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Testimony Before the House of Representatives
Legislative Branch Appropriations Subcommittee
Regarding the Government Accountability Office
2 April 2019

Chairman Ryan, Ranking Member Herrera Beutler, and members of the Legislative Branch Appropriations Subcommittee, thank you for the opportunity to speak with you today.

The Government Accountability Office plays a critical role in Congressional oversight of the Executive Branch. Unfortunately, that role may be stymied when it comes to the Intelligence Community (“IC”). Despite the fact that, by statute, GAO already has the purview to conduct oversight of *all* federal agencies² and has since its creation in 1921,³ the IC has, with a few exceptions, insisted that it is not subject to such audits since its inception. **This effectively deprives Congress of one of the most effective tools in its arsenal, especially at a time when the activities of the IC present some of the most pressing needs for robust oversight in the Executive Branch.** I respectfully recommend that Congress take steps to conclusively validate GAO’s jurisdiction in such matters.

In response to the IC’s recalcitrance, some Members of Congress have periodically attempted to resolve the matter over the past few decades. For instance, then-Congressman Leon Panetta introduced a bill in 1987 called the CIA Accountability Act to officially clarify GAO’s authority vis-à-vis the IC.⁴ Unfortunately, it was not enacted. In 1988, GAO attempted to conduct an investigation “[i]n order to evaluate whether ‘information about illegal activities by high level officials of other nations may not be adequately considered in U.S. foreign policy decisions,’” leading the National Security Council to request an opinion from the Department of Justice Office of Legal Counsel which has been cited ever since:

We therefore conclude based on the nature of the GAO request that the subject of the GAO investigation is the Executive’s discharge of its constitutional foreign policy responsibilities, not its statutory responsibilities. The subject is thus not “a program or activity the Government carries out under existing law,” and it is beyond GAO’s authority under 31 U.S.C. § 717(b). . . .

In addition to the infirmity in GAO’s statutory authority to pursue this investigation, we believe that GAO is specifically precluded by statute from access to intelligence information. In establishing by law the oversight relationship between the intelligence committees and the executive branch, Congress indicated that such oversight would be the exclusive means for

¹ Joined by the Government Accountability Project and the Project on Government Oversight.

² See 31 U.S.C. §§ 712, 717, 3523(a) (GAO has authority to investigate each “department, agency, or instrumentality of the United States Government.”).

³ Budget and Accounting Act, Pub. L. 67-13, 42 Stat. 26, June 10, 1921 (“All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them.”).

⁴ H.R. 3603, available at <https://fas.org/irp/eprint/panetta-1987.pdf>.

Congress to gain access to confidential intelligence information in the possession of the executive branch.

This intelligence oversight system has been codified at 50 U.S.C. § 413. That section sets forth requirements for the Director of Central Intelligence, the heads of all other federal agencies involved in intelligence activities, and the President to inform the Congress through the intelligence committees (and in some circumstances the Speaker and minority leader of the House of Representatives and the majority and minority leaders of the Senate) of intelligence activities.⁵

Over two decades later, this fight was still underway. When an amendment to the FY2010 Intelligence Authorization Act sought to reaffirm GAO authority, it prompted a veto threat in the form of a letter from Director of the Office of Management and Budget Peter Orszag,⁶ which Acting Comptroller General Gene Dodaro thoroughly refuted, demonstrating that “[n]either the language of section 413 nor its legislative history provides support for this position” and that **the IC’s resistance “has greatly impeded GAO’s work for the intelligence committees and also jeopardizes some of GAO’s work for other committees of jurisdiction, including Armed Services, Appropriations, Judiciary, and Foreign Relations, among others.”**⁷

Despite Mr. Dodaro’s testimony, the enacted law took a middle-of-the-road approach, stating that clarification was necessary but deferring to the Executive for that clarification, instructing the Director of National Intelligence (“DNI”) to “issue a written directive governing the access of the Comptroller General to information in the possession of an element of the intelligence community.”⁸ The DNI, for his part, issued Intelligence Community Directive 114 the following year, which reluctantly admitted that GAO had *some* authority to investigate the IC, but adopted a severely restrictive interpretation of the scope of that authority:

Information that falls within the purview of the congressional intelligence oversight committees generally shall not be made available to GAO to support a GAO audit or review of core national intelligence capabilities and activities, which include intelligence collection operations, intelligence analyses and analytical techniques, counterintelligence operations, and intelligence funding. IC elements may on a case-by-case basis provide information in response to any GAO requests not related to GAO audits or reviews of core national intelligence capabilities and activities.⁹

In other words, GAO can investigate anything involving the IC that the intelligence oversight committees cannot, which amounts to basically nothing. Moreover, this is not an academic dispute: in response to a question about this matter from then-Chairman Yoder last

⁵ *Investigative Authority of the General Accounting Office*, 12 Op. Off. Legal Counsel 171 (1988).

⁶ Letter from Orszag to Feinstein of 3/15/10, available at <https://fas.org/irp/news/2010/03/omb031610.pdf>.

⁷ Letter from Dodaro to Feinstein of 3/18/10, available at <http://www.pogoarchives.org/m/co/dodaro-letter-to-intel-committees-20100318.pdf>. Mr. Dodaro concluded that reaffirming GAO’s authority in this area “would prove beneficial both to the conduct of oversight by the intelligence committees and to the efficiency and effectiveness of IC operations.”

⁸ 50 U.S.C. § 3308.

⁹ ICD 114(D)(4)(b), available at https://www.dni.gov/files/documents/ICD/ICD_114.pdf.

year, Mr. Dodaro explained that this remains an ongoing controversy, although the situation is minimally better than it was before 2010:

Mr. YODER. Do you need additional support from Congress—

Mr. DODARO. Yes.

Mr. YODER [continuing]. Or direction to the intel agencies to make sure they are aware that this is an authority you have?

Mr. DODARO. Yes, that would be helpful.¹⁰

When Mr. Dodaro testified before this Subcommittee in February regarding GAO's Fiscal Year 2020 budget, Chairman Ryan again asked him about this matter, and Mr. Dodaro again remarked that GAO needs "the cooperation of the Intelligence Community" because GAO "ha[s] more difficulties when the request comes from non-intelligence committees," concluding, **"I think we could do more, particularly in the management area, and in the investments that are made, in that area, whether there's good return on the investments in all cases."**¹¹

GAO possesses significantly more resources and institutional expertise in certain kinds of Executive Branch investigations than even the most robust committee staff, and there is frankly no reason for this arbitrary restriction on its authority. Congress gave the Executive Branch a chance to establish reasonable limitations which balanced the Executive's legitimate interests with one of the most important functions of Congress—effective oversight. **Instead of crafting a reasonable policy, the DNI memorialized the hard-line position the IC had taken from the very beginning.**

I recommend this Subcommittee include language to remove any doubt concerning GAO's audit power over the IC by advancing a measure that restates Section 335 of the FY2010 Intelligence Authorization Act, as engrossed by the House of Representatives in February 2010.¹²

Not only would taking such a measure resolve a longstanding problem, but it would be revenue neutral, since it would not require GAO to take on any more responsibilities than it already has; it would only open the universe of matters it *may* investigate. When one considers the fact that the number of GAO employees with Top Secret/Sensitive Compartmented Information ("TS/SCI") clearances is higher than the combined number of staffers employed by both intelligence oversight committees, **it is clear that these artificial restrictions on GAO's authority are causing Congress to expend *more* financial and manpower resources to accomplish *less* oversight over a significant portion of the Executive Branch.** It is time for Congress to assert its prerogatives to protect its oversight capabilities over *all* agencies.

¹⁰ *Legislative Branch Appropriations for 2019: Part 2, Fiscal Year 2019 Legislative Branch Appropriations Requests, Hearings before the Subcomm. on the Legislative Branch of the House Comm. on Appropriations*, 115th Cong., 2d Sess. 310 (Apr. 25, 2018) [hereinafter *SSP Hearing I*] (testimony of Comp. Gen. Gene Dodaro) (testifying that GAO has been able to investigate peripheral matters in the IC such as "a facilities area" and contract management in the last few years).

¹¹ Available at <https://www.youtube.com/watch?v=G3WU2uZMlyk>.

¹² Available at <https://www.gpo.gov/fdsys/pkg/BILLS-111hr2701eh/pdf/BILLS-111hr2701eh.pdf>.