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INSPECTOR GENERAL OF THE INTELLIGENCE COMMUNITY  
WASHINGTON, D.C. 20511

September 17, 2019

VIA EMAIL

Mr. Steven Engel  
Assistant Attorney General  
Office of Legal Counsel  
U.S. Department of Justice  
Washington, D.C. 20530

Re: (U//~~FOUO~~) Response to the Office of Legal Counsel's September 3, 2019, Memorandum for Jason Klitenic, General Counsel, Office of the Director of National Intelligence

Dear Mr. Engel:

(U//~~FOUO~~) The Inspector General of the Intelligence Community (ICIG) is in receipt of and herein responds to the Memorandum for Jason Klitenic, General Counsel, Office of the Director of National Intelligence, dated September 3, 2019, from the Department of Justice's Office of Legal Counsel (hereinafter, "Memorandum"), regarding the ICIG's Urgent Concern Determination.

(U//~~FOUO~~) As you know, on August 12, 2019, the Office of the Inspector General of the Intelligence Community (ICIG) received a disclosure from an individual (hereinafter, "the Complainant") regarding an alleged "urgent concern," pursuant to 50 U.S.C. § 3033(k)(5)(A).<sup>1</sup> The term "urgent concern" is defined, in relevant part, as:

Classified By: [REDACTED]  
Derived From: [REDACTED]  
Declassify On: [REDACTED]

<sup>1</sup> (U) 50 U.S.C. § 3033(k)(5)(A) provides that an "employee of an element of the intelligence community, an employee assigned or detailed to an element of the intelligence community, or an employee of a contractor to the intelligence community who intends to report to Congress a complaint or information with respect to an urgent concern may report such complaint or information to the Inspector General." The Intelligence Community Whistleblower Protection Act, under Section 8H of the Inspector General Act of 1978, 5 U.S.C. App., parallels the urgent concern provision in the ICIG statute, and provides another pathway to report an alleged urgent concern to the ICIG.

(U) A serious or flagrant problem, abuse, violation of the law or Executive order, or deficiency relating to the funding, administration, or operation of an intelligence activity within the responsibility and authority of the Director of National Intelligence involving classified information, but does not include differences of opinions concerning public policy matters.<sup>2</sup>

(U//~~FOUO~~) After receiving the Complainant's disclosure, the ICIG was required within 14 calendar days to determine whether the information alleged by the Complainant with respect to an urgent concern appeared credible.<sup>3</sup> During that 14-day time period, the ICIG conducted a preliminary review of the disclosure. As a result of that preliminary review, I determined that the Complainant's disclosure met the definition of an urgent concern, *i.e.*, a "serious or flagrant problem, abuse, violation of the law or Executive order, or deficiency relating to the funding, administration, or operation of an intelligence activity within the responsibility and authority of the Director of National Intelligence involving classified information."<sup>4</sup> I also determined that there were reasonable grounds to believe that information relating to the urgent concern appeared credible.<sup>5</sup>

(U//~~FOUO~~) On August 26, 2019, I forwarded to the Acting Director of National Intelligence the Complainant's disclosure and accompanying materials, along with my determination that the Complainant's information appeared credible. Pursuant to the urgent concern statute, upon receipt of the ICIG's transmittal, the DNI within seven calendar days is required to forward such transmittal to the congressional intelligence committees along with any comments he considers appropriate.<sup>6</sup>

(U//~~FOUO~~) After I alerted the Acting DNI about the ICIG's receipt of the urgent concern allegation, the Acting DNI received an opinion from the Department of Justice's Office of Legal Counsel (OLC). After reviewing the Complaint and accompanying materials, OLC concluded that the complaint does not fall within the statutory definition of an "urgent concern" that the law requires the DNI to forward to the congressional intelligence committees.

(U//~~FOUO~~) I respectfully disagree with OLC's conclusion that the Complainant's allegations do not constitute an "urgent concern" within the meaning of the statute. The notion that the complaint does not concern "the funding, administration, or operation of an intelligence activity" under the authority of the DNI,<sup>7</sup> or, more specifically, that "election interference by

<sup>2</sup> (U) 50 U.S.C. § 3033(k)(5)(G)(i).

<sup>3</sup> (U) *Id.* at § 3033(k)(5)(B).

<sup>4</sup> (U) *Id.* at § 3033(k)(5)(G)(i).

<sup>5</sup> (U) *Id.* at § 3033(k)(5)(B).

<sup>6</sup> (U) *Id.* at § 3033(k)(5)(C).

<sup>7</sup> (U) Memorandum at p. 1.



foreign actors . . . would not involve an activity or program of the intelligence community under the DNI's supervision,"<sup>8</sup> not only appears contrary to settled understandings of the DNI's responsibilities and authorities, but is gravely troubling for the reasons described below. I understand that formal legal opinions from OLC, such as the one issued here, are binding upon the Executive Branch, and the ICIG will abide by OLC's opinion. Nevertheless, I want to note my disagreement with OLC's opinion.

(TS// [REDACTED]) The Complainant has alleged, among other things, that the President of the United States, Donald J. Trump, in a telephone call with Ukrainian President Volodymyr Zelenskyy on July 25, 2019, "sought to pressure the Ukrainian leader to take actions to help the President's 2020 reelection bid." Specifically, allegations included that President Trump had requested that the Ukrainian government investigate the activities of one of the President's potential domestic political rivals, former Vice President Joseph Biden, and his son, Hunter Biden. The complaint also involves allegations that the President had requested Ukrainian assistance in investigating whether interference in the 2016 U.S. presidential election had actually originated in Ukraine, as opposed to Russia, and that Ukrainian investigators meet with the President's personal lawyer, Rudolph Giuliani, as well as Attorney General William Barr regarding these matters. The ICIG believes these allegations fall squarely within the jurisdiction of the Director of National Intelligence.

(S// [REDACTED]) U.S. laws and regulations prohibit a foreign national, directly or indirectly, from making a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election.<sup>9</sup> Similarly, U.S. laws and regulations prohibit a person from soliciting, accepting, or receiving such a contribution or donation from a foreign national, directly or indirectly, in connection with a Federal, State, or local election.<sup>10</sup> Further, in the ICIG's judgment, alleged conduct by a senior U.S. public official to seek foreign assistance to interfere in or influence a Federal election would constitute a "serious or flagrant problem [or] abuse" under 50 U.S.C. § 3033(k)(5)(G)(i), which would also potentially expose such a U.S. public official (or others acting in concert with the U.S. public official) to serious national security and counterintelligence risks with respect to foreign intelligence services aware of such alleged conduct.

(U//~~FOUO~~) I, therefore, disagree with OLC's conclusion that such activity falls outside the DNI's jurisdiction because it "does not arise in connection with the operation of any U.S. government intelligence activity under the authority of the DNI." In fact, one of the DNI's most significant responsibilities is securing our Nation's elections by leading the Intelligence Community's efforts to collect, analyze, and disseminate information indicating that a foreign

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<sup>8</sup> (U) *Id.* at p. 7.

<sup>9</sup> (U) *See, e.g.*, 52 U.S.C. § 3012(a)(1)(A); 11 C.F.R. § 110.20(b).

<sup>10</sup> (U) *See, e.g.*, 52 U.S.C. § 3012(a)(2); 11 C.F.R. § 110.20(g).



government, or any person acting as an agent of or on behalf of a foreign government, has acted with the intent or purpose of interfering in a U.S. election.

(U) The Director of National Intelligence has responsibility and authority pursuant to federal law and Executive Orders to administer and operate programs and activities related to potential foreign interference in a United States election.<sup>11</sup> Among other responsibilities and authorities, subject to the authority, direction, and control of the President, the Director of National Intelligence “shall serve as the head of the Intelligence Community, act as the principal adviser to the President, to the [National Security Council], and to the Homeland Security Council for intelligence matters related to national security, and shall oversee and direct the implementation of the National Intelligence Program and execution of the National Intelligence Program budget.”<sup>12</sup> Further, Executive Order No. 12333 states the following regarding the DNI’s leadership of the Intelligence Community:

(U) Consistent with applicable Federal law and with the other provisions of this order, and under the leadership of the Director [of National Intelligence], as specified in such law and this order, the Intelligence Community shall . . . collect information concerning, and conduct activities to protect against, . . . intelligence activities directed against the United States . . . and other hostile activities directed against the United States by foreign powers, organizations, persons, and their agents.<sup>13</sup>

(U) Recently, in issuing Executive Order No. 13848, *Imposing Certain Sanctions in the Event of Foreign Influence in a United States Election* (Sept. 12, 2018), President Trump stated the following regarding foreign influence in United States elections:

(U) I, DONALD J. TRUMP, President of the United States of America, find that the ability of persons located, in whole or in part, outside the United States to interfere in or undermine public confidence in United States

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<sup>11</sup> (U) See, e.g., National Security Act of 1947, as amended; Exec. Order No. 12333, as amended, *United States Intelligence Activities*; Exec. Order No. 13848, *Imposing Certain Sanctions in the Event of Foreign Influence in the United States Election* (Sept. 12, 2018).

<sup>12</sup> (TS// [REDACTED]) Exec. Order No. 12333 at § 1.3. In the Complainant’s Classified Appendix, the Complainant reported that officials from the Office of Management and Budget, in the days before and on the day after the President’s call on July 25, 2019, allegedly informed the “interagency” that the President had issued instructions to suspend all security assistance to Ukraine. The Complainant further alleges in the Classified Appendix that there might be a connection between the allegations concerning the substance of the President’s telephone call with the Ukrainian President on July 25, 2019, and the alleged action to suspend (or continue the suspension of) all security assistance to Ukraine. If the allegedly improper motives were substantiated as part of a future investigation, the alleged suspension (or continued suspension) of all security assistance to Ukraine might implicate the Director of National Intelligence’s responsibilities and authority with regard to implementing the National Intelligence Program and/or executing the National Intelligence Program budget.

<sup>13</sup> (U) Exec. Order No. 12333 at § 1.4.

elections, including through the unauthorized accessing of election and campaign infrastructure or the covert distribution of propaganda and disinformation, constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States.

(U) Among other directives, the Executive Order requires the Director of National Intelligence, in consultation with the heads of any other appropriate executive departments and agencies, not later than 45 days after the conclusion of a United States election, to “conduct an assessment of any information indicating that a foreign government, or any person acting as an agent of or on behalf of a foreign government, has acted with the intent or purpose of interfering in that election,” and the “assessment shall identify, to the maximum extent ascertainable, the nature of any foreign interference and any methods employed to execute it, the *persons* involved, and the foreign government or governments that authorized, directed, sponsored, or supported it.”<sup>14</sup>

(U) More recently, on July 19, 2019, as part of the Director of National Intelligence’s responsibility and authority to administer and operate programs and activities related to potential foreign interference in a United States election, the Director of National Intelligence announced the establishment of the Intelligence Community Election Threats Executive. In the words of then-Director of National Intelligence Daniel R. Coats, who announced the establishment of the new position within the Office of the Director of National Intelligence (ODNI), “Election security is an enduring challenge and a top priority for the IC.”<sup>15</sup> A few days later, in an internal announcement for the ODNI, then-Director Coats stated, “I can think of no higher priority mission than working to counter adversary efforts to undermine the very core of our democratic process.”<sup>16</sup>

(U//~~FOUO~~) Despite these authorities, OLC concluded that the complaint does not concern “the funding, administration, or operation of an intelligence activity” under the authority of the DNI.<sup>17</sup> More specifically, OLC concluded that “election interference by foreign actors . . . would not involve an activity or program of the intelligence community under the DNI’s supervision.”<sup>18</sup> OLC should clarify the apparent inconsistency between the DNI’s authority and responsibility to lead the Intelligence Community’s efforts to collect, analyze, and disseminate information about – and conduct activities to protect against – foreign election interference, and OLC’s opinion that

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<sup>14</sup> (U) Exec. Order No. 13848 at § 1.(a) (emphasis added). The term “person” is defined as “an individual or entity,” *id.* at § 8.(a), and, thus, would appear to include the President of the United States.

<sup>15</sup> (U) ODNI News Release, *Director of National Intelligence Daniel R. Coats Establishes Intelligence Community Election Threats Executive* (July 19, 2019).

<sup>16</sup> (U) Memorandum from Daniel R. Coats, Director of National Intelligence, entitled, *Designation of Intelligence Community Election Threats Executive and Assistant Deputy Director for Mission Integration* (July 23, 2019).

<sup>17</sup> (U) Memorandum at p. 1.

<sup>18</sup> (U) *Id.* at p. 7.



“election interference by foreign actors . . . would not involve an activity or program of the intelligence community under the DNI’s supervision.”<sup>19</sup>

(U//~~FOUO~~) In this regard, in a footnote in its opinion, OLC appears to express some uncertainty with respect to any oversight authority the DNI has with regard to foreign election interference, before concluding that “even if foreign election interference would generally fall within the DNI’s purview, the complaint does not concern an ‘intelligence activity within the responsibility and authority’ of the DNI under section 3033(k)(5).”<sup>20</sup> It is unlikely that the many employees, detailees, and contractors currently working in the Intelligence Community to collect, analyze, and disseminate information about – and conduct activities to protect against – foreign interference in U.S. elections are aware that they may be doing so without legal authorization. Further, if they are authorized to engage in such work, it will likely be difficult for them to distinguish between “foreign election interference,” which “would generally fall within the DNI’s purview,”<sup>21</sup> and “election interference by foreign actors,” which “would not involve an activity or program of the intelligence community under the DNI’s supervision.”<sup>22</sup> OLC should clarify whether the DNI has any authorized oversight responsibility over foreign election interference and, if so, distinguish the activities or programs within the intelligence community with respect to “foreign election interference,” which “would generally fall within the DNI’s purview,”<sup>23</sup> from “election interference by foreign actors,” which “would not involve an activity or program of the intelligence community under the DNI’s supervision.”<sup>24</sup>

(U//~~FOUO~~) After determining that the alleged conduct was not an “urgent concern” within the meaning of the statute because it did not concern “the funding, administration, or operation of an intelligence activity” within the responsibility and authority of the DNI, OLC advised the Acting DNI that he was not required to transmit my determination of a credible urgent concern or the Complainant’s information to the congressional intelligence committees. I was thereafter informed that as a result of OLC’s determination, and to preserve appropriate privileges, the DNI would exercise his discretion not to transmit my determination of a credible urgent concern or any of the Complainant’s information to the congressional intelligence committees.<sup>25</sup> 50 U.S.C. §

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<sup>19</sup> (U) *Id.*

<sup>20</sup> (U) *Id.* at p. 5 n.7.

<sup>21</sup> (U) *Id.*

<sup>22</sup> (U) *Id.* at p. 7.

<sup>23</sup> (U) *Id.*

<sup>24</sup> (U) *Id.*

<sup>25</sup> (U//~~FOUO~~) Under these circumstances, the Complainant will have no additional recourse to the congressional intelligence committees through the parallel Intelligence Community Whistleblower Protection Act under Section 8H of the Inspector General Act of 1978, 5 U.S.C. App. (hereinafter, the “IG Act”).



3033(k)(5)(A) states that “upon receipt of a transmittal from the Inspector General . . . the Director shall, within 7 calendar days of such receipt, forward such transmittal to the congressional intelligence committees, together with any comments the Director considers appropriate.” Not only does the clear language of the statute appear to require the DNI to transmit to Congress the information, but prior Directors of National Intelligence have acted in the past in accordance with that previously understood statutory requirement.

(U//~~FOUO~~) OLC’s interpretation of the urgent concern statute has resulted in the current Complainant being treated in a significantly disparate manner than have past complainants. The ICIG has on occasion in the past determined that disclosures submitted to the ICIG under the urgent concern statute did not constitute an urgent concern for a variety of reasons. Even though the ICIG determined that those disclosures did not meet the definition of an urgent concern, previous Directors of National Intelligence nevertheless provided direction to the ICIG to transmit the ICIG’s determination and the complainants’ information to the congressional intelligence committees. In each of those cases, the ICIG followed the DNI’s direction and transmitted the ICIG’s determination along with the complainants’ information to the congressional intelligence committees.

(U//~~FOUO~~) That past practice permitted complainants in the Intelligence Community to contact the congressional intelligence committees directly, in an authorized and protected manner. As it now stands, because the DNI has not transmitted my determination of a credible urgent concern to the congressional intelligence committees, the Complainant, an employee, contractor, or detailee in the Intelligence Community, is left without an authorized means to present the Complainant’s information concerning an alleged urgent concern, which involves classified information, to the congressional intelligence committees.

(U//~~FOUO~~) That past practice also provided complainants with protection from reprisal, or threat of reprisal, as a result of reporting an alleged urgent concern to the congressional intelligence committees. However, because OLC’s opinion determined that the DNI is not required to transmit the complaint to the intelligence committees, a question has arisen about whether the Complainant has the statutory protections against a reprisal, or threat of reprisal, for submitting the disclosure pursuant to the “urgent concern” process.<sup>26</sup> Further, although OLC’s opinion was limited to the facts set forth in the Complainant’s disclosure, OLC noted the definition of “urgent concern” in the IG Act is not limited to intelligence activities that are specifically “within the responsibility of the” Director of National Intelligence, because the complaint procedures in section 8H of the IG Act apply to multiple Inspectors General within the Intelligence Community.<sup>27</sup> As a result, there is now uncertainty about whether the statutory protections against reprisal, or threat of reprisal, apply to individuals in the Intelligence Community who submit a disclosure with regard to an urgent concern if it is later determined that the matter was outside the jurisdiction of the individual’s intelligence element.

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<sup>26</sup> (U) *See id.* at § 3033(k)(5)(G)(iii); *see also* 5 U.S.C. § 2302(a)(2)(A).

<sup>27</sup> Memorandum at p. 4 n.6.



(U//FOUO) In addition, there are protections for individuals across the Executive Branch against actions constituting reprisal, or threat of reprisal, for making a complaint or disclosing information to Inspectors General concerning activities within the authorities and responsibilities of the department or agency the Inspectors General oversee constituting a violation of laws, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to the public health and safety.<sup>28</sup> It has been well understood from these statutory provisions that protections against reprisal, or threat of reprisal, do not apply in the following circumstance: when the complaint was made or the information was disclosed with the knowledge that it was false or with willful disregard for its truth or falsity. In the ICIG's view, the way such laws have previously been understood will be substantially changed if those protections against reprisal, or threat of reprisal, do not also apply if it is later determined that the disclosure was outside the jurisdiction of the Office of the Inspector General that received the complaint.

(U//FOUO) OLC's opinion, therefore, poses potentially significant consequences for whistleblower rights and protections in all Executive Branch departments and agencies, as well as in the government contracting industry. OLC should clarify whether the protections against reprisal, or threat of reprisal, apply to disclosures with respect to urgent concerns, or a violation of laws, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to the public health and safety, if the matter is later determined to fall outside the jurisdiction of the Office of the Inspector General that received the complaint. If OLC has determined that any of those individuals will not be protected from reprisal, or threat of reprisal, then OLC should immediately publish its interpretation of the law on that important issue. Such an interpretation will require all affected Executive Branch departments and agencies, as well as government contractors, to re-educate and re-train their workforces on these diminished whistleblower rights and protections.

(U//FOUO) Based on all of the foregoing, the ICIG respectfully disagrees with OLC's formal legal opinion. The ICIG requests that OLC reconsider the conclusions reached in its legal opinion, and clarify the opinion in the ways and for the reasons stated herein.

Sincerely yours,



Michael K. Atkinson  
Inspector General  
of the Intelligence Community

cc: The Honorable Joseph Maguire  
Director of National Intelligence (Acting)

<sup>28</sup> See, e.g., IG Act § 7(c); 50 U.S.C. § 3033(g)(3)(B).