



Permanent Select Committee
on Intelligence
U.S. House of Representatives

September 24, 2019

The Honorable William P. Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear General Barr:

Acting Director of National Intelligence (“DNI”) Joseph Maguire continues to withhold from the House Permanent Select Committee on Intelligence (“Committee”) a whistleblower complaint lawfully submitted to the Inspector General of the Intelligence Community (“IC IG”) by a member of the Intelligence Community (“IC”) on August 12, 2019 (“Complaint”). According to the Office of the Director of National Intelligence (“ODNI”), the Acting DNI withheld the complaint from the Committee after “consulting” with the Department of Justice (“DOJ” or “Department”).¹

In a September 17 letter to the Committee, IC IG Michael Atkinson informed the Committee that he disagreed with the determination, and “*particularly DOJ’s conclusion,*”² that “no statute requires disclosure of the complaint to the intelligence committees” because, per DOJ’s position, “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.”³ DOJ’s conclusion overruled a determination by the independent IC IG, after a preliminary review, that the Complaint met statutory criteria and appeared credible. The statute makes no provision for the DNI to refuse to transmit such a Complaint to the relevant congressional committees.

DOJ’s intervention in the Intelligence Community whistleblower complaint process, as set forth in 50 U.S.C. § 3033(k)(5), is improper and contrary to both a clear, categorical statutory

¹ Letter from Office of Director of National Intelligence General Counsel Jason Klitenic to Chairman Burr, Chairman Schiff, Vice Chairman Warner, and Ranking Member Nunes, September 13, 2019.

² Letter from IC IG Atkinson to Chairman Schiff and Ranking Member Nunes, September 17, 2019. (Emphasis added.)

³ Letter from Office of Director of National Intelligence General Counsel Jason Klitenic to Chairman Burr, Chairman Schiff, Vice Chairman Warner, and Ranking Member Nunes, September 13, 2019.

directive and longstanding IC whistleblowing practices. If permitted to stand, moreover, the Department's view, which the Acting DNI cited in overruling the IC IG, could have serious and corrosive consequences for whistleblowing within the IC and the Committee's exercise of its lawful oversight duties. The Committee therefore demands that you produce the relevant legal opinion, among other materials described below.

By letter dated September 13, 2019,⁴ and then through a second letter dated September 17, 2019,⁵ the ODNI refused to comply with the Committee's request and subsequent subpoena for all documents and materials related to the Complaint, which a member of the IC submitted to the IC IG in accordance with procedures permitting IC whistleblowers to report "serious or flagrant" misconduct of an "urgent concern" to the congressional intelligence committees.⁶

The ODNI explained its deviation from consistent past practice of disclosure by asserting that the complaint did not relate to "the funding, administration or operation of an intelligence activity within the responsibility or supervision of the DNI."⁷ As a result, ODNI, based on DOJ's legal opinion, determined that "no statute"—including 50 U.S.C. § 3033(k)(5)—required the complaint's transmittal to the congressional intelligence committees.

This determination was based on "consultation" with the Department, which, the Committee has learned, in fact involved a formal opinion—likely from the Office of Legal Counsel—based on a fact-specific analysis of the Complaint, yet without the benefit of the preliminary investigation conducted by the IC IG. In effect, the Department appears to have usurped the IC IG's fact-finding role in an unprecedented manner, and then disguised its reversal of the IC IG's findings in a purportedly non-partisan legal opinion from OLC.

To the contrary, the IC IG, who, unlike DOJ, routinely reviews this type of whistleblower complaint, found that the Complaint "not only falls within the DNI's jurisdiction, but relates to one of the most significant and important of the DNI's responsibilities to the American people."⁸

The statute, moreover, does not allow for this sort of *ex post facto* factual analysis or legal assessment of the underlying complaint by either ODNI, DOJ, or, per reports, the White House Counsel's Office. Instead, the statute requires that, if the IC IG finds that an urgent concern complaint is credible following a preliminary investigation, ODNI "shall" transmit the

⁴ Letter from ODNI General Counsel Jason Klitenic to Chairman Adam B. Schiff, dated September 13, 2019 ("ODNI Sept. 13 Letter").

⁵ Letter from ODNI General Counsel Jason Klitenic to Chairman Adam B. Schiff, dated September 17, 2019 ("ODNI Sept. 17 Letter").

⁶ 50 U.S. Code § 3033(k)(5).

⁷ The Sept. 13 Letter also cited the fact that the subject of the complaint is not a member of the Intelligence Community, but that is not a requirement of the statute and therefore is irrelevant to the "urgent concern" inquiry. See ODNI Sept. 13 Letter, p. 1, 2.

⁸ Letter from Inspector General for the Intelligence Community Michael K. Atkinson to Chairman Adam Schiff and Ranking Member Devin Nunes, dated September 17, 2019 ("IC IG Sept. 17 Letter"), at p. 2.

complaint to the congressional intelligence committees as requested by the whistleblower.⁹ Indeed, the Committee understands that this is the first complaint—credible or not—that ODNI has withheld from the congressional intelligence committees *at least* since the IC IG’s establishment by statute in 2010.

In support of its decision to overrule the IC IG, ODNI cited to several Executive Branch statements or opinions to support the notion that the statute permits the ODNI to review—and potentially withhold—information that is either classified or relates to “potentially privileged communications.”¹⁰ Yet neither classification nor privilege considerations formed the basis of ODNI’s decision, as informed by DOJ’s opinion, to withhold the Complaint from the congressional intelligence committees. In fact, the IC IG, who has reviewed the OLC opinion, explained to the Committee that ODNI’s decision to withhold the Complaint was “for reasons other than awaiting a classification review or asserting appropriate privileges.”¹¹ In fact, there has been no assertion of any privilege.

If permitted to stand, the Department’s flawed advice—particularly its factual conclusion that the complaint does not constitute an “urgent concern” under the statute and thus need not be transmitted to the committees—could have serious and far-reaching implications. The most serious relate to this whistleblower, who acted in good faith, in full compliance with statutory procedures, and with a reasonable expectation that, by adhering to such procedures, protections from reprisal would automatically apply as provided by law. DOJ’s radical interpretation of the law could result in a subsequent finding that a whistleblower who followed the law to protect classified information might not benefit from the important whistleblower protections included in the statute.

The potential chilling effect of this bait-and-switch could have widespread ramifications, both to this individual and to lawful whistleblowers inside and outside of the Intelligence Community. As a proud former member of the Department of Justice, I cannot underscore enough how alarmed I am that DOJ, whether through OLC or another component, would be complicit in such a distorted interpretation of a straight-forward statute in order to facilitate concealing from Congress information about serious or flagrant wrongdoing.

Other serious consequences could follow if DOJ’s position, which ODNI perceives to be binding, holds. Among other things, DOJ’s view appears to remove the Complaint from the jurisdiction of the IC IG, who therefore cannot conduct his own investigation into the underlying conduct.

⁹ 50 U.S. Code § 3033(k)(5)(C).

¹⁰ ODNI Sept. 13 Letter, p. 3.

¹¹ IC IG Sept. 17 Letter, p. 3. The IC IG also informed the Committee that every “urgent concern” complaint undergoes a classification review within the 21-day period between submission of the Complaint and the date by which the DNI must transmit a complaint. The Committee does not understand that a classification review forms any of the basis for withholding the Complaint by the ODNI.

These consequences raise the specter that the Department has participated in a dangerous cover-up to protect the President.¹²

Finally, the Committee also requests that the Department abide by its own “best practices” and produce the OLC opinion in order to bolster transparency and accountability.¹³ Applying this approach, OLC recently has released legally controversial opinions, including another opinion which, like this one, conferred discretion on the Executive Branch to ignore a clear statutory command to make information available to a congressional committee.¹⁴ The questionable foundation for the the Department’s advice to ODNI, and the harms that advice risk causing, require at least that the Department’s opinion be furnished to the Committee so that the Department’s actions can be evaluated fully.

Accordingly, pursuant to its constitutional oversight and legislative authority, its statutory authority to be kept fully and currently informed of all counterintelligence and foreign intelligence matters, and authority vested in the Committee as part of the House of Representatives’ formal impeachment inquiry, the Committee requests the following:

1. Any legal opinion, legal analysis, or factual analysis, by OLC or another element of the Department, related to the Complaint;
2. Any information related to an investigation or other form of assessment or inquiry by the Federal Bureau of Investigation into the underlying conduct of the Complaint, including but not limited to confirmation or denial of the existence of an open assessment, preliminary inquiry, and/or investigation;
3. Any and all DOJ communications, correspondence, and consultation with ODNI or the IC IG related to the Complaint;
4. Any and all DOJ communications, correspondence and consultation with the White House, including the White House Counsel’s office, related to the Complaint; and
5. Any and all documents and information about DOJ involvement, analysis, review and participation related to any previous whistleblower complaint under the Intelligence

¹² Neither the ODNI nor the IC IG would inform the Committee as to whether the underlying conduct had been referred to the Federal Bureau of Investigation (FBI) for further investigation. As outlined in more detail below, the Committee therefore asks the Department to confirm whether the FBI has opened an investigation into the underlying conduct.

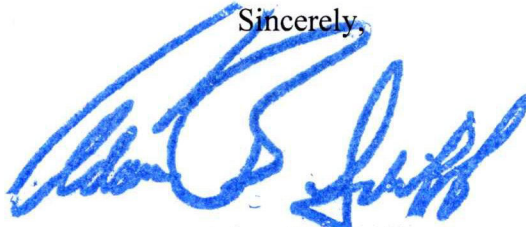
¹³ See Memorandum for Attorneys of the Office, *Re: Best Practices for OLC Legal Advice and Written Opinions* at 5 (July 16, 2010).

¹⁴ See generally Memorandum for the General Counsel, Department of the Treasury, *Congressional Committee’s Request for the President’s Tax Returns Under 26 U.S.C. § 6103(f)* (June 13, 2019) (clear statutory directive to produce tax return information to a congressional committee may be ignored if the Executive Branch decides that the committee’s “legislative purpose” in seeking such information is, in the Executive Branch’s view, pretextual and/or not “legitimate”).

Community Whistleblower Protection Act of 1998 or its companion provisions found at 50 U.S.C. § 3033 *et seq.*

Please produce the response to the request in paragraph 1 above no later than **Friday, September 27**. Please produce the remainder of the materials requested no later than **Tuesday, October 1**. If you have any questions, please contact Committee staff at (202) 225-7690.

Sincerely,

A handwritten signature in blue ink, appearing to read "Adam B. Schiff", is written over the word "Sincerely,".

Adam B. Schiff
Chairman

Cc: The Honorable Christopher Wray
Director, Federal Bureau of Investigation

Michael Horowitz, Esq.
Inspector General, Department of Justice