

October 28, 2019

The Honorable Richard Burr
Chairman
Senate Select Committee on Intelligence
211 Hart Senate Office Building
Washington, DC 20510

The Honorable Adam Schiff
Chairman
House Permanent Select Committee on
Intelligence
Capitol Visitor Center HVC-304
US Capitol Building
Washington, DC 20515

The Honorable Mark Warner
Vice Chairman
Senate Select Committee on Intelligence
211 Hart Senate Office Building
Washington, DC 20510

The Honorable Devin Nunes
Ranking Member
House Permanent Select Committee on
Intelligence
Capitol Visitor Center HVC-304
US Capitol Building
Washington, DC 20515

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

We write to you as a coalition of organizations spanning the ideological spectrum that share sincere and grave concerns about recent events surrounding an intelligence community (IC) whistleblower, their allegations, and the weaknesses in the whistleblowing laws that cover our intelligence community. As organizations that advocate for government-wide best practice whistleblower protections, we write to express those concerns and to ask that you consider implementing urgently needed reforms.

We believe that Acting Director of National Intelligence (DNI) Joseph Maguire mishandled a whistleblower's urgent underlying disclosure when he diverted from clear legal processes laid out in the Intelligence Community Whistleblower Protection Act (ICWPA). That mishandling revealed one of many deficiencies in the current system of protections for intelligence community whistleblowers that are highlighted by this current situation while also extending beyond it. We also believe that the retaliatory rhetoric and unnecessary focus on the identity of the individual by President Donald Trump,¹ some Members of Congress,² and certain media outlets³ demonstrate an urgent threat to the perceived legitimacy of whistleblowing writ large.

¹ Colby Itkowitz and Reis Thebault, "'Almost a spy': Transcript and video of Trump's remarks at private U.N. event about whistleblower," *Washington Post*, September 27, 2019. https://www.washingtonpost.com/politics/almost-a-spy-transcript-of-trumps-remarks-at-private-un-event-about-whistleblower/2019/09/26/f85477fe-e0bb-11e9-b199-f638bf2c340f_story.html

² Ronn Blitzer, "Lindsey Graham vows to have whistleblowers testify publicly if Democrats impeach Trump," *Fox News*, October 6, 2019. <https://www.foxnews.com/politics/lindsey-graham-somebody-needs-to-look-at-the-bidens-but-not-china>

³ Dean Baquet, "Why The Times Published Details of the Whistle-Blower's Identity," *New York Times*, September 26, 2019. <https://www.nytimes.com/2019/09/26/reader-center/whistle-blower-identity.html>; CNN, "Right Now with Brianna Keilar," *Fox News correspondent: Whistleblower is 'rotten snitch'*, September 27, 2019, 00:00:14. <https://www.cnn.com/videos/politics/2019/09/27/geraldo-rivera-fox-news-rotten-snitch-whistleblower-sot-vpx-crn.cnn>

As a result of these events, a spotlight has been placed on intelligence community whistleblowing and the shortcomings in the law. We ask that you seize this opportunity to reform the law so that it better protects intelligence community whistleblowers. Recognizing the important role whistleblowers play, we believe these reforms should receive bipartisan support.

Our suggested reforms, outlined below, would help to bring the procedures and protections for intelligence community whistleblowers in line with those for other federal employees who are covered under the Whistleblower Protection Act of 1989. They include independent due process rights for IC employees, the removal of prior restraint on IC employees to contact Congress, congressional review of existing non-public whistleblower regulations in the intelligence community, and ensuring that Congress is well-prepared and adequately staffed to receive and act on whistleblower disclosures safely and securely.

DNI's Inaction Demonstrates Need for Safe and Direct Disclosures to Congress

Acting Director Maguire failed to fulfill his legal obligation under the Intelligence Community Whistleblower Protection Act to convey to the congressional intelligence committees within seven days of a whistleblower's disclosure deemed urgent by the Intelligence Community inspector general.⁴

The Act lays out a clear path by which employees of the intelligence community are to send matters of "urgent concern" to the congressional intelligence committees. The whistleblower must first send their disclosure to the Intelligence Community inspector general, who then forwards matters it deems urgent to the DNI for comment. The DNI is then charged with sending the matter to the intelligence committees, directly.⁵ A separate law also explicitly protects certain disclosures made by an employee of the intelligence community to Members of Congress on the intelligence committees.⁶

Legislators made it clear in the Intelligence Community Whistleblower Protection Act that they intended for IC employees to be able to make disclosures to Congress without undue interference from the executive branch, stating: "No basis in law exists for requiring prior authorization of disclosures to the intelligence committees of Congress by employees of the executive branch of classified information about wrongdoing within the Intelligence Community."⁷ They further expressed that Congress "is empowered by the Constitution to serve as a check on the executive

⁴ 50 U.S.C. § 3033(k)(5)(C) (2019).

[https://uscode.house.gov/view.xhtml?req=\(title:50%20section:3033%20edition:prelim\);](https://uscode.house.gov/view.xhtml?req=(title:50%20section:3033%20edition:prelim);) Letter from Chairman Adam Schiff to Acting Director of National Intelligence Joseph Maguire regarding Maguire's failure to send the whistleblower's complaint to the House Intelligence Committee, September 10, 2019.

https://intelligence.house.gov/uploadedfiles/20190910_-_chm_schiff_letter_to_acting_dni_maguire.pdf

⁵ 50 U.S.C. § 3033(k)(5) (2019).

[https://uscode.house.gov/view.xhtml?req=\(title:50%20section:3033%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:50%20section:3033%20edition:prelim);)

⁶ 50 U.S.C. § 3234(b) (2019). <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title50-section3234&num=0&edition=prelim>

⁷ Intelligence Community Whistleblower Protection Act of 1998, §(b)(4), H.R. 3694, 105th Cong., (1998).

<https://www.govinfo.gov/content/pkg/STATUTE-112/pdf/STATUTE-112-Pg2396.pdf#page=5>

branch; in that capacity, it has a ‘need to know’ of allegations of wrongdoing within the executive branch, including allegations of wrongdoing in the Intelligence Community.”⁸ Unfortunately, the law does not provide any alternative path for the whistleblower or the Inspector General if the DNI does not follow the process, allowing intelligence agencies to improperly constrain Congress’s ability to faithfully execute its constitutional oversight duties.

Despite the clear legislative text, the acting director failed to forward the whistleblower’s complaint to Congress. Further, the White House Office of Legal Counsel (OLC) issued a misleading statement asserting that the acting director’s failure was warranted and appropriate.⁹ The Council of the Inspectors General On Integrity and Efficiency, joined by 67 federal inspectors general, subsequently responded in disagreement with that OLC opinion, stating “we agree with the ICIG that the OLC opinion creates a chilling effect on effective oversight and is wrong as a matter of law and policy. We urge you to reconsider the conclusions of the OLC opinion and withdraw or modify it.”¹⁰ It seems that both the acting director and the Office of Legal Counsel disregarded both the plain reading of the black and white requirements of the Intelligence Community Whistleblower Protection Act and clear congressional intent.

We appreciate that the acting director spoke out about the need to protect whistleblowers in his public hearing before the House Permanent Select Committee on Intelligence, and that he has apparently reassured current Office of the Director of National Intelligence employees about their right to blow the whistle. It is essential that the heads of agencies continue to train employees and vocalize their support for the whistleblowing process. But actions speak louder than words, and merely offering verbal support for whistleblowers is insufficient if leaders are unwilling to step up to the plate to do what is required of them by law. We believe that the acting director’s refusal to send the whistleblower’s report to Congress within the required timeframe demonstrated an unwillingness to operate within the bounds of law.

In light of these events, several former intelligence agency inspectors general sent an open letter to Congress reflecting on the importance of independent review of an IC whistleblower’s disclosure: “The ICWPA was enacted to remove political influence and possible retaliation from the reporting of wrongdoing. More importantly, it removes political appointees and office holders from the decision of whether to bring the matter to light. Instead, it assigns that function to an independent Inspector General.”¹¹

⁸ Intelligence Community Whistleblower Protection Act of 1998, §(b)(3), H.R. 3694, 105th Cong., (1998). <https://www.govinfo.gov/content/pkg/STATUTE-112/pdf/STATUTE-112-Pg2396.pdf#page=5>

⁹ Office of Legal Counsel, “Memorandum Opinion for the General Counsel Office of The Director of National Intelligence,” September 3, 2019. <https://www.justice.gov/olc/opinion/file/1205711/download>

¹⁰ Letter from Council of Inspectors General on Integrity and Efficiency to Assistant Attorney General Steven A. Engel regarding their disagreement with the OLC opinion, October 22, 2019. https://ignet.gov/sites/default/files/files/CIGIE_Letter_to_OLC_Whistleblower_Disclosure.pdf

¹¹ Open letter from group of former intelligence community agency inspectors general to Members of Congress regarding the intelligence community inspector general’s “letter of urgent concern,” October 3, 2019. <https://www.pogo.org/letter/2019/10/former-intelligence-community-inspectors-general-protect-the-critical-role-of-whistleblower/>

The whistleblower's disclosure in this instance has been made public due to proactive measures taken by the whistleblower and by Inspector General Michael Atkinson to alert Congress of its existence.¹² However, we cannot simply rely on the discretion and integrity of one or two individuals as our only failsafe for accountability. Instead, we need to reform the law regarding "urgent concerns" to empower the whistleblower to contact Congress directly in order to prevent this kind of incident in the future.

Retaliatory Backlash Necessitates Independent Due Process

Of equal if not greater concern to our organizations is the swift and dangerous backlash the whistleblower has been subjected to by certain Members of Congress, certain media outlets, and from President Trump himself.

Whistleblowers put their careers at risk even when they make by-the-book, protected disclosures. This is even more true for whistleblowers in the intelligence community, as they don't have access to independent due process.¹³ That is why so many, like this individual, come forward anonymously. Unfortunately, a commonly used tactic to divert attention away from a disclosure is to attack the whistleblower's own credibility, often resulting in a retaliatory investigation or smear campaign.¹⁴

The identity of a whistleblower should not matter. Even more so in this instance, there is no public value in revealing the whistleblower's identity as the inspector general of the Intelligence Community independently verified the credibility of the whistleblower's underlying disclosure. Efforts to uncover the whistleblower's identity not only put the individual, their career, and potentially their family at risk, they create a chilling effect that may discourage other whistleblowers from coming forward with disclosures that expose waste, fraud, and abuse in our federal government.¹⁵

Regardless of who this whistleblower is, he or she made the disclosures within the bounds of a legal framework designed by Congress to enable legitimate whistleblowing disclosures to the intelligence committees. Unfortunately, the message that has been sent back to the whistleblower, and to all potential whistleblowers watching, is that compliance with the law is not enough to protect you from retaliation.

Again, we find a pressing need for reform to the law.

¹² Letter from Inspector General of the Intelligence Community Michael Atkinson to the Chairmen of the House and Senate intelligence committees regarding receipt of urgent concern disclosure, September 9, 2019.

https://intelligence.house.gov/uploadedfiles/20190909_-_ic_ig_letter_to_hpsci_on_whistleblower.pdf

¹³ 50 U.S.C. § 3234(d) (2019) leaves enforcement of IC whistleblower retaliation provisions to the President rather than laying out an independent mechanism for enforcement as in civil service whistleblower protections.

<https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title50-section3234&num=0&edition=prelim>

¹⁴ Shanna Devine et al., Government Accountability Project, *Whistleblower Witch Hunts: The Smokescreen Syndrome* (2010). <https://www.whistleblower.org/wp-content/uploads/2018/12/WWHfinal-1.pdf>

¹⁵ Reis Thebault, "Trump's rhetoric will have a chilling effect on whistleblowing, legal experts say," *Washington Post*, September 20, 2019. <https://www.washingtonpost.com/national-security/2019/09/21/trumps-rhetoric-will-have-chilling-effect-future-whistleblowers-legal-experts-say/>

Suggested Reforms to Intelligence Community Whistleblower Law

The following are suggested reforms to existing intelligence community whistleblower protections to address the issues identified above:

- 1) Eliminate prior restraint: Create an explicit mechanism for whistleblowers and/or the Intelligence Community inspector general to go directly to the congressional intelligence committees.
- 2) Create enforceable due process for intelligence community whistleblowers by granting an independent reviewer the authority to reverse agency actions, stay authority for temporary relief, and judicial or quasi-judicial appeal rights.
- 3) Codify a permanent security officer (an IC officer who handles clearance and national security issues) within the Office of the Inspector General of the Intelligence Community to afford greater independence to the inspector general's security-related determinations and to protect whistleblowers' confidentiality when they make inquiries into the status of their security clearances.
- 4) Conduct a review of all non-public whistleblower regulations and policies currently in place within the intelligence community elements resulting in a public report.
- 5) Ensure adequate clearances for at least one personal office staffer for each Member of Congress. Constitutional duties to conduct oversight do not stop at committee jurisdiction's edge.
- 6) Allow intelligence community whistleblowers to go to any congressional committee with concerns, not just the intelligence committees.¹⁶
- 7) Require annual training for congressional staff on how to handle classified disclosures.
- 8) Clarify the legal standards for credible reports of urgent concern to neutralize the damaging effect of the Office of Legal Counsel opinion issued on September 3, 2019, entitled "Urgent Concern Determination by the Inspector General of the Intelligence Community."
- 9) Require the application of a public interest balancing test before the Department of Justice can bring a case involving the Espionage Act where there are allegations of mishandling classified information.
- 10) Make retaliatory security clearance actions a violation of the Whistleblower Protection Act, to be adjudicated by the Whistleblower Protection Act burdens of proof.
- 11) Consider economic damage to the whistleblower's potential earnings capacity when evaluating security clearance actions.

Thank you for considering these reforms as you continue to address shortcomings in intelligence community whistleblower protections. We would be happy to meet with your offices to discuss these reforms in greater detail.

¹⁶ R Street, Demand Progress, Freedom Works, and EFF, *Strengthening Congressional Oversight of the Intelligence Community*, September 13, 2016. https://s3.amazonaws.com/demandprogress/reports/Strengthening_Congressional_Oversight_of_the_IC_White_Paper_Sept_2016.pdf

As our country considers these issues in the coming weeks and months in light of this individual whistleblower's disclosure, we feel it is essential to remind those in positions of influence to remain conscious of messaging and focus. Whistleblowers are the greatest allies Congress has as it conducts its essential oversight function, and are crucial for an administration to root out waste, fraud, and abuse. When whistleblowers are made out to be the enemy, we risk their silence on important issues affecting the nation. As a result, we risk an ineffective, corrupt, and unaccountable federal government.

Sincerely,

Acorn 8

Government Accountability Project

Liberty Coalition

Project On Government Oversight

Public Citizen

Taxpayers Protection Alliance

Whistleblowers of America

cc: House and Senate Whistleblower Protection Caucuses