Kel McClanahan, Executive Director
National Security Counselors
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Chairman Connolly, Ranking Member Meadows, and members of the Committee on Oversight and Reform's Government Operations subcommittee, thank you for the opportunity to provide this testimony about the issues facing actual and potential whistleblowers in and around the federal government. Because the Subcommittee heard from five exceptional witnesses in its hearing on 28 January 2020, I will endeavor to avoid retreading any territory they already covered in significant detail, except where necessary to provide context for my own comments.

I am the Executive Director for National Security Counselors ("NSC"), a public interest law firm which specializes in national security employment law and information and privacy law. As part of our work, NSC regularly represents government and private sector whistleblowers, most often in the Intelligence Community. I am also an Adjunct Professor at the American University Washington College of Law and the George Washington University Law School, where I most recently taught a course entitled "Law of Secrecy" covering, among other topics, whistleblowing in the Intelligence Community.

This testimony is based on my professional experience and the experience of NSC clients, as well as my academic expertise in relevant matters.

In light of the previous testimony about "big picture" problems facing whistleblowers, I will largely focus on the more arcane and technical issues which nonetheless pose significant problems for government whistleblowers, especially in the Intelligence Community, for which corrections would result in a disproportionally significant improvement in the overall system.

The Right to Informed Counsel

Intelligence Community whistleblowers face numerous obstacles when attempting to hire lawyers to help them through the process. If, for instance, a disclosure involves classified information (or if the whistleblower is a covert employee), some agencies will refuse to allow them to provide any of that information to a private attorney. Those agencies insist that all communications with attorneys be subjected to the prepublication review process, which contains no restrictions on how the prepublication review office may share any submissions given to it. Some agencies even go so far as to insist that a whistleblower has no right to have an attorney present during interviews.

The need for cleared counsel

In an agency which treats whistleblowers relatively conscientiously, there is a standard process for handling the issue of classified information. The following is a generic description of this process, although each agency is different:

1. The whistleblower contacts a private lawyer and tells them that they wish to hire the lawyer to represent them in a whistleblowing matter involving classified information. They do not reveal any classified information to the lawyer.

2. Once the whistleblower and the lawyer enter into a representation agreement, either the whistleblower or the lawyer (depending on the specific agency process) contacts the relevant agency office—generally the Office of General Counsel or Office of Security—and requests that the lawyer be processed for limited access to relevant classified information.

3. This limited access is termed an "LSA" and stands for either Limited Security Access or Limited Security Approval (depending on whom you ask). It is for all intents and purposes a "one time use" clearance which authorizes the lawyer to access *only* the classified information directly relevant to the representation of that specific client.

4. The agency processes the lawyer for an LSA in roughly the same manner as it would process someone for an interim clearance. It is a significantly simpler investigation than a full clearance background investigation, but the lawyer generally still has to complete the full SF-86 questionnaire used for security clearances.

5. If the lawyer is granted an LSA, they sign a similar non-disclosure agreement to the one given to clearance holders at the agency, which includes an agreement to protect classified information. For all legal purposes, the lawyer is now subject to the same liability—civil and criminal—as a clearance holder.

6. At this point, the whistleblower may now provide relevant classified information to the lawyer without significant further restrictions. The lawyer also has access, on occasion, to other classified information that the client does not know, but that is less common in whistleblowing matters.

This process works well in agencies which utilize it, but not all agencies are as conscientious about it as others. A lawyer with an LSA can accomplish many things that a lawyer operating in the dark cannot. They can advise their client on how to navigate the often confusing process. They can advise their client on how best to protect national security when whistleblowing. They can assist their client in making sure that the concerns of investigators or Congressional staffers are addressed. They can even advise their clients, if appropriate, that the conduct they wish to disclose is not actually improper under the law, thereby ensuring that the relevant authorities are not burdened with an unintentionally frivolous complaint.[1]

[1] This happens more often than one would expect. Many whistleblowers are subject matter experts in non-legal matters but are less familiar with the nuances of the law, where it is not uncommon for an apparently improper act to actually be legal. I once used a variation on this scenario as a fact pattern in an exam, where the fictitious client attempted to blow the whistle on what he thought was illegal surveillance, but which turned out, if the student performed the proper legal analysis, to be legal under the Foreign Intelligence Surveillance Act. An experienced

However, as I noted above, not all agencies utilize this process, and their failure to do so often results in whistleblowers failing in their efforts to bring unlawful conduct to the attention of the proper authorities. For a vivid example of this problem, one need only consider the example of my client John Reidy. Mr. Reidy attempted to blow the whistle on a "massive intelligence failure" in which "upwards of 70 percent of our operations had been compromised."[2] Instead of investigating his disclosures, the Central Intelligence Agency ("CIA") retaliated against Mr. Reidy and aggressively obstructed his attempts to draw attention to the problem. When he did manage to capture the attention of the Congressional intelligence committees, CIA downplayed the allegations and informed the committees that it had fully investigated the matter and found no merit to the claims. Throughout the entire process CIA refused to allow Mr. Reidy to provide the classified details about his disclosures to any of his lawyers, even those who possessed full security clearances, and as a result we were unable not only to effectively counter CIA's narrative, but to even recognize until long after the fact that when CIA said that it fully investigated the matter and found no merit to the claims, CIA *meant* that it had concluded that it did not need to investigate the matter because Mr. Reidy was a contractor and, according to the Agency's lawyers, did not have any whistleblower rights. As a result, this "massive intelligence failure" went unaddressed for years. In 2018, *Yahoo News* independently reported that Mr. Reidy's complaints had pertained to Iran's compromise of CIA's covert communications system which ultimately led to the complete dismantling of CIA's spy network in Iran in 2010 and 2011 and the deaths of over two dozen CIA assets in China in 2011 and 2012, which Mr. Reidy had warned about *in 2008*.[3]

Mr. Reidy's case perfectly exemplifies the need for whistleblowers in the Intelligence Community—and the federal government writ large—to have access to competent, *informed* counsel. Had Mr. Reidy been allowed to tell a lawyer in 2008—or even 2011—the actual classified information he knew, there is a significant chance that some if not of the fallout from the "massive intelligence failure" he was desperately trying to report could have been avoided.

This problem can be easily solved by adding the following statutory language to any bill designed to reform the process used by Intelligence Community whistleblowers:

> **Upon the request of an individual seeking to make a protected disclosure or file a complaint alleging prohibited retaliation for making a protected disclosure, and a showing that classified information is material to the protected disclosure, counsel or other representation retained by the individual shall be considered for access to classified information for the limited purposes of such disclosure or complaint.**

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lawyer can offer a broader perspective on potential misconduct that a whistleblower often lacks due to their specialized training and expertise.

[2] Marisa Taylor, *Pentagon, CIA instructed to re-investigate whistleblower cases*, McClatchy (July 23, 2015), *at* https://www.mcclatchydc.com/news/nation-world/national/article28348576.html.

[3] Zach Dorfman & Jenna McLaughlin, *The CIA's communications suffered a catastrophic compromise. It started in Iran*, Yahoo News (Nov. 2, 2018), *at* https://www.yahoo.com/news/cias-communications-suffered-catastrophic-compromise-started-iran-090018710.html. Neither Mr. Reidy nor I can confirm the accuracy of this reporting, as he remains bound by his nondisclosure agreement not to reveal information without authorization and CIA has never permitted me to learn the details of his disclosures.

The need for appropriate prepublication review

As noted above, if a whistleblower's lawyer is not granted an LSA by an agency, or if the matter does not involve classified information, a whistleblower with a security clearance is required by their nondisclosure agreement to submit all communications[4] intended for their lawyer to the agency for prepublication review. This causes several complications for such whistleblowers.

First, many agencies apply a different standard for prepublication review of materials submitted by current employees and contractors than they do for former employees and contractors. For instance, CIA claims the right to prohibit current employees and contractors from disclosing not only classified information, but also any information which could:

> (a) reasonably be expected to impair the author's performance of his or her job duties,
> (b) interfere with the authorized functions of the CIA, or
> (c) have an adverse effect on the foreign relations or security of the United States.[5]

CIA defends this "appropriateness" standard by claiming that discussion of "internal organizational operations, policies, and information . . . could in certain circumstances interfere with CIA's ability, as an employer, to promote an effective work place,"[6] and it is easy to see how this would negatively impact potential whistleblowers. The act of whistleblowing by its very nature is often viewed by agencies as interfering with "an effective work place," can "impair the author's performance of his or her job duties," and, if the subject is agency misconduct, might "have an adverse effect on the foreign relations or security of the United States." The fact that such a whistleblower can be prohibited from disclosing information to their lawyer *even if it does not meet the low standard for classification* should be reason enough to reform this system.

The problems with this system do not end there, however. When submitting a document—even one designed to be a communication from a client to an attorney—for prepublication review, a current CIA employee or contractor must provide the reviewing office with the name of their immediate supervisor or contracting officer. The office "will notify the appropriate Agency manager or contracting officer, whose concurrence is necessary for publication."[7] This means that someone seeking to blow the whistle on misconduct must choose between navigating the system alone by making a confidential, protected disclosure, or hiring a lawyer and *informing their boss of the disclosure before the lawyer*. And because of the "appropriateness" standard, the lawyer may never even learn about the misconduct, while the guilty party is given advance notice of the imminent whistleblowing.

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[4] An employee or contractor with a security clearance is generally required to submit *all* documents related to their work for prepublication review, whether they believe they contain classified information or not. The rationale for this requirement is the conceit that an individual author may not have the full story and may accordingly not be competent to decide if the document would reveal classified information.
[5] CIA, AR 13-10, *Agency Prepublication Review of Certain Material Prepared for Public Dissemination* (June 25, 2011).
[6] *Id.*
[7] *Id.*

In fact, while there are restrictions on the ability of an Inspector General to disclose the substance of a protected disclosure and the identity of the whistleblower, there are no such restrictions on an agency prepublication review office. It is therefore possible—and in my experience, likely—that an office conducting prepublication review of an otherwise privileged communication involving potential litigation against the agency would share that information with the agency's Office of General Counsel, Office of Security, Office of Human Resources, and any other office responsible for protecting the agency's interests. This would also apply equally to a communication from an employee to a lawyer about making a confidential disclosure to Congress or filing a *qui tam* lawsuit against a contractor. The net result is that, if the agency declines to grant the lawyer an LSA, or if the whistleblowing does not involve classified information, the potential whistleblower is deprived of both attorney-client privilege and the ability to make the confidential disclosures to the appropriate authorities which forms the basis of our entire whistleblower protection system.

This problem too can be easily solved by adding the following statutory language to any bill designed to reform the process used by Intelligence Community whistleblowers:

> **(a) Upon submission for prepublication review by an individual seeking to make a protected disclosure or file a complaint alleging prohibited retaliation for making a protected disclosure of an intended communication between the individual and an attorney hired to assist in such a disclosure or complaint, an agency shall not disclose the existence of the submission or the identity of the individual outside the office conducting the review.**
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> **(b) The agency shall not prohibit the disclosure of any information contained in such an intended communication which is not currently and properly classified in the interest of national security.**

To address the agency's reasonable need for an office conducting a prepublication review to consult with other offices about the classification status of information, report language should be added as follows:

> **This is not intended to preclude a prepublication review officer from contacting another agency office to ascertain whether or not information in the submission is classified. Rather, it is intended to ensure that the fact that whistleblowing is occurring is kept confidential. For example, if a prepublication review officer sent to another office a copy of a memo written from a whistleblower to an attorney about a plan to file a complaint about the Chief of Station in Beijing using a piece of malicious software called "Spynet" to spy on a love interest, along with the question, "Is any of this classified," that would be prohibited. However, if the prepublication review officer extracted information from the memo and asked another office questions such as "Is the name of the Beijing Chief of Station classified" and "Is the existence of Spynet classified," that would be permissible, because it**

would not reveal the existence of whistleblowing activity or the identity of a whistleblower.

The need for counsel, period

There is a subtle flaw in the Administrative Procedure Act which is abused by agencies seeking to exclude any outside lawyers from the whistleblowing process. 5 U.S.C. § 555(b) states:

> A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.

This provision of law appears to guarantee that people involved in investigations being conducted by an Inspector General can have a lawyer present in any interviews, but that is not how it is always interpreted. Some agencies narrowly parse the language and conclude that a whistleblower is not entitled to have a lawyer present in any interviews because the whistleblower is not being "compelled to appear" and an interview with an investigator is not an "agency proceeding." To those agencies, only the *targets* of investigations are entitled to be accompanied by lawyers, while the *accusers* are not.[8]

The case of John Reidy is again illustrative of this point. After the Intelligence Community Inspector General ("ICIG") directed the CIA Office of Inspector General ("OIG") to actually investigate Mr. Reidy's allegations, an investigator contacted Mr. Reidy to schedule an interview. Mr. Reidy directed the investigator to coordinate with me about scheduling an interview that works for both of us. The investigator refused. For the next several weeks, the following pattern of communication emerged:

1. The investigator calls Mr. Reidy about the interview.
2. Mr. Reidy informs me of the call.
3. I email the investigator and tell him to talk to me and not my client.
4. The investigator calls Mr. Reidy about the interview.
5. The cycle repeats.

At one point, I managed to get the investigator on the phone, and he informed me that he "was instructed by the lawyers not to involve any lawyers." He did not grasp the surrealism of that statement.

Of all of the issues addressed in this testimony, this is by far the easiest to remedy, with the following statutory language:

[8] In fact, many agencies require employees to participate in such interviews, which would mean that in those agencies, the accused parties are entitled to be accompanied by lawyers and witnesses are entitled to be accompanied by lawyers, while the only person who is not entitled to be accompanied by a lawyer is the person who actually reported the misconduct.

Section 555(b) of title 5, United States Code, is amended to strike "compelled" and insert "entitled."

By correcting these three issues, Congress can ensure that actual and potential whistleblowers have privileged access to competent, fully informed counsel. Doing so will improve their ability to effectively report waste, fraud, abuse, or misconduct to the appropriate authorities, will reduce the reporting of issues which do not meet that description, and will make whistleblower retaliation more difficult by reducing the number of people who know about protected disclosures. Such a result would yield a net benefit for the national security of the United States.

Practical Independence of Inspectors General

Offices of agency Inspectors General are designed to be legally unique entities within the government because their purpose is to conduct audits and investigations of agency operations.[9] However, even though these offices retain *legal* independence from the agencies they oversee, in many cases they are still *practically* compromised. This problem primarily arises in the context of information technology ("IT") and information access.

When an Inspector General's office relies upon the agency's IT infrastructure, it creates vulnerabilities and conflicts of interest. For example, one need only consider the case of Daniel Meyer, formerly the ICIG Director of Whistleblowing and Source Protection. Mr. Meyer exchanged emails about confidential whistleblower disclosures with Senator Grassley's office, and CIA intercepted and reviewed those emails, allegedly for security reasons.[10] CIA was able to do this because the ICIG, even though it is housed in the Office of the Director of National Intelligence and exercises oversight over the entire Intelligence Community, uses CIA email servers. ICIG employees have email accounts on the ucia.gov domain (the domain used by CIA employees), and as a result CIA claims the right to review any information stored therein, arguing that the fact that the information is stored on a CIA computer brings it within the scope of CIA's counterintelligence mission. As a result, an operational office of CIA is given virtually unlimited access to the confidential whistleblower files of the Inspector General charged with its oversight. Moreover, there appear to be little restrictions on CIA's use of this information; Mr. Meyer's emails were then given to the CIA OIG, which itself falls under the ICIG's oversight jurisdiction.

This arrangement stands in stark contrast to the relationship between the Department of Homeland Security ("DHS") and its Inspector General. In that case, the DHS OIG possesses its own dedicated IT staff and has established numerous firewalls and protocols to ensure that its files cannot be accessed by non-OIG staff. The General Services Administration ("GSA") OIG has a separate domain of its own: gsaig.gov. However, it is currently unknown whether DHS and GSA represent the norm, or whether CIA does.

[9] Inspector General Act of 1978, Pub. L. No. 95-452 (Oct. 12, 1978), 5 U.S.C. app. 3.
[10] Charles Clark, *Grassley Wins Declassification of CIA Documents on Monitoring Whistleblowers*, Gov't Exec. (Nov. 2, 2018), *at* https://www.govexec.com/oversight/2018/11/grassley-wins-declassification-cia-documents-monitoring-whistleblowers/152546/.

A similar issue can be seen with respect to the control of access to information. For example, it creates an unavoidable conflict of interest for an agency's security office to make adjudications about security clearances or other access to information restrictions (e.g., public trust suitability determinations) about employees who might be in a position to investigate the security office. While a total duplication of effort would likely be wasteful, it is reasonable to expect a truly independent Inspector General's office to have its own personnel security staff to handle its own personnel security issues such as access determinations, to avoid this conflict. Such a dedicated staff could share resources and coordinate with the agency's security office, but decisions about what access to grant to OIG employees would need to be made by OIG security staff, just as Inspectors General are required by law to obtain and maintain legal counsel separate from agency counsel.

Because the extent of these problematic relationships is currently unknown, I propose that Congress should direct the Council of the Inspectors General on Integrity and Efficiency ("CIGIE") to conduct a comprehensive survey of all Inspectors General to determine the extent to which their offices are entangled with the agencies they oversee in an IT and information access context. In recognition of the tension between CIGIE and several agency Inspectors General, Congress should also explicitly mandate that all agencies cooperate with this survey. Once CIGIE has completed this survey and published its report—which should be public—Congress will be in a position to decide if statutory reform is appropriate.

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, and through which he often represents Intelligence Community employees and contractors. He is an adjunct professor at the George Washington University Law School and the American University Washington College of Law, where he teaches various topics in national security law. He sits on the Board of Directors of the National Military Intelligence Foundation and the Board of Directors of the Bar Association of the District of Columbia, and is a charter member of the Security Clearance Lawyers Association.

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.

He can be found on Twitter at @NatlSecCnslrs.