

Statement by

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Before the

House Permanent Select Committee on Intelligence

June 10, 1998

on

H.R. 3829 "Intelligence Community Whistleblower

Protection Act of 1998"

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

INTRODUCTORY REMARKS

I appreciate the opportunity to appear before the committee to discuss the issue of whistleblower protection for persons within the intelligence community of the Department of Defense (DoD) who wish to make disclosures to the Congress regarding classified information.

Under the Inspector General Act of 1978 (5 U.S.C., Appendix 3) (IG Act), the Office of the Inspector General, Department of Defense (OIG, DoD) is charged with promoting economy, efficiency and effectiveness within the programs and operations of the Department of Defense and with preventing and detecting fraud, waste and abuse in such programs and operations. Whistleblower protection is an important component of fulfilling this statutory responsibility. In particular, Section 7 of the IG Act provides for the confidentiality of employees who make complaints to an Inspector General and also prohibits reprisal against employees who make complaints to an Inspector General. Before I specifically address the proposed legislation to protect classified information whistleblowers, I would like to provide the committee with an overview of the general OIG, DoD whistleblower reprisal protection program.

OVERVIEW OF THE OIG, DoD WHISTLEBLOWER REPRISAL PROTECTION PROGRAM

The OIG, DoD has statutory responsibility for the investigation of three categories of

whistleblower reprisal complaints. The first category, under 10 U.S.C. Section 1034, provides for the protection of whistleblowers who are members of the Armed Forces. In summary, this section provides that no person may restrict a member of the Armed Forces from lawfully communicating with a Member of Congress or to an inspector general. Further, this section states that a member of the Armed Forces may not be reprisal against for disclosing information relating to fraud, waste and abuse to: an inspector general; Member of Congress; DoD audit, inspection, investigation or law enforcement organization; or, any other person or organization designated pursuant to regulations or other established procedures to receive protected communications.

The second category of whistleblower reprisal complaints is under 10 U.S.C. Section 1587, and provides for the protection against reprisal of DoD employees of nonappropriated fund instrumentalities. The term "nonappropriated fund employee" is defined as "a civilian employee who is paid from nonappropriated funds of the Army and Air Force Exchange Service, Navy Exchange Service Command, Marine Corps exchanges, or any other instrumentality of the United States under the jurisdiction of the armed forces which is conducted for the comfort, pleasure, contentment, or physical or mental improvement of members of the armed forces." This section provides that a nonappropriated fund instrumentality employee shall be protected from making a disclosure of information which the employee reasonably believes evidences: a violation of any law, rule or regulation; or, mismanagement, gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if the information is not specifically required by or pursuant to

executive order to be kept secret in the interest of national defense or conduct of foreign affairs. However, the statute further provides that a disclosure of information that is specifically prohibited by law and specifically required by or pursuant to executive order to be kept secret shall be protected if the disclosure is made to any civilian employee or member of the armed forces designated by law or by the Secretary of Defense to receive such a disclosure.

The third category of whistleblower reprisal complaints is under 10 U.S.C. Section 2409, and provides for the protection against reprisal for employees of defense contractors for disclosures to a Member of Congress or to an authorized official of the DoD or the Department of Justice regarding information relating to a substantial violation of law related to a defense contract.

Nearly all of the whistleblower complaints that are considered by the OIG, DoD result from disclosures made to the DoD Hotline. The DoD Hotline is responsible for receiving, evaluating and referring for inquiry, if warranted, allegations of fraud, waste and abuse or mismanagement within the DoD. Allegations that are identified by the DoD Hotline as potential whistleblower reprisal cases are referred to the Special Inquiries Directorate, OIG, DoD for further review and action. The Special Inquiries Directorate is staffed by 19 investigators and is responsible for conducting all OIG, DoD whistleblower reprisal investigations as well as oversight of whistleblower reprisal investigations conducted by the military departments.

In FY 97, the DoD Hotline received a total of nearly 16,000 contacts, encompassing the

full-range of complaints or allegations of impropriety involving programs or operations of the DoD. These contacts were initially reviewed by a staff of 12 DoD Hotline investigators. As a result of this initial review, of the total contacts received, 2,437 were identified by the Hotline as warranting formal examination by either the OIG, DoD or another office within the DoD or the military departments. Of the 2,437 contacts warranting formal examination, 312 were identified as whistleblower reprisal cases and were referred to the Special Inquiries Directorate. For FY 97, the Special Inquiries Directorate closed a total of 243 whistleblower reprisal cases.

Of the 312 whistleblower reprisal cases received by the Special Inquiries Directorate for FY 97, 5 cases originated from DoD intelligence organizations (i.e., the Defense Intelligence Agency; the National Imagery and Mapping Agency; the National Reconnaissance Office; or, the National Security Agency). However, none of the 5 cases involved allegations concerning classified information. As the data reflects, the OIG, DoD does not receive many whistleblower reprisal complaints from DoD intelligence community employees. Furthermore, since the beginning of FY 98, the Special Inquiries Directorate has received 1 whistleblower reprisal allegation from a DIA employee involving classified information.

The DoD Hotline has a procedure for receiving complaints involving classified information. If a DoD Hotline investigator receiving a complaint believes that the whistleblower is revealing or is about to reveal classified information, the Hotline investigator cautions the whistleblower not to discuss classified information over an unsecured telephone. The investigator then obtains as much unclassified information as possible to be able to identify the

security clearance level and access required to review or discuss the information involved. With that information, the matter is transferred/referred to an appropriate OIG, DoD employee who has the proper clearance and access. The OIG, DoD employee will contact the whistleblower over a secure telephone and be sure that he has the proper clearance and access to discuss the matter with the whistleblower. Sometimes the OIG, DoD employee must be read-in to the particular program before the OIG, DoD employee can discuss the matter with the whistleblower. Once properly cleared, the OIG, DoD employee will receive the complaint from the whistleblower and ensure the complaint is investigated.

HR 3829

As DoD Inspector General, I have oversight responsibilities for the four DoD organizations affected by HR 3829, "Intelligence Community Whistleblower Protection Act of 1998." This bill would apply to the employees of the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Reconnaissance Office and the National Security Agency. Its coverage would also include contractors to those organizations. The proposed legislation would amend the IG Act to require employees of the intelligence organizations described above, who wish to report to Congress a complaint or information with respect to an urgent concern, to first make that report to my office. Any designee of the Inspector General, authorized to receive classified complaints, would be required to report such employee complaints directly to the Inspector General within 7 days; and, if the employee requested confidentiality, the Inspector General could not disclose the identity of the employee.

Furthermore, the proposed legislation provides that this would be the sole process for employees of the intelligence organizations to submit complaints or information with respect to an urgent concern to Congress.

The Inspector General would have 60 days to determine whether the complaint was credible, and if so, to transmit the complaint to the head of the establishment and notify the complaining employee of the Inspector General's action. The head of the establishment would then have 7 days to forward such transmittal to the intelligence committees.

If the Inspector General fails to transmit or does not accurately transmit the complaint, the employee may contact the intelligence committees directly to submit the complaint if the employee has notified both the Inspector General and the head of the establishment of his intent to do so and obtains and follows direction from the head of the establishment on how to contact the intelligence committees in accordance with appropriate security practices.

The proposed legislation also provides that the head of the establishment may decide in exceptional cases, in order to protect vital law enforcement, foreign affairs or national security interests, not to transmit or allow the employee to transmit the complaint to the intelligence committees, but the head of the establishment must then provide the committees with the reason for such action within 7 days.

The HR 3829 defines "urgent concern" as a serious or flagrant problem, abuse, violation

of law or Executive Order relating to the administration or operation of an intelligence activity involving classified information; a false statement to Congress on an issue of material fact relating to the administration or operation of an intelligence activity; or an action constituting reprisal or threat of reprisal in response to the employee's reporting an urgent concern.

As described above, current practices, laws and regulations protecting whistleblowers already provide whistleblowers the ability to bring information, including classified information to the Office of the Inspector General. However, I do understand and appreciate Congressional concerns about the ability of whistleblowers to bring such information, particularly when critical issues are involved, to the attention of the Congress. I believe HR 3829 provides a reasonable and workable way to address those concerns. Utilizing the experience and the credibility of the inspectors general in the whistleblower arena, the bill would enable an employee of the DoD intelligence community to provide to the Congress information about a serious problem or violation of law concerning an intelligence activity or about a materially false statement to the Congress relating to an intelligence activity. Based on our experience in this area, I believe the Inspectors General would be capable of handling the investigative responsibilities envisioned by this legislation.

I do, however, want to offer several other points for the committee to consider regarding HR 3829. First, as noted previously, this legislation apparently would apply only to employees of the four specifically identified DoD intelligence organizations or contractors to those organizations. However, I would remind the committee that there are many other DoD

employees in organizations other than the four specifically identified DoD intelligence organizations that have access to classified information. While these employees may wish to report to the Congress a complaint or information with respect to an urgent concern, I do not believe the legislation as proposed would protect them.

Secondly, I share the Chairman's concern about the language in HR 3829 directing that an employee "shall" report through the Inspector General and the language that describes this process as the "sole process" by which an employee may report a serious problem in the intelligence organization involving classified information. There may be other legitimate mechanisms for DoD employees to report serious problems in the DoD intelligence organizations concerning classified information. I do not believe it is the intent of this committee, by proposing HR 3829, that DoD employees be precluded from using other legitimate mechanisms.

Mr. Chairman, in closing, I do want to commend the committee's efforts, and those of your very capable staff, to fashion a reasonable and practical solution to an issue that I know has been of great concern both to the Congress and to the Administration. I also want to thank you, Mr. Chairman, and the members of the committee, for both your continued interest in, and support for, the efforts of the Inspectors General in the intelligence community. We do appreciate it and would be pleased to answer any questions you may have.