

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
OFFICE OF GENERAL COUNSEL
WASHINGTON, DC 20511

September 13, 2019

The Honorable Richard Burr
Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

The Honorable Adam Schiff
Chairman
Permanent Select Committee on Intelligence
United States House of Representatives
Washington DC 20515

The Honorable Mark Warner
Vice Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

The Honorable Devin Nunes
Ranking Member
Permanent Select Committee on Intelligence
United States House of Representatives
Washington DC 20515

Dear Chairman Burr, Chairman Schiff, Vice Chairman Warner, and Ranking Member Nunes,

(U//~~FOUO~~) On September 10, 2019, Chairman Schiff sent a letter to the Acting Director of National Intelligence (“DNI”), requesting information relating to a complaint that the Inspector General of the Intelligence Community (“ICIG”) had received from an individual within the Intelligence Community. In that letter, Chairman Schiff expressed the view that the DNI’s handling of the complaint was not consistent with 50 U.S.C. § 3033(k)(5). The ICIG sent a separate letter to both committees concerning the underlying complaint on September 9, 2019. I write to provide the intelligence committees with additional information concerning the complaint and to explain how the DNI fully complied with applicable law. As explained below, because the disclosure in this case did not concern allegations of conduct by a member of the Intelligence Community or involve an intelligence activity under the DNI’s supervision, we determined, after consulting with the Department of Justice (“DOJ”), that no statute requires disclosure of the complaint to the intelligence committees.

(U//~~FOUO~~) The DNI believes strongly in the role of the ICIG and in the statutory provisions that encourage Federal employees and government contractors to report truthful allegations of wrongdoing, in accordance with the specific legal process. The DNI also takes seriously his obligation to protect lawful whistleblowers from retaliation. For the Intelligence Community, this process is codified in the Intelligence Community Whistleblower Protection Act (“ICWPA”) and in the parallel provisions in Title 50 of the U.S. Code. Under ICWPA, Congress enacted a framework to report matters of “urgent concern” within the Intelligence Community to Congress that protects both Congress’ legitimate oversight responsibilities as well as the constitutional authority of the President to determine how, when, and under what circumstances classified or privileged information may be reported to Congress. *See generally Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92 (1998).

(U//~~FOUO~~) In this instance, the ICIG transmitted to the DNI a complaint, that he viewed as an urgent concern, and we reviewed that report immediately upon receipt. Because there were serious questions about whether the complaint met the statutory definition of an “urgent concern” under 50 U.S.C. § 3033(k)(5), we consulted with DOJ concerning the appropriate way to handle the complaint. We also included the ICIG in those consultations to make sure that he had the opportunity to provide his views.

(U//~~FOUO~~) Based on those consultations, we determined that the allegations did not fall within the statutory definition of an “urgent concern” and that the statute did not require the complaint to be transmitted to the intelligence committees. The statutory definition of “urgent concern” requires the reporting of a serious allegation involving classified information relating to “the funding, administration, or operation of an intelligence activity within the responsibility and authority of the Director of National Intelligence.” 50 U.S.C. § 3033(k)(5)(G)(i). This complaint, however, concerned conduct by someone outside the Intelligence Community and did not relate to any “intelligence activity within the responsibility and authority of the DNI.” The complaint therefore did not fall within the statutory framework governing reporting matters of “urgent concern” to Congress.

(U//~~FOUO~~) In his September 10, 2019 letter, Chairman Schiff states that the statute “requires” the DNI “to forward *all* whistleblower transmittals from the ICIG to the congressional intelligence committees within a statutorily-mandated 7-day period.” *Sept. 10 Letter at 1*. Respectfully, however, those are not the words of the statute. Instead, the statutory procedures apply only when “[a]n employee of an element of the intelligence community . . . intends to report to Congress a complaint or information with respect to an urgent concern,” which is itself a defined term. 50 U.S.C. § 3033(k)(5)(A), (k)(5)(G). The provision contemplates, as relevant here, that the employee first “report[s] such complaint or information to” the ICIG. *Id.* § 3033(k)(5)(A). The ICIG then determines whether to transmit it to the DNI. *Id.* § 3033(k)(5)(B). If the ICIG transmits a complaint to the DNI “under subparagraph (B),” then the DNI “shall, within 7 calendar days of such receipt, forward such transmittal to the [congressional] intelligence committees, together with any comments the [DNI] considers appropriate.” *Id.* § 3033(k)(5)(C). However, when a complaint does not state an urgent concern, the statute does not require the DNI to transmit it to the intelligence committees, because the complaint is not one “under subparagraph (B).” Here, we determined, in consultation with DOJ, that the complaint did not state an urgent concern.

(U//~~FOUO~~) We also respectfully disagree with the Chairman’s suggestion that “the statute provides for an Intelligence Community whistleblower to contact the congressional intelligence committees” directly in these circumstances. *Sept. 10 Letter at 2 n.3*. That provision of the statute cannot apply where, as here, the complaint falls outside the statutory definition of an urgent concern.

(U//~~FOUO~~) We believe that it is important to apply the statute as it was written, because reading it to give a complainant a unilateral right to forward a complaint to the congressional intelligence committees would raise serious constitutional questions. As the Obama Administration explained in its comments on the legislation enacting section 3033(k), “if this bill were read to give Intelligence Community employees unilateral discretion to disclose classified information to Congress, it would be unconstitutional.” Letter for the Hon. Dianne Feinstein,

Chairman, and the Hon. Christopher S. Bond, Vice-Chairman, Senate Select Committee on Intelligence, from Ronald Weich, Assistant Attorney General, Office of Legislative Affairs at 2 (Mar. 15, 2010). Assistant Attorney General Weich also advised Congress that, if it were enacted, the Executive Branch would “interpret” the statute “in a manner consistent with” the statement President Clinton issued upon signing the ICWPA into law. *Id.*

(U//~~FOUO~~) In that statement, President Clinton noted that “[t]he Constitution vests the President with authority to control disclosure of information when necessary for the discharge of his constitutional responsibilities.” *Statement on Signing the Intelligence Authorization Act for Fiscal Year 1999*, 2 Pub. Papers of William J. Clinton 1825 (1998). Accordingly, the Executive Branch would construe the statute not to “constrain” its “constitutional authority to review and, if appropriate, control disclosure of certain classified information.” *Id.* We therefore do not understand the statute to require the DNI automatically to forward every complaint to Congress, even where the complaint falls outside the plain terms of the underlying statutory procedures. We also do not understand the statute to foreclose the DNI from reviewing information in such complaints and withholding confidential Executive Branch information.

(U//~~FOUO~~) Notwithstanding the plain language of the statute, the ICIG requested that the DNI transmit the complaint to the intelligence committees or provide guidance on how he might do so. The ICIG observed that, in the past, the DNI has transmitted complaints to the intelligence committees even when the ICIG determined that they did not meet the definition of an “urgent concern.” The information within the present complaint, however, is different in kind from that involved in any past cases of which we are aware. The present complaint does not allege misconduct within the Intelligence Community or concern an intelligence activity subject to the authority of the DNI. Furthermore, because the complaint involves confidential and potentially privileged communications by persons outside the Intelligence Community, the DNI lacks unilateral authority to transmit such materials to the intelligence committees. Therefore, the DNI determined not to transmit this confidential information to the intelligence committees.

(U//~~FOUO~~) Notwithstanding this conclusion, ODNI remains committed to working to accommodate the Committees as best as we can. Indeed, after consulting with the ODNI, the ICIG informed the committees of the complaint. Should the Committees have further questions about this matter, we will seek to answer them and to work with the appropriate officials to accommodate any legitimate legislative interests that the Committees have in this matter, while also protecting Executive Branch confidentiality interests. *See Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. at 102.

Respectfully,



Jason Klitenic
General Counsel