

Kel McClanahan, Executive Director
National Security Counselors
Testimony Before the House of Representatives
Legislative Branch Appropriations Subcommittee
17 March 2023

Chairman Amodei, Ranking Member Espaillat, and members of the Legislative Branch Appropriations Subcommittee, thank you for the opportunity to submit this written testimony.

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 agencies¹ and has since its creation in 1921,² 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 Central Intelligence Agency (“CIA”) and the IC as a whole.³ 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 Congress to gain access to confidential intelligence information in the possession of the executive branch.

¹ See 31 U.S.C. §§ 712, 717, 3523(a) (GAO has authority to investigate each “department, agency, or instrumentality of the United States Government.”).

² 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.”).

³ H.R. 3603, available at <https://fas.org/irp/eprint/panetta-1987.pdf>.

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.⁴

Over two decades later, this fight was still underway. When an amendment to the FY2010 Intelligence Authorization Act (“IAA”) 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,⁵ 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.”**⁶

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.”⁷ 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.⁸

In other words, GAO can investigate anything involving the IC that the Intelligence Committees cannot, which amounts to basically nothing. Moreover, this is not an academic dispute: in response to a question about this matter from Congressman Yoder in 2018, Mr.

⁴ *Investigative Authority of the General Accounting Office*, 12 Op. Off. Legal Counsel 171 (1988).

⁵ Letter from Orszag to Feinstein of 3/15/10, available at <https://fas.org/irp/news/2010/03/omb031610.pdf>.

⁶ 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.”

⁷ 50 U.S.C. § 3308.

⁸ ICD 114(D)(4)(b), available at https://www.dni.gov/files/documents/ICD/ICD_114.pdf.

Dodaro explained that this remained 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.⁹

When Mr. Dodaro testified before this Subcommittee in 2019 regarding GAO's FY2020 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.**"¹⁰ And in his testimony before this Subcommittee in 2020, Mr. Dodaro testified, "**It's the same status as it was last year.** Congress could work with the Intelligence Committees to provide better direction to the intelligence agencies to cooperate with us."¹¹

In fact, however, even the involvement of the Intelligence Committees is not sufficient to overcome the IC's reliance on ICD 114 to obstruct meaningful GAO access. In a meeting in 2019 with staffers from this Subcommittee and the Defense Appropriations Subcommittee, a member of that Subcommittee's staff dismissed the need for reform, arguing that IC components do not refuse GAO requests for information if GAO was acting pursuant to an Intelligence Committee request. That presumption is unfortunately false. One need only consider the example of AR 13-5, the internal CIA regulation which implements ICD 114. This regulation directly addresses the question of how the Agency should respond to a GAO request for information when GAO is acting under the direction of an Intelligence Committee:

As a general rule, if GAO makes a request on behalf of or to obtain information responsive to a tasking by an intelligence oversight committee, the [Point of Contact ("POC")] will ensure that the CIA response to GAO does not contain information prohibited in paragraph b.(2)(c)(3) above.¹² The response to GAO shall

⁹ *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) (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).

¹⁰ Available at <https://www.youtube.com/watch?v=G3WU2uZMlyk>.

¹¹ Available at <https://www.youtube.com/watch?v=uaRnD62qun4>. Mr. Dodaro's testimony last year reiterated the same point, see <https://www.youtube.com/watch?v=-PQWaMSJG7Y>.

¹² That paragraph reads:

Information that falls within the purview of the congressional intelligence oversight committees generally shall not be made available to GAO to support an audit or review of intelligence collection operations; covert action; intelligence capabilities related to national intelligence activities; counterintelligence operations; intelligence analysis and analytical techniques; intelligence sources and methods; or intelligence budgets or funding; (including records or expenditures made under the authority of 22 U.S.C. 2396(a)(8) or 10 U.S.C. 127, 7231 and 50 U.S.C. 403j(b)).

indicate that information responsive to the tasking, but not authorized for release to GAO under the provisions of ICD 114, shall be made directly available to the requesting intelligence oversight committee. The POC shall prepare an additional response for the intelligence oversight committee that contains information responsive to the committee request, but not authorized for GAO access.¹³

In other words, if GAO asks CIA for any information which would fall under the jurisdiction of an Intelligence Committee, CIA will simply refuse to cooperate, but if an Intelligence Committee tasks GAO to make the request, CIA will still refuse to provide the information to GAO, but instead will send the information directly to the relevant Intelligence Committee. In neither situation does GAO receive the requested information.

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 IC's original hard-line position.**

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 IAA, as engrossed by the House of Representatives in February 2010.¹⁴

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 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.** In a time of crisis, when agencies across the Government are spending vast amounts of time, money, and resources to combat a once-in-a-century threat, it is more important than ever that GAO be able to investigate allegations of governmental waste, fraud, abuse, and violations of law wherever they may be found. **It is time for Congress to assert its prerogatives to protect its oversight capabilities over *all* agencies.**

¹³ CIA, AR 13-5: *Comptroller General Access to Information in the Possession of the CIA*, § (b)(3) (copy attached).

¹⁴ Available at <https://www.gpo.gov/fdsys/pkg/BILLS-111hr2701eh/pdf/BILLS-111hr2701eh.pdf>.

Kel McClanahan Biography

Kel McClanahan is the Executive Director of National Security Counselors, a Washington-area non-profit public interest law firm which specializes in national security law and information and privacy law. He is an adjunct professor at the George Washington University Law School, where he teaches Law of Secrecy. He is a regular contributor to *Just Security* and has been featured in the *Washington Post*, the *Daily Beast*, and *Politico*.

He received his Master of Arts cum laude in Security Studies from the Georgetown University Edmund A. Walsh School of Foreign Service, his Juris Doctorate from the American University Washington College of Law, and his Master of Laws in National Security Law from the Georgetown University Law Center.

He belongs to the bars of New York, the District of Columbia, the U.S. Supreme Court, and several other federal courts.

(U) Disseminating or sharing any part of this document outside CIA must comply with AR 10-16.

AR 13-5 (U) COMPTROLLER GENERAL ACCESS TO INFORMATION IN THE POSSESSION OF THE CIA (Formerly AR 7-24)

CPS - Agency Regulation Series 13 (Special Reporting Requirements/Restrictions) Published on 12 October 2011

Regulation Summary

Ingested from Regulations.cia on 10 May 2013

I. (U) Policy

(U) SUMMARY: 12 October 2011

(U//~~FOUO~~) AR 7-24 is promulgated to comply with Intelligence Community Directive 114, Comptroller General Access to Intelligence Community (IC) Information, which directed Intelligence Community element heads to develop written procedures that detail the element's process for responding to General Accounting Office (GAO) reviews. This regulation applies to all requests by the Comptroller General for information related to intelligence activities and programs which is in the possession of the Central Intelligence Agency (CIA).

(U) The ADD/CIA signed and approved this issuance on 12 October 2011.

(U) Because this regulation is new, boldfaced text has not been used.

(U) This regulation was prepared by the Office of Congressional Affairs, (b)(3) CIAAct (secure).

24. (U) COMPTROLLER GENERAL ACCESS TO INFORMATION IN THE POSSESSION OF THE CIA

(U) SYNOPSIS. This regulation implements Intelligence Community Directive (ICD) 114, Comptroller General Access to IC Information, and sets out procedures which apply to all

requests by the Comptroller General for information related to intelligence activities and programs which is in the possession of the CIA. These procedures are effective as of the date of the Associate Deputy Director (ADD/CIA) signature and may be amended with the approval of the ADD/CIA or designee.

- a. **(U) AUTHORITY.** This regulation is issued pursuant to ICD 114, the National Security Act of 1947 (50 U.S.C. 401 et seq.), the Central Intelligence Agency Act of 1949 (50 U.S.C. 403a et seq.), 22 U.S.C. 2396(a)(8) and 10 U.S.C. 127, 7231.
- b. **(U) POLICY.** It is the policy of the CIA to cooperate with the Comptroller General, through the General Accountability Office (GAO), to the fullest extent possible, and to provide timely responses to requests for information. To the extent consistent with applicable law, national security and the protection of sources and methods, the Agency shall provide GAO access to information within the possession of CIA that relates to matters that are the subject of announced GAO reviews.
 - (1) **(U) POINT OF CONTACT.** By approving these procedures, ADD/CIA has determined that CIA will maintain a single Point of Contact (POC) for coordinating review of all requests from the Comptroller General received through the GAO. This POC will be an Office of Congressional Affairs (OCA) Liaison Officer, to be selected by Director/OCA (D/OCA).
 - (2) **(U) CONSIDERATION OF REQUESTS.** CIA will cooperate with the Comptroller General to the fullest extent possible and provide timely responses to requests for information. To that end, upon receipt of a GAO request for information, the POC shall:
 - (a) (U) Promptly notify D/OCA and the Office of the Director of National Intelligence/Office of Legislative Affairs (ODNI/OLA) of the request.
 - (b) (U) Ensure that GAO's request is made in writing and clearly identifies the purpose of the request.
 - (c) (U) In consultation with appropriate CIA components and other IC

elements if appropriate, evaluate and review the request in accordance with following ICD 114 D.4.a.-c. principles:

- (1) (U) Generally, IC elements shall cooperate with GAO audits or reviews and make information available to appropriately cleared GAO personnel;
 - (2) (U) Finished, disseminated national intelligence information relevant to a GAO review, information relating to the administration of a United States Government-wide program or activity, or publicly available information shall generally be provided to GAO;
 - (3) (U) Information that falls within the purview of the congressional intelligence oversight committees generally shall not be made available to GAO to support an audit or review of intelligence collection operations; covert action; intelligence capabilities related to national intelligence activities; counterintelligence operations; intelligence analysis and analytical techniques; intelligence sources and methods; or intelligence budgets or funding; (including records or expenditures made under the authority of 22 U.S.C. 2396(a)(8) or 10 U.S.C. 127, 7231 and 50 U.S.C. 403j(b)); and,
 - (4) (U) Determine whether the information is subject to statutory restrictions, executive branch confidentiality interests or involves disclosure of sensitive intelligence sources and methods.
- (d) (U) Engage in dialogue and work with GAO, as appropriate, to:
- (1) (U) Tailor the response to address the specific objectives of the review; and
 - (2) (U) Explore alternative means to accommodate a request for access to specific information if the POC determines that GAO should not have access to the specific information requested. For example, GAO and the POC shall discuss any available alternatives to GAO access to the specific information

requested, such as oral analytic briefings or discussions.

- (e) (U) If the request includes a request for access to another agency's information, refer the request to the other agency for response directly to GAO or obtain the written consent of the other agency to provide the information to GAO in the CIA response.
- (f) (U) For the GAO personnel identified by the GAO as those who will have access to the information requested, ensure that GAO verifies their eligibility for access to classified national security information according to the following ICD 114 D.6.b.(2) (a-d) requirements:
 - (1) (U) The individuals possess the appropriate security clearance or have obtained a limited security approval from CIA and have signed an approved non-disclosure agreement;

(b)(3) NatSecAct

- (3) (U) GAO and the designated GAO personnel have acknowledged and agreed to abide by the classification, dissemination controls, and other special handling requirements of any document or information provided to GAO;
 - (4) (U) The retention and dissemination of intelligence information by GAO shall comply with Executive Order 12333, part 2, as it pertains to U.S. persons information.
- (g) (U) Notify GAO of any delay in responding to the request.
 - (h) (U) Provide information to GAO in a manner consistent with the obligation to protect sources and methods.
 - (i) (U) After review and evaluation of the request and consultation with appropriate CIA components, make a determination as to whether any information responsive to the request can be provided to GAO and provide a prompt response to GAO. The response shall:

- (1) (U) Be in writing;
 - (2) (U) Inform GAO of the classification and sensitivity of any information provided, including the confidentiality obligations and penalties at 31 U.S.C. 716(e) and section 348(b) of Public Law 111-259, as well as any special handling instructions; and
 - (3) (U) If a denial of access to information, notify D/OCA and set out the justification for the denial, with a copy of the response provided to ODNI/OLA.
- (3) **(U) REQUESTS ON BEHALF OF OVERSIGHT COMMITTEES.** As a general rule, if GAO makes a request on behalf of or to obtain information responsive to a tasking by an intelligence oversight committee, the POC will ensure that the CIA response to GAO does not contain information prohibited in paragraph b.(2)(c)(3) above. The response to GAO shall indicate that information responsive to the tasking, but not authorized for release to GAO under the provisions of ICD 114, shall be made directly available to the requesting intelligence oversight committee. The POC shall prepare an additional response for the intelligence oversight committee that contains information responsive to the committee request, but not authorized for GAO access.
- (4) **(U) ACCESS AND DISPUTE RESOLUTION.** The POC shall attempt to resolve all access issues in consultation with appropriate CIA components, other agencies as necessary, and GAO. When access issues cannot be resolved by the POC, the outstanding access issues shall be elevated to D/OCA or higher for review and resolution.
- (5) **(U) REPORT TO ASSOCIATE DEPUTY DIRECTOR (ADD/CIA).** On a quarterly basis, or as otherwise directed by the ADD/CIA, the POC will provide the ADD/CIA via D/OCA a brief summary of substantive GAO requests for information and CIA's response. At a minimum, this summary shall include all requests initiated by the intelligence oversight committees, as well as requests that may be considered by CIA to be particularly sensitive.

- (6) **(U) OFFICE OF INSPECTOR GENERAL (OIG)**. The POC will notify the CIA OIG of all requests from the GAO for information in CIA's possession. Notification will take place in a timely fashion and will be in writing.
- (7) **(U//~~AIUO~~) NOTIFICATION TO DNI**. A copy of these procedures shall be provided to ODNI/OLA after review by Director CIA/Information Release Officer (DCI/IRO) and pre-approval in writing by Director/Chief Information Office/Information Management Services (D/CIO/IMS), per AR 70-5 (U) DECLASSIFICATION AND RELEASE.

/s/

V. Sue Bromley

Associate Deputy Director, Central Intelligence Agency

Truth in Testimony Disclosure Form

In accordance with Rule XI, clause 2(g)(5)* of the *Rules of the House of Representatives*, witnesses are asked to disclose the following information. Please complete this form electronically by filling in the provided blanks.

Committee: Appropriations

Subcommittee: Legislative Branch

Hearing Date: 03/24/2023

Hearing Title :

FY 2024 Public Witness

Witness Name: Kel McClanahan

Position/Title: Executive Director

Witness Type: Governmental Non-governmental

Are you representing yourself or an organization? Self Organization

If you are representing an organization, please list what entity or entities you are representing:

National Security Counselors

FOR WITNESSES APPEARING IN A NON-GOVERNMENTAL CAPACITY

Please complete the following fields. If necessary, attach additional sheet(s) to provide more information.

Are you a fiduciary—including, but not limited to, a director, officer, advisor, or resident agent—of any organization or entity that has an interest in the subject matter of the hearing? If so, please list the name of the organization(s) or entities.

No

Please list any federal grants or contracts (including subgrants or subcontracts) related to the hearing's subject matter that you or the organization(s) you represent have received in the past thirty-six months from the date of the hearing. Include the source and amount of each grant or contract.

None

Please list any contracts, grants, or payments originating with a foreign government and related to the hearing's subject that you or the organization(s) you represent have received in the past thirty-six months from the date of the hearing. Include the amount and country of origin of each contract or payment.

None

Please complete the following fields. If necessary, attach additional sheet(s) to provide more information.

- I have attached a written statement of proposed testimony.
- I have attached my curriculum vitae or biography.

* Rule XI, clause 2(g)(5), of the U.S. House of Representatives provides:

(5)(A) Each committee shall, to the greatest extent practicable, require witnesses who appear before it to submit in advance written statements of proposed testimony and to limit their initial presentations to the committee to brief summaries thereof.

(B) In the case of a witness appearing in a non-governmental capacity, a written statement of proposed testimony shall include— (i) a curriculum vitae; (ii) a disclosure of any Federal grants or contracts, or contracts, grants, or payments originating with a foreign government, received during the past 36 months by the witness or by an entity represented by the witness and related to the subject matter of the hearing; and (iii) a disclosure of whether the witness is a fiduciary (including, but not limited to, a director, officer, advisor, or resident agent) of any organization or entity that has an interest in the subject matter of the hearing.

(C) The disclosure referred to in subdivision (B)(ii) shall include— (i) the amount and source of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) related to the subject matter of the hearing; and (ii) the amount and country of origin of any payment or contract related to the subject matter of the hearing originating with a foreign government.

(D) Such statements, with appropriate redactions to protect the privacy or security of the witness, shall be made publicly available in electronic form 24 hours before the witness appears to the extent practicable, but not later than one day after the witness appears.

False Statements Certification

Knowingly providing material false information to this committee/subcommittee, or knowingly concealing material information from this committee/subcommittee, is a crime (18 U.S.C. § 1001). This form will be made part of the hearing record.

Witness signature

3/17/23

Date