OFFICE OF THE INSPECTOR GENERAL OF THE INTELLIGENCE COMMUNITY

WASHINGTON, D.C. 20511

Report on Intelligence Community Whistleblower Matters & Harmonization of Processes and Procedures

MARCH 4, 2021

On behalf of the Office of the Inspector General of the Intelligence Community (IC IG) and the IC IG Forum, I am pleased to provide you with our review of intelligence community whistleblower matters and provide recommendations on improving whistleblower procedures and authorities.

This report responds to two Congressionally Directed Actions included within the Intelligence Authorization Act for Fiscal Years 2018, 2019, and 2020. Specifically, Sections 5333 and 6713 required that the IC IG, in coordination with the IC IG Forum, conduct reviews of intelligence community whistleblower matters and develop recommendations regarding the harmonization of procedures for whistleblower reprisal matters. The IC IG Forum established a working group of its subject matter experts and counsels to respond to these requests. The working group collected and reviewed documents, held discussions and briefings, and prepared the enclosed report. I would like to extend my thanks to the IC IG Forum, the Intelligence Community (IC) elements, and the Intelligence Community Inspectors General offices for their collaboration and assistance in preparing this report.

We believe that the recommendations included in this report will help strengthen the processes for whistleblowers, inspectors general, and the intelligence elements they serve. We look forward to continuing to engage with the congressional intelligence committees further on this matter.

Sincerely,

for Thomas A. Monheim
Acting Inspector General of the Intelligence Community

SUMMARY

Sections 5333 and 6713 of the Intelligence Authorization Act for Fiscal Years 2018, 2019, and 2020, which was included as Division E of the Consolidated Appropriations Act signed into law on December 20, 2019, direct the IC IG, in consultation with its IC IG Forum partners, to review and make recommendations regarding the existing statutory and regulatory framework for protecting IC whistleblowers from reprisals. That legal framework is governed by Presidential Policy Directive 19 (PPD-19), issued in 2012, and three successive enacting statutes, passed in 2014, 2018, and 2019 (collectively, the "Enacting Statutes"). In response to Congress's direction, this memorandum examines key inconsistencies and disharmony between PPD-19 and the subsequent Enacting Statutes, which are also inconsistent with each other. The resulting uneasy coexistence of PPD-19 and the three Enacting Statutes creates ambiguity and uncertainty for whistleblowers and intelligence elements alike. As discussed further below, the key inconsistencies and ambiguities we identified include:

1. *Protections Available for Contractors:* Contractors are only protected against actions by other contractors, and are not protected against threats of personnel action reprisal.

2. *Potentially Inconsistent Procedures in Personnel Action Reprisal Matters:* Differences between PPD-19 and the Enacting Statutes result in review under different procedures.

3. *Security Clearance Retaliations Treated Differently than Personnel Action Retaliations:* Differences between the Enacting Statutes result in review under different processes.

4. *Agencies Covered by the Enacting Statutes:* Due to a drafting error, a literal reading of the statute prohibiting clearance reprisals indicates that most IC members are not protected from security clearance reprisal.

5. *Protections for Reports of Mismanagement:* Reports of simple mismanagement are only covered by the personnel action statute for non-contractor employees.

6. *Different Categories of Disclosures Protected by Different Authorities:* Statutes provide inconsistent protections over different types of disclosures to different recipients.

7. *Protections for "Normal Course" Disclosers:* Protections for "Normal Course" disclosers are complicated by a drafting error.

After analyzing these material differences between PPD-19 and the Enacting Statutes, as well as inconsistencies within the Enacting Statutes themselves, this memorandum discusses several recommendations designed to promote clear, consistent, and transparent intelligence community whistleblower protections. These recommendations include revising the governing authorities to rectify the problems caused by statutes that have errors and are inconsistent with PPD-19.

THE WHISTLEBLOWER PROTECTION FRAMEWORK

The Whistleblower Protection Act of 1989, the seminal modern whistleblower-protection statute, protected civilian employees but explicitly carved out IC employees and contractors from the protections it recognized for most every other federal employee. When the Intelligence Community Whistleblower Protection Act (ICWPA) was enacted in 1998, it provided for certain mechanisms to lawfully make classified disclosures, but it had no provision to protect IC employees from adverse personnel actions or security clearance determinations taken in reprisal for an IC employee's disclosure of fraud, waste, abuse, or misconduct.[1]

Thus, in 2012, PPD-19, *Protecting Whistleblowers with Access to Classified Information*, was issued to provide additional whistleblower protections for IC employees and authorize a system to review reprisal complaints.[2] PPD-19 prohibits retaliation against employees for reporting fraud, waste, and abuse. The directive has been a cornerstone in protecting IC whistleblowers and ensuring that allegations of reprisal receive the review they are due. PPD-19's main directives are divided into three sections: Section A, which prohibits retaliatory personnel actions; Section B, which prohibits retaliatory actions which affect a whistleblower's eligibility for access to classified information; and Section C, which establishes a processes whereby complainants can petition the Inspector General of the Intelligence Community to convene an External Review Panel (ERP) to review the determinations made by the complainant's local Inspector General. Since 2012, there have been three significant legislative steps to codify Sections of PPD-19. The principal codifications are:

- *Section 601 and 602 of Title VI of the FY2014 IAA (P.L. 113-126), which codified provisions of Sections A and B on July 7, 2014. 50 U.S.C. § 3234; 50 U.S.C. § 3341(j).*

- *The Foreign Intelligence Surveillance Reauthorization Act of 2017 (P.L. 115-118), which expanded Section A and B protections to contractors on January 19, 2018.*

- *The FY2018, 2019, 2020 IAA (P.L. 116-92), which enacted the Section C External Review Panel procedures on December 20, 2019. 50 U.S.C. § 3236.*

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[1] Members of the armed forces, including those serving the intelligence community, are protected by the Military Whistleblower Protection Act of 1988, as amended, 10 U.S.C. § 1034 (hereinafter "MWPA") as well as by some of the authorities discussed in this report. Although military whistleblower protections are not the focus of this report, variations between the military and the civilian whistleblower protection authorities can produce different outcomes.

[2] Presidential Directives are a specific form of Executive Order, issued with the advice and consent of the National Security Council, which state the Executive Branch's national security policy. Unless in conflict with or superseded by federal statute, as discussed below, Presidential Directives carry the force and effect of law with respect to the Executive Branch. Different Presidents have used different names for Presidential Directives. *e.g.,* "National Security Decision Directives" (President Ronald Reagan), "Homeland Security Presidential Directives" (President George W. Bush), "Presidential Policy Directives" (President Barack Obama), "National Security Presidential Memoranda" (President Donald Trump), and "National Security Directives" (President Joseph Biden).

Though efforts to codify PPD-19 are appreciated and worthwhile, unfortunately, the piecemeal manner of codification has resulted in inconsistencies between the Enacting Statutes and PPD-19, and among the Enacting Statutes themselves. Where the Enacting Statutes and PPD-19 are in direct conflict the statutes control.[3] However, PPD-19 has not been revoked, and it is not always unambiguously inconsistent with a subsequent enacting statute.[4] As a result, whistleblowers, agencies, and Offices of Inspectors General (OIGs) face uncertainty when the statutory language does not clearly endorse or reject rights available under PPD-19. Further complicating matters, the Enacting Statutes also differ with one another. In particular, 50 U.S.C. § 3234 (the "Personnel Action Statute," which codifies PPD-19 Section A) and 50 U.S.C. § 3341(j) (the "Clearance Statute," which codifies PPD-19 Section B) contain differences that create inconsistent protections for IC whistleblowers.

INCONSISTENCIES

The inconsistencies between PPD-19 and the Enacting Statutes are both substantive and procedural, and they create unanticipated results in which certain whistleblowers are offered greater protection than others. These inconsistencies are described below.

1. Protections Available for Contractors

Under the existing statutory framework, contractor whistleblowers are protected from actual reprisal actions, but unlike employees, contractors have no protection from threats of personnel action reprisal. PPD-19 makes no reference to contractors. For this reason, rights or remedies that are exclusively available under PPD-19 apply only to non-contractor employees, except where contractor's clearances may be protected through PPD-19's reference to an

[3] When Congress has spoken on a matter, executive authority is curtailed. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 682 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."). It is rare for executive proclamations to be given precedence over statutes. "Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject." *Id.* More importantly, the Enacting Statutes were passed after PPD-19 and signed by President Obama, giving the Enacting Statutes even further supremacy over the presidential proclamation. *See e.g., Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322 (1996) (holding executive order was preempted by statute). Moreover, a president may unilaterally choose to revoke or modify past executive orders and often does so.

[4] For clearance reprisals, the statute appears to explicitly keep PPD-19 in effect: "Nothing in this section or the amendments made by this section shall be construed to preempt, preclude, or otherwise prevent an individual from exercising rights, remedies, or avenues of redress currently provided under any other law, regulation, or rule." P.L. 113-126, Sec. 602(d) (July 7, 2014).

executive order. Statutory whistleblower protections were not extended to contractors until the FISA Reauthorization Act of 2017 amended the Enacting Statutes to require it.[5]

However, only PPD-19 prohibits "*threaten[ing]* to take or fail to take" a personnel action in retaliation for a protected disclosure.[6] The Personnel Action Statute omits this protection and provides only that employees "shall not, with respect to such authority, take or fail to take a personnel action," saying nothing about threats.[7] Accordingly, if a whistleblower is threatened with a personnel action, the only available protection would be under PPD-19 Section A, if at all, and that protection could apply only to non-contractor employees.[8] This inconsistent treatment of contractors and employees, combined with the inconsistent treatment of threatened reprisal actions, leads to the presumably unintended circumstance in which a contractor is unprotected from retaliatory threats of reprisal.

Contractor whistleblowers also have lesser protections depending on the type of individual who carries out the retaliation. The Personnel Action Statute states that "*Any employee of a contractor*, subcontractor, grantee, subgrantee, or personal services contractor, of a covered intelligence community element who has authority [shall not take a personnel action] with respect to *any contractor employee* of covered intelligence community element in reprisal for a lawful disclosure."[9] The statute thus covers reprisal actions taken by a contractor against a contractor. Significantly, however, the statute does not cover a circumstance in which an agency employee takes a reprisal action against a "contractor employee." Thus, contractors are protected only from reprisal by other contractors, and employees are protected only from reprisal by other employees. As a practical matter, situations do arise where employees supervise contractors, direct their

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[5] P.L. 115-118.

[6] PPD-19, Section A (October 10, 2012) (emphasis added). An IC member who is a member of the military would be protected from threats under the MWPA. 10 U.S.C. § 1034(b).

[7] 50 U.S.C. § 3234.

[8] Service members in the intelligence community are excluded from PPD-19 Section A protections because PPD-19's definitions explicitly carve out personnel "actions taken with respect to a member of the Armed Forces, as used in [the MWPA]." PPD-19, Section F. Furthermore, the Personnel Action Statute prohibits retaliatory action by "[a]ny employee of an" intelligence community element, but, in most cases, military elements do not consider service members "employees" and thus apply the MWPA. This characterization is often advantageous for service member whistleblowers because the MWPA generally affords broader protections than the other whistleblower authorities. It is not always advantageous, however. For example, the MWPA imposes a one-year statute of limitations that is not included in PPD-19 Section A or the Personnel Action Statute. *Compare* 10 U.S.C. § 1034(c)(5) *with* 50 U.S.C. § 3234; PPD-19, Section A.

[9] 50 U.S.C. § 3234(c)(1) (emphasis added). Note that, "[t]he term 'contractor employee' means an employee of a contractor, subcontractor, grantee, subgrantee, or personal services contractor, of a covered intelligence community element." 50 U.S.C. § 3234(a)(4). The Personnel Action Statute originally only applied to employees, but in 2018, the Foreign Intelligence Surveillance Reauthorization Act of 2017 extended these protections to contractors.

work or training, and have authority to take other personnel actions.[10] The limitation of this statutory language results in uneven treatment and unintended consequences.[11]

2. Potentially Inconsistent Procedures in Personnel Action Reprisal Matters

PPD-19 and the Enacting Statutes could lead to different and potentially inconsistent review procedures and OIG standards of review when assessing whistleblower reprisal claims. PPD-19 Section A expressly calls for OIGs to use, "to the fullest extent possible," the Merit System Protection Board (MSPB) procedures set forth in 5 U.S.C. § 2302. Thus, OIGs look to Office of the Special Counsel and MSPB case law when evaluating reprisal allegations.

The Enacting Statutes, however, provide no express procedural standards for review of personnel actions. To the contrary, the relevant statute merely states that "the President shall provide for enforcement." 50 U.S.C. § 3234(d); *see also Pars v. Central Intelligence Agency*, 295 F.Supp.3d 1, 4 (2018) ("The statute is silent as to how the President should enforce the Prohibition."). To date, no president has provided any such procedural guidance, and, should one ever do so, the guidance would not necessarily be consistent with the Title 5 procedures mandated by PPD-19.[12] With no other binding or guiding authority, many OIGs have chosen to apply PPD-19 processes when evaluating personnel action reprisal claims in accordance with Title 5 standards. However, if a president were to provide different procedures and standards for enforcement of the Personnel Action Statute, a whistleblower's claim could require assessment under both PPD-19's Title 5 review process and § 3234(d) procedures.

3. Security Clearance Retaliations Treated Differently than Personnel Action Retaliations

Reprisals that target a whistleblower's security clearance can curtail or thwart an individual's ability to do his or her job. As such, security clearance reprisals are just as potent as retaliatory personnel actions. Nevertheless, the Enacting Statutes treat clearance action reprisals differently from personnel action reprisals in a number of significant, though seemingly arbitrary,

[10] This is especially true for personal services contractors who are more likely to be supervised and directed by cadre personnel.

[11] The reverse is also true; however, it is unlikely that many contractors would have the authority to take personnel actions against employees. Even so, employees could also be protected under remaining PPD-19 Section A authorities not specifically overruled by the Enacting Statutes.

[12] PPD-19 Section A mandates these standards "shall be consistent, to the fullest extent possible, with the policies and procedures used to adjudicate alleged violations of section 2302(b) (8) of title 5, United States Code."

respects.[13] There are sound policy reasons to apply different statutory frameworks for evaluating personnel and clearance retaliations; nevertheless, many cases involve both personnel and clearance actions which requires an analysis under each framework.[14] These differences are discussed below.[15]

First, unlike the Personnel Action Statute, the Clearance Statute is silent with respect to the procedures and standards by which clearance action reprisals should be considered. As discussed above, the Personnel Action Statute at least provided that "the President shall provide for enforcement," although no president has done so. The Clearance Statute lacks even this "the President shall provide" language.

Second, unlike the Personnel Action Statute, the Clearance Statute imposes deadlines. An employee must challenge a retaliatory security clearance action within 90 days of notice of an adverse decision. Moreover, under the Clearance Statute, the employee may not claim retaliation during a temporary clearance suspension (defined as less than one year) imposed for investigative purposes.[16] Under the statutes, no appeal may be made for a suspension made for the purposes of investigating and lasting less than one year.[17] PPD-19 does not specify a 90-day limit and does allow for reprisal claims for temporary suspensions for investigative purposes.

Third, under the Clearance Statute, a successful claimant's compensation is limited to $300,000.[18] There is no cap in the Personnel Action Statute.[19]

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[13] The Clearance Statute's procedures are also different from PPD-19's. However, PPD-19 Section B, which protects IC employee whistleblowers from security clearance retaliation, has been substantively codified by the Clearance Statute, but has not been formally withdrawn. Although PPD-19 Section B, unlike Section A discussed above, did not expressly direct IGs to employ MSPB-type procedures, IGs in practice in the past used the same procedures for both personnel action and security clearance reprisal matters.

[14] To the extent PPD-19 is still operative, these differences could cause discord between coexistent paths. For example, consider a claimant that requests PPD-19 Section B review of their case. That claimant could argue that the statute's more deferential review standard should not be applied and that their claim is not subject to the statute's compensation cap. Note that this disharmony extends beyond IC whistleblowers, because any federal employee with a security clearance is subject to the competing authorities of PPD-19 Section B and the Clearance Statute.

[15] As an additional confounding factor, service members and non-IC federal employees with security clearances who allege both personnel and clearance retaliation must bifurcate their appeals because only the clearance retaliation claims are reviewable by an ERP. There are obvious policy reasons to have different standards and procedures for civilian IC members, service members, and for non-IC employees with clearances, and we make no recommendations with respect to the MWPA or Title 5 authorities. However, any harmonization process should take into account the additional authorities and procedures applicable to military IC members and non-IC employees with clearances.

[16] PPD-19 Section B did not contain a deadline, nor did it preclude retaliation claims made while the claimant was being investigated.

[17] 50 U.S.C. § 3341(j)(4)(A).

[18] 50 U.S.C. § 3341(j)(4)(B).

[19] PPD-19 Section B had no cap and also specifically authorized awarding attorneys' fees.

Fourth, unlike the Personnel Action Statute, the Clearance Statute allows the agency to defend its clearance action by proving by a preponderance of the evidence that the agency would have taken the action even had the whistleblower not made any protected disclosure, "giving the utmost deference to the agency's assessment of the particular threat to the national security interests of the United States in the instant matter."[20] Under Title 5 case law which is typically applied to the Personnel Action Statute, the agency's burden is the higher "clear and convincing evidence" standard, and there is no obligation defer to agency assessments of national security interests.[21] As a result, statutory cases call for more agency deference than cases brought under PPD-19, Section B.[22]

Finally, in one respect, the Clearance Statute affords greater protection to a whistleblower than does the Personnel Action Statute. The Clearance Statute provides for appellate review of an adverse determination of a whistleblower's claim prior to the ERP process.[23] The Personnel Action Statute, by contrast, provides for no appellate review other than the right to petition for external review. The Clearance Statute appellate rights appear to be in addition to the ERPs contemplated by § 3236, and they have not been implemented as required by the Clearance Statute. Guidance from 2014 suggests that until these policies and procedures are developed, PPD-19 Section C appeal procedures, ERPs, should be used in their place.[24] Since the codification of the ERP rights in FY2020 IAA, this could create an aberrant result where a whistleblower could receive an ERP as their § 3341(j)(5) appeal and then receive a second ERP under § 3236(b)(2). In this case, the first ERP decision would qualify as the "decision on an appeal regarding that claim"

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[20] 50 U.S.C. § 3341(j)(4)(C).

[21] PPD-19 also uses the "clear and convincing" standard.

[22] It is worth noting an additional inconsistency for military service members. Currently service members serving within the IC face the same authority overlap as non-military IC members, creating many of the same ambiguities and inconsistencies discussed above. In addition to differences between the MWPA and the Personnel Action Statute, both PPD-19, Section B and the Clearance Statute apply to service members' clearance reprisal claims. In practice, service members' clearance retaliation allegations are reviewed under PPD-19, Section B, and not the Clearance Statute. In so doing, in accordance with Section B, once there is a *prima facie* showing of reprisal, the military OIGs require the IC element to provide "clear and convincing evidence for establishing that the action would have occurred absent the protected disclosure." DoD Implementation of Presidential Policy Directive 19, DTM 13-008 (July 19, 2017). This holds military IC elements to a higher standard because for statutory clearance reprisal claims under the Clearance Statute, the IC element need only show by a "preponderance of the evidence that it would have taken the same action in the absence of such disclosure, giving the utmost deference to the agency's assessment of the particular threat to the national security interests of the United States in the instant matter." 50 U.S.C. § 3033(j)(4)(C). Thus, at this time, service member clearance retaliation claims being analyzed under PPD-19 Section B are assessed differently from other IC whistleblowers' claims made pursuant to the Clearance Statute. It should also be noted that DTM 13-008 (first issued on July 8, 2013) expired effective January 8, 2018. No updated guidance has been issued.

[23] 50 U.S.C. § 3341(j)(5).

[24] "[U]ntil such time as additional policies and procedures are developed, this requirement should be implemented through existing agency appeal procedures under PPD-19, Section B and appeal procedures under PPD-19, Section C, to the Inspector General for the IC." DNI James Clapper, *FY2014 Intelligence Authorization Act Impact on PPD-19*, ES 2014-00529 at 2.

required under § 3236(b)(2)(B) and the second ERP would convene to review the first ERP's decision. In parallel, the whistleblower could pursue a third ERP under PPD-19. The regulatory framework should not be structured so that three ERPs could be asked to review the same matter.

4. Agencies Covered by the Enacting Statutes

The Personnel Action Statute and the Clearance Statute are inconsistent in the scope of agency coverage. The Personnel Action Statute reaches six enumerated agencies[25] and "any executive agency or unit thereof determined by the President under section 2302(a)(2)(C)(ii) of title 5 to have as its principal function the conduct of foreign intelligence or counterintelligence activities."[26] The Clearance Statute, by contrast, reaches only agencies which are "(A) an executive agency (as that term is defined in section 105 of title 5); (B) a military department (as that term is defined in section 102 of title 5); and (C) an element of the intelligence community."[27]

Note that the Clearance Statute's coverage is described in the conjunctive, *i.e.*, it covers only an agency that is an executive agency, a military department, *and* an element of the intelligence community. Strictly construed, a plain-language reading of this provision would yield perverse results: an "agency" only qualifies if it is an executive agency *and* a military department *and* an IC member.[28] This excludes many IC elements that are not military departments. The Clearance Statute technically offers protections to only a subset of the Intelligence Community members. Although the plain language of this definition is exceedingly restrictive, OIGs typically interpret the Clearance Statute to be broader than the Personnel Action Statute, which was likely the intent of Congress.

5. Protections for Reports of Mismanagement

The Personnel Action Statute offers protection against retaliation for a whistleblower's disclosure of "mismanagement." By contrast, the Clearance Statute offers protection for disclosures of "gross mismanagement." A whistleblower whose security clearance is revoked in retaliation for reporting mere "mismanagement" thus has no recourse under the Clearance Statute. It is our belief that Congress did not intend to create a circumstance in which the

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[25] The Office of the Director of National Intelligence, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and the National Reconnaissance Office.

[26] 50 U.S.C. § 3234(a)(2)(A)(ii).

[27] 50 U.S.C. § 3341(a)(1)(emphasis added).

[28] *See, e.g.*, City *of Rome v. United States*, 446 U.S. 156, 172 (1980) ("By describing the elements of discriminatory purpose and effect in the conjunctive [using the word "and"], Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent.")(emphasis original); *United States v. Woods*, 134 S. Ct. 557, 567 (2013) ("operative terms are connected by the conjunction "or"… [which] is almost always disjunctive, that is, the words it connects are to be given separate meanings") (quotations omitted).

difference between protection and no protection for whistleblower's protected disclosure of mismanagement turned on the type of retaliation chosen by the reprising official.

6. Different Categories of Disclosures Protected by Different Authorities

The Personnel Action Statute and the Clearance Statute provide differing definitions of the disclosures meriting protection. As discussed above, only the Personnel Action Statute protects employee reports of simple mismanagement. In other ways, the Clearance Statute is more expansive and specifically enumerates additional categories of protected disclosures:

- So long as the actions do not result in unlawful disclosures, no clearance reprisal may be taken when exercising appeal, complaint, or grievance rights; or when assisting or testifying in those proceedings; or when assisting an OIG. [29]

- No clearance reprisals may be taken for any lawful disclosure in compliance with certain subsections of section 8H of the Inspector General Act of 1978 or certain subparagraphs of sections 3517(d)(5) or 3033(k)(5) of title 50.[30]

Unlike the protections in the Clearance Statute, the Personnel Action Statute does not specify those protections listed above. Instead, the Personnel Action Statute generally describes that the disclosures of wrongdoing[31] may be made to the DNI (or designees), IC IG, head of the agency (or designees),[32] the IG of the employing agency,[33] a congressional intelligence committee, or a member of a congressional intelligence committee. The listing of potential disclosure recipients is narrower than what the Clearance Statute provides.

Individuals who lawfully exercise an appellate right, testify or assist in that process, or assist the IC IG are not specifically protected from reprising personnel actions. Employees who disclose any information to the IC IG are not definitively protected from personnel action by statute, unless that employee reasonably believes their information evidences certain wrongdoing. However, under the Clearance Statute, so long as classified information is protected, an employee may cooperate with an OIG or exercise other rights guaranteed by law without fear of security

[29] 50 U.S.C. § 3341(j)(1)(D)(i)-(iii).

[30] 50 U.S.C. § 3341(j)(1)(C)(i)-(iii).

[31] The information that "the [contractor] employee reasonably believes evidences— (1) a violation of any Federal law, rule, or regulation; or (2) [gross] mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 50 U.S.C. § 3234(b) & (c).

[32] Head of the contracting agency for contractors.

[33] Inspector General of the contracting agency for contractors.

clearance reprisal. While the Personnel Action Statute does not authorize reprisal for interacting with OIGs, only the Clearance Statute specifically prohibits it.[34]

Further, the specific protections provided by the Clearance Statute (Section 3341(j)(1)(C)) allow for lawful disclosures according to those statutes—when the listed statutes prescribe certain action not contemplated under the Personnel Action Statute, there is further divergence between the Enacting Statutes. For example, nowhere does the Personnel Action Statute contemplate interaction with a committee member's staff, while the Clearance Statute, under 3341(j)(1)(C)(i), specifically endorses it—for example, by protecting notification to a committee member's staff that urgent concerns were submitted under 3517(d)(5)(H). There is no indication that Congress intended to authorize personnel action reprisal under these circumstances, but only one of the statutes specifically prohibits it. While the circumstances here are narrow, it would be possible for an individual making lawful disclosures to do so in a manner that would only protect their security clearance from reprisal.

Further, the Enacting Statutes and PPD-19 prescribe different individuals to whom protected disclosures may be made. PPD-19 protects disclosures to anyone in the direct chain of command, IGs, the DNI, and their designees.[35] Conversely, the Enacting Statutes protect disclosures made to the head of the agency, OIGs, the DNI, or those individuals' designees.[36] There is potential for discord between PPD-19 and the Enacting Statutes if supervisors in a whistleblower's chain of command were not designees. If a whistleblower were to make disclosures in their direct chain of command to a supervisor who was not designated under the Enacting Statutes, a whistleblower would only be protected by PPD-19. Intelligence Community Directive 120, which implemented PPD-19, included PPD-19's definition which protects disclosures within an employee's chain of command. It is not explicit whether maintaining PPD-19's definition in this directive qualifies as the designation required by the Enacting Statutes.

7. Protections for "Normal Course" Disclosures

The Clearance Statute contains a puzzling provision which seemingly has no place or meaning. Specifically, Section 3341(j)(3)(B) states:

> If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from paragraph (1) [the paragraph describing which disclosures are protected] if any employee who has authority to take, direct

[34] This is especially concerning in light of obligations that often require employees to assist OIGs. *See e.g.*, ODNI Instr. 10.34. All efforts should be made to make protections explicit, even more so when statutes require employees to engage in behavior that may be unprotected. *See e.g.*, 50 U.S.C. § 3033(g)(2).

[35] Defines protected disclosures to include, "supervisor in the employee's direct chain of command up to and including the head of the employing agency." PPD-19 at 7.

[36] 50 U.S.C. § 3234(b); 50 U.S.C. § 3341(j)(1). Another quirk, note that an IC OIG's designees are only explicitly covered by the Clearance Statute, but not the Personnel Action Statute.

> others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure.

This provision states that a disclosure made in the normal course must be protected, so long as the employee suffers an adverse personnel action or threatened personnel action.[37] This language leads one to question why the prohibition against exclusion applies (or the protection attaches), only when the discloser also experiences a personnel action or threat. All IC members have a duty to report fraud, waste, abuse, or other illegality. Accordingly, any IC member could be considered a "normal course" discloser. The security clearance of "normal course" whistleblowers should not only be guaranteed protections if they simultaneously experience a retaliatory personnel action. A plain reading of this provision implies that an employee whose normal duties include making disclosures will only be protected from retaliatory security clearance actions *if* they also experience reprisal by a personnel action.[38]

The statutory language appears to have been lifted from the since-amended[39] text of 5 U.S.C. § 2302(f)(2), which reads, "If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure."

Because the referenced subsection (b)(8) dealt with personnel actions, the sentence had meaning: that a discloser in the normal course would still be protected from personnel action. *See Acha v. Dep't of Agriculture*, 841 F.3d 878, 881-883 (2016). This statutory protection was added to address a gap in section 2302 coverage established in subsequent litigation. *See, e.g., Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1352 (Fed. Cir. 2001) (holding that "an employee who makes disclosures as part of his normal duties" is not a protected whistleblower), *superseded by statute*, Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199. Under the Clearance Statute, the referenced paragraph (3341(j)(1)) does not refer to personnel actions, but rather clearance actions. Therefore, instead of guaranteeing protections for normal course disclosers like 2302(f)(2) does, the Clearance Statute's provision actually requires normal course disclosers to experience *additional* reprisal to avoid exclusion.[40]

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[37] Interestingly, threats of personnel action are included here; this is the only place in the Enacting Statutes where threats of personnel actions are contemplated.

[38] Unlike the Personnel Action Statute, the MWPA explicitly protects service members' normal course disclosures. 10 U.S.C. § 1034(c)(3)(F).

[39] There have been subsequent edits to the text of § 2302(f)(2), but none to Section 3341(j)(3)(B).

[40] In other words, the provision from where this language originated was designed to supersede case law and protect normal course disclosers, but because the cross-reference in 3341(j)(3)(B) refers to a different type of reprisal, this language actually does the opposite.

It appears that this provision is a drafting error. Without the provision, there does not appear to be authority within the statute to exclude a disclosure because it was made in the course of the discloser's official duties.[41]

THE DIFFICULTY OF FILLING THE GAPS

With the discord between PPD-19 and the Enacting Statues, OIGs must consider whether Congress's codification of some portions of PPD-19 forecloses action under those portions of PPD-19 that were not legislatively endorsed. Clearly, the Enacting Statutes control where they are more expansive; however, it is unclear when the non-enacted provisions of PPD-19 can still be utilized. Because the Enacting Statues do not revoke or supersede PPD-19, codify some of PPD-19's provisions, and are silent on others, the likelihood of collision between the PPD-19 and statutory framework is high. For security clearance matters only, the Enacting Statutes are explicit that existing rights remain unchanged. This could be interpreted to explicitly authorize OIGs to continue utilizing PPD-19 in clearance matters.[42] Creating further discord, a parallel provision does not exist for personnel actions.

Following PPD-19 could provide additional rights or lead to different results. OIGs could treat PPD-19 expansively and provide any additional protections that existed prior to the Enacting Statutes. For example, cadre employees would be protected from threats of personnel action under PPD-19,[43] even though the Personnel Action Statute is silent on whether those threats constitute reprisal.[44] In many cases, legislation will explicitly revoke existing executive orders by declaring they "shall not have any legal effect."[45] Congress did not make clear whether the Enacting Statutes were intended to supplant PPD-19; in fact, PPD-19 is not even referenced in the Enacting Statutes, even though much of the language is identical and the basis for the legislative action.

If PPD-19 is treated as a parallel process that survives the Enacting Statutes, it could create even more disharmony by causing reprisal allegations for cadre employees to be evaluated under similar, but different legal standards. For example, when evaluating security clearance reprisal,

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[41] Since this provision is a prohibition against exclusion, the drafting error would be effectively meaningless if OIGs chose not to exclude any otherwise protected disclosure because it was made as part of an employee's normal duties, regardless of whether the employee experienced personnel action reprisal. However, OIGs may need to consider whether to apply the reasoning in *Huffman* and other title 5 case law which originally stripped normal course disclosers of protections.

[42] P.L. 113-126, Sec. 602(d) (July 7, 2014).

[43] *See supra* page 2.

[44] Had the Enacting Statutes been passed first, this analysis would be significantly easier. A presidential directive could be used to add protections against reprisal by threat, but instead we are faced with the question of whether the PPD-19 protections remain when only some of them are codified by Congress.

[45] P.L. 103-43, § 121; 107 Stat. 133 (1993) (revoking Executive Order 12806); *see also* P.L. 109-58, § 334 (2005) (explicitly revoking Executive Order).

the Enacting Statutes place a lower burden on the agency to prove it would have taken the same action absent the protected disclosure. If OIGs considered PPD-19 as a remaining parallel process, it would render inert the precise statutory language in the Enacting Statutes. For example, the lower agency burdens enacted in the Clearance Statute (Section 3341(j)(4)(C)) would be effectively irrelevant for cadre employees who could instead demand consideration under PPD-19 Section B. Similarly, a complainant could demand that an OIG disregard the statutory limit on corrective action awards which is present only in the Clearance Statute, but absent in PPD-19.[46]

Where the Enacting Statutes are not in direct conflict, it might be possible for OIGs to continue to utilize PPD-19. For example, when covering threats, OIGs should give meaning to Congress's choice to exclude threats from the Personnel Action Statute and not provide statutory protection to individuals threatened with personnel action.[47] Agencies are given broad latitude to interpret their own regulations and there is no indication that not including "threats" in the statute was meant to prohibit or repeal existing PPD-19 protections.[48] Without any congressional direction to the contrary,[49] it could be within OIGs' authority to continue to provide PPD-19 protections against threats of personnel actions to whistleblowers. While this will not protect contractors from personnel threats, it retains the PPD-19 protections that existed prior to the Enacting Statutes. Regardless of whether OIGs choose to continue to use PPD-19 or not, the differences in practice could be a source of significant disharmony in the evaluation of whistleblower reprisal claims thus resulting in the potential that similar whistleblowers will be treated dissimilarly.

While PPD-19 authorities can cleanse some disharmony in the statutes, the differences between, and irregularities within, the Enacting Statutes themselves are unavoidable. The disclosers most impacted are contractors. While PPD-19 remains in force where the statutes do not conflict, where there is a conflict, the statutory language is controlling. Even if PPD-19 is still utilized, some illustrative scenarios OIGs are likely to see when evaluating complaints are:

- An employee reprises against a contractor by committing a personnel action because of that contractor's disclosure. The Personnel Action Statute does not prohibit employee-contractor reprisal. PPD-19 does not protect contractors from personnel actions.

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[46] That argument would be well based in law, since the Clearance Statute makes clear that it shall not "be construed to preempt, preclude, or otherwise prevent an individual from exercising rights, remedies, or avenues of redress currently provided under any other law, regulation, or rule." P.L. 113-126, Sec. 602(d) (July 7, 2014).

[47] It is a canon of statutory interpretation to consider what has been omitted, but an omission does not justify judicial legislations. *See Ebert v. Poston*, 266 U.S. 548, 554 (1925) ("A *casus omissus* does not justify judicial legislation").

[48] Courts must "give substantial deference to an agency's interpretation of its own regulations," *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994), and must accept the agency's interpretation as "controlling" unless it is "plainly erroneous or inconsistent with the regulation." *Id.*

[49] There is no evidence in the legislative history that Congress intended to curtail PPD-19 protections in any way and, to the contrary, meant to endorse them. *See e.g.*, S. Rep. 113-120 at 11-13.

- A contractor is threatened with personnel actions by their contracting agency because of their disclosures. The Personnel Action Statute does not prohibit threats of personnel action. PPD-19 does not protect contractors from personnel actions.

- A contractor is reprised against by a security clearance action. Under a precise reading of the Clearance Statute, many contractors would have no recourse because most IC elements do not qualify as covered agencies.

- A contractor is reprised against by personnel action against for exercising appellate, complaint, or grievance rights. Unlike the Clearance Statute, the Personnel Action Statute does not specifically prohibit reprisal under these circumstances. PPD-19 Section A does not protect contractors.

If OIGs do not consider PPD-19 to remain in effect, then many of the described scenarios could also apply to employees. While there may be a policy basis for providing contractors with more narrowly tailored protections, any intended divergence is exacerbated because only employees can rely on PPD-19 to cover statutory gaps over personnel actions, and only if OIGs choose to do so. Seemingly unintended statutory holes provide disparate coverage for employees and contractors. The Enacting Statutes should be revised to provide contractors similar rights as employees. There may also be reason to have different frameworks for evaluating personnel action and for security clearance reprisal, so some divergence between the statutes is to be expected. Relying on PPD-19 may fill some of these gaps for non-contractor employees, but that practice creates its own problems. While there may be room to address some statutory gaps by revising Intelligence Community Directive 120, which implements PPD-19 and some of the Enacting Statutes, more changes are needed to fix the current regulatory framework. Employing PPD-19 to reverse gap fill and amending OIG policies will not solve most of the issues described in this memorandum.

The IC IG has taken steps to mitigate some of these issues, but more work is needed. For example, as part of the IC IG's harmonization efforts and in consultation with the Forum, the IC IG issued new ERP procedures to replace procedures that were out of date and inconsistent with the external review provision recently codified by Congress. The updated procedures make the external review process more transparent to IC members and IC inspectors general. These procedures also lengthen the deadlines, which harmonizes with other statutory deadlines, and they provide a clearly defined standard of review. These improvements are a first step towards harmonization and deconfliction within the whistleblower protection framework, but because the

legal framework itself is a primary source of inconsistency, changes to those governing authorities are still required to close jurisdictional gaps and ensure consistent accountability.[50]

The disharmony described in this memorandum presents problems for both OIGs and whistleblowers. OIGs must consider when and whether to continue using PPD-19 authorities and how to operate under statutes with dissonance and error. The issues present in the whistleblower reprisal authorities also create uncertainty for whistleblowers who are unable to determine which of the conflicting authorities will be applied to their case and whether they will receive appropriate protections. Absent revisions to the governing authorities, OIGs and the communities they serve will continue to face difficult and confusing questions that must be decided under inconsistent laws.

RECOMMENDATIONS: REVISE THE GOVERNING AUTHORITIES

The current statutory framework should be revised to clarify which disclosures are covered and what actions qualify as reprisal. Absent these statutory changes, amendments to OIG policies, IC IG policies, or Intelligence Community Directives are insufficient to fix the outstanding issues.

In order to allow for the fair and expeditious resolution of whistleblower matters, the Enacting Statutes must first be amended and harmonized. We recommend that Congress consider taking the following steps:

1. **Amend the Enacting Statutes to address drafting errors.** At a minimum, these revisions should correct the language to ensure all IC members are protected from clearance reprisal.

2. **Harmonize any unintended inconsistencies in protections for contractors and employees.** For example, ensure that both employees and contractors are protected regardless of who commits the act of reprisal.

3. **Codify any PPD-19 protections not currently guaranteed by statute.** These changes should include expanding the Enacting Statutes to protect threats of personnel action and to explicitly allow whistleblowers to make protected disclosures to their chain of command.

4. **Once statutes are harmonized to include PPD-19 protections, explicitly supersede PPD-19 by statute to eliminate the possibility that matters can be covered by two**

[50] While not the focus of this report, the IC IG also reviewed the processes available for Intelligence Community whistleblowers with complaints against Inspectors General. In response to Section 5332 included in the Intelligence Authorization Act for Fiscal Years 2018, 2019, and 2020, the IC IG issued a report and proposed recommendations to ensure that Intelligence Community whistleblowers can request external review of their reprisal allegations regardless of whether an Inspector General is the subject of the allegations. *See Analysis and Recommendations for External Review Processes for Allegations Against Intelligence Community Inspectors General*, IC IG Memorandum (Feb. 25, 2021).

different frameworks. Reprisal complaints should not be subject to differing standards and processes. The coexistence of PPD-19 and the Enacting Statutes which seek to govern the same claims causes confusion for IC members and difficulties for OIGs who must administer these programs.

5. **Resolve any unintended differences between the Personnel Action and Clearance Statute.** While there are public policy bases to treat clearance and personnel actions differently, any statutory revisions should confirm that each of these differences is purposeful and based on sound policy.

6. **Ensure that the policies called for in the Enacting Statutes are established.** The Personnel Action Statute asks that the president provide for its enforcement, but so far no provision has been provided.[51] Similarly, the Clearance Statute requires that the DNI issue appellate policies, but no final policies have been adopted.[52]

These changes would help to resolve legal barriers to effectively resolving whistleblower matters. The current statutory framework presents OIGs with conflicting authorities. The existing inconsistencies make it difficult to develop cogent policies to apply the law.

In the meantime, Intelligence Community OIGs must continue to fairly evaluate the whistleblower matters before them despite the divergence of the executive and statutory frameworks. Harmonization and consistent review of whistleblower matters by OIGs will only be possible when the governing authorities are revised.

[51] 50 U.S.C. § 3234(d).

[52] 50 U.S.C. § 3341(j)(5)(B).

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