July 24, 2013

Honorable James Clapper
Director of National Intelligence
Washington, DC 20511

Attn:
Matthew Webb
Office of General Counsel

Dear Mr. Clapper:

The undersigned organizations write to assist you with the proper implementation of the Presidential Policy Directive 19 (PPD-19) "Protecting Whistleblowers with Access to Classified Information," which protects many national security and intelligence community whistleblowers for the first time. For years, we championed protections for these workers as part of the Whistleblower Protection Enhancement Act. We applauded President Obama's leadership issuing PPD-19 on October 10, 2012, after it was clear that similar protections would be removed from the legislation to overcome objections by the House Permanent Select Committee on Intelligence. From long experience, however, we have learned that a formal acknowledgement of whistleblower rights can set a dangerous trap for those who conscientiously report government illegality, fraud, waste, mismanagement, abuse of authority, threats to public health or safety, or other wrongdoing, if these rights are not supported by effective due process mechanisms designed to ensure enforcement.

PPD-19 requires each agency within the intelligence community or with classified information to certify to the Director of National Intelligence (DNI) within 270 days that a review process for retaliation claims, compliant with PPD-19, is in place. That deadline was on July 7. If an agency fails to certify, or the DNI disagrees with the agency certification, the DNI must notify the President. Additionally, PPD-19 directs the DNI, in consultation with the Secretary of Defense, the Attorney General, and the heads of agencies with intelligence community elements, to issue within 365 days policies and procedures to ensure employees are aware of the protections and review processes available for protected disclosures (that deadline is this October 10th).

We view the standards and process required by PPD-19 as essential to encouraging intelligence community whistleblowers to use protected channels when reporting government waste, fraud or abuse, rather than what many see as the safer avenue of making anonymous leaks to the news media. . Importantly, PPD-19 will provide some legal protections for classified disclosures within institutional channels or to Congress for the first time. NSA contractor Edward Snowden publicly stated that before making his own choices, he carefully studied the nightmarish harassment of National Security Agency (NSA) whistleblowers who acted internally without an effective process to enforce their employment or other rights against retaliation. There must be a credible, legitimate channel to work within the system, or future whistleblowers increasingly choose the relative safety of anonymous media leaks. PPD-19 is a promising step towards a more functional and accountable intelligence community.

PPD-19 requires that when reviewing proposed agency policies the DNI apply standards that are "consistent, to the fullest extent possible, with the policies and procedures used to adjudicate alleged violations section 2302(b)(8) of title 5, United States Code." We recommend that, at a minimum, the DNI enforce the following standards for certification of agency compliance:

1) Protection against all personnel actions listed in 5 USC 2302(a): Since 1978 the procedures established in the Civil Service Reform Act have been the baseline for evaluating agency actions that constitute threats to the merit system if taken for improper reasons. Policies to implement PPD-19 will be illegitimate unless all personnel actions in listed in 5 USC section 2302(a) are included as prohibited personnel practices when taken after a whistleblower disclosure. This includes the "anti-gag" provision in 5 USC 2302(a)(2)(A)(xi).

2) Clarification that PPD-19 covers contractors and grantees: Failing to protect the more than one million contractors with security clearances throughout our government would create a huge gap that will undermine achieving the policy's objectives. The Center for Public Integrity recently reported:

> 'The Executive Branch is evaluating the scope' of protections for such contract workers as it implements Obama's order, according to an unsigned, undated statement supplied to the Center for Public Integrity by the Office of the Director of National Intelligence.

Protecting the entire intelligence community workforce is essential to the creation of effective whistleblower protections. The administration's goal to prevent unauthorized leaks of classified information realistically cannot be achieved if the processes established through the PPD fail to protect government contractors and grantees.

3) Whistleblower Protection Act burdens of proof: Replicating WPA burdens of proof is an absolute prerequisite for legitimacy. Again, PPD-19 requires that agencies "shall be consistent, to the fullest extent possible, with the policies and procedures used to adjudicate alleged violations section 2302(b)(8) of title 5, United States Code." Under the burdens that apply to the civil service and every government contractor or corporate whistleblower law since 1992, an employee establishes a *prima facie* case by demonstrating that protected activity was a contributing factor in causing a challenged personnel action, but the employer still may prevail by proving through clear and convincing evidence that it would have taken the same action for independent reasons. Among the statutes in which these standards have been reiterated is the 2009 stimulus law, which covers intelligence community contractors. These burdens of proof long have established the ground-rules for a fair chance at achieving justice in whistleblower cases. They have been applied in as diverse settings as the United Nations, the World Bank and others, all which deal with sensitive issues analogous to those in the intelligence community.

This recommendation is consistent with the Department of Defense (DOD) Office of Inspector General (OIG) proposed procedures for DOD intelligence units. *See* Michael Vickers, Undersecretary of Defense for Intelligence, Directive-type Memorandum (DTM) 13-008, "DoD Implementation of Presidential Policy Directive 19" (July 8, 2013), Attachment 2, sections 2.f,

3.b.4, and 4.b. The OIG is right. Intelligence community employees already face unique, additional barriers when challenging agency personnel actions, such as the States Secrets Act and classified evidence. If employees are subjected both to these unique barriers and to antiquated burdens of proof that have not governed analogous proceedings since 1989, the PPD will not have legitimacy as mechanism to enforce safe rights to make institutional whistleblowing disclosures.

4) Consistency with the Administrative Procedures Act (APA): The PPD allows agencies to customize procedural rules, but the rights will not be taken seriously without legitimate due process to enforce them. The APA has long set standards requiring the opportunity to know the grounds for any proposed action, know and confront accusers, engage in pre-trial discovery, and present witness testimony and other evidence in an open administrative hearing for unclassified evidence and issues. Without this baseline, whistleblowers will not take their rights seriously—nor should they.

5) Inspector General corrective action: Offices of Inspector General (OIG's) who investigate alleged violations "may" recommend corrective action to "return the employee as nearly as practical and reasonable, to the position such employee would have held had the reprisal not occurred." Each agency's rules should specify that the OIG shall make corrective action recommendations, including restoration of security clearances removed illegally, in the absence of extraordinary circumstances for bypassing corrective action that must be disclosed and can be appealed. When the OIG confirms illegal retaliation there is no excuse to make corrective action discretionary.

6) Interim relief: For consistency with procedures and remedies codified in section 2302(b)(8), the OIG must have authority to provide interim relief until final action is completed. Legal actions typically take years to resolve. If an employee is without paycheck or clearance during the interim, ultimate vindication may be too late for practical relevance. The opportunity for interim relief is a core, essential part of enforcement for section 2302(b)(8), which makes it functional for employees to pursue their rights and facilitates timely settlement.

7) Application of longstanding legal standards to assess appeals: The PPD has a provision for appeal to an Inspector General External Review Panel. But it is silent on the standards the panel will apply. It is unprecedented for a panel of non-jurists to have a monopoly on appellate review of legal rulings. To be credible, the administration must inform agencies and employees that appeals will be assessed under the longstanding criteria of the APA, rejecting agency decisions that are arbitrary and capricious, or not supported by substantial evidence.

8) Due process before the Review Panel: To be consistent with the Whistleblower Protection Act's procedures for appellate review, the Panel must adopt the due process rights available for appellants under the Federal Rules of Appellant Procedure. That means the opportunity to file an initial and reply brief, as well as to participate in oral arguments.

9) OIG training: The PPD requires outreach so that all employees are aware of their corresponding rights and responsibilities. This outreach should include mandatory training for Office of Inspector General staff throughout the Executive branch, specifically including OIG

Ombudsmen who have parallel duties under the Whistleblower Protection Enhancement Act. Those agencies will have primary responsibility for enforcement, but traditionally have displayed little knowledge or interest in anti-retaliation rights.

10) Protection for lawful disclosures of classified information: The definitions for "protected disclosure" include exercise of appeal rights, participation in investigations to enforce PPD-19, and participation as a witness in OIG investigations, but only "*if the actions described under subparagraphs (c) through (e) do not result in the employee disclosing classified information or other information contrary to law*" (emphasis added). However, *it is lawful* to disclose classified information in the contexts for activities in paragraphs (c) through (e). Those settings include litigation in which closed sessions can receive it, as well as OIG investigations where it is explicitly lawful by statute to communicate classified information. The DNI review standards should require proper clarification that the restriction on classified communications is in regard to unlawful public release of information, rather than information disclosed in those protected settings.

11) Protection for communications with all lawful audiences, including Congress and the OSC: Under 5 USC section 1213, the U.S. Office of the Special Counsel can receive classified disclosures from intelligence community whistleblowers. While the PPD does not explicitly mention the OSC, agency rules must recognize its protected status as a member of the Council on Inspectors General for Integrity and Efficiency (CIGIE). The PPD will not have credibility if there is no protection for disclosures to the government's primary whistleblower protection and disclosure agency. In paragraph (b), the PPD recognizes it intends to protect communications under section 8)(H) of the Inspector General Act, which under the Intelligence community Whistleblower Protection Act includes disclosures to Congress. There is no basis to exclude protection for disclosures to the government's primary whistleblower office or members of Congress.

12) Periodic review. PPD-19 seeks to overcome a culture of blanket secrecy pervasive in nearly all intelligence agencies since their creation. Inevitably, achieving the PPD's objectives will require a difficult process of trial and error to apply lessons learned. As a result, the agency policies should include an annual assessment of results, with evaluation and recommendations every five years for any modifications necessary for the PPD to work as intended.

Finally, we request that you make all agency certifications and related policies public. Not only is there no legitimate need to keep whistleblower protections secret, but also secrecy will make these policies less legitimate and effective.

We request a meeting with your relevant staff to discuss these recommendations and other implementation issues. To reach us, you may contact Tom Devine at the Government Accountability Project at tomd@whistleblower.org or 202-457-0037 or Angela Canterbury at the Project On Government Oversight at acanterbury@pogo.org or 202-347-1122.

Sincerely,

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ACLU

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Michael Ostrolenk
Liberty Coalition

Angela Canterbury
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Keith Wrightson
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Celia Wexler
Union of Concerned Scientists

cc: Inspector General of the Intelligence Community Charles McCullough
Secretary of Defense Chuck Hagel
Attorney General Eric H. Holder, Jr.
Director of the Central Intelligence Agency John O. Brennan
National Security Agency Director Keith B. Alexander
Director of the Defense Intelligence Agency Michael T. Flynn
Director of the National Geospatial-Intelligence Agency Letitia A. Long
Director of the National Reconnaissance Office Betty J. Sapp