intelligence oversight and privacy laws, feedback from Congress, and the privacy and civil liberty requirements set forth by the Department's Office of Privacy and the Office for Civil Right and Civil Liberties. If confirmed, I look forward to working with you and other members of the committee to ensure that DHS I&A strikes an appropriate balance between producing high quality homeland security intelligence analyses and safeguarding Americans' private information.