

Kel McClanahan, Executive Director
National Security Counselors¹
Testimony Before the House of Representatives
Legislative Branch Appropriations Subcommittee
17 April 2018

Chairman Yoder, Ranking Member Ryan, 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 1982,³ the IC has insisted that it is not subject to such audits from the outset. **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 early recalcitrance, 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 (“OLC”) 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 Joined by the Government Accountability Project and the Project on Government Oversight.

² See 32 U.S.C. §§ 712, 717, 3523(a) (GAO has authority to investigate each “department, agency, or instrumentality of the United States Government.”)

³ An Act to revise, codify, and enact without substantive change certain general and permanent laws, related to money and finance, as title 31, United States Code, “Money and Finance,” Pub. L. 97–258, Sept. 13, 1982.

⁴ 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.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.

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

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.

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, and it is time for Congress to assert its prerogatives to protect its oversight capabilities over *all* agencies.**

I recommend this committee 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 2010.¹⁰

As a final note, I add my support to the written testimony submitted by Mandy Smithberger of the Project on Government Oversight, and I offer my experience and expertise with such matters in support of her testimony regarding the question of security clearances for House staffers.

¹⁰ 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. Before chartering National Security Counselors with his fellow directors, he served as Director of FOIA Operations for the James Madison Project and Of Counsel to the Law Office of Mark S. Zaid, PC. He has taught National Security Law at the American University Washington College of Law, the University of the District of Columbia, and Point Park University. He also sits on the Board of Directors of the National Military Intelligence Foundation and the Steering Committee of the Bar Association of the District of Columbia's Committee on National Security Law, Policy, and Practice.

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.

Witness Disclosure Form

Clause 2(g) of rule XI of the Rules of the House of Representatives requires non-governmental witnesses to disclose to the Committee the following information. A non-governmental witness is any witness appearing on behalf of himself/herself or on behalf of an organization other than a federal agency, or a state, local or tribal government.

Your Name, Business Address, and Telephone Number:

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1. Are you appearing on behalf of yourself or a non-governmental organization?
Please list organization(s) you are representing.

National Security Counselors

2. Have you or any organization you are representing received any Federal grants or contracts (including any subgrants or subcontracts) since October 1, 2012 related to the agencies or programs funded by the Subcommittee?

Yes

No

3. Have you or any organization you are representing received any contracts or payments originating with a foreign government since October 1, 2012 related to the agencies or programs funded by the Subcommittee?

Yes

No

4. If your response to question #2 and/or #3 is "Yes", please list the amount and source (by agency and program) of each Federal grant (or subgrant thereof) or contract (or subcontract thereof), and/or the amount and country of origin of any payment or contract originating with a foreign government. Please also indicate whether the recipient was you or the organization(s) you are representing.

Signature:



Date: 4/5/18