STATEMENT OF THE GOVERNMENT ACCOUNTABILITY PROJECT
to
THE PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD
[ID - PCLOB-2014-0001-0005]
August 29, 2014

In response to the Privacy and Civil Liberties Oversight Board's ("PCLOB" or "Board") formal request[1] for "the views of non-governmental organizations, the business community and the general public on [the Board's] mid-term and long-term agenda," we are writing to you today to encourage you to recommend that the Board become a legally-authorized recipient of disclosures by intelligence community (IC) whistleblowers and to review the efficacy of existing IC whistleblowing channels.

The Government Accountability Project (GAP) is a whistleblower defense and advocacy organization established in 1976. GAP has provided legal advice to thousands of whistleblowers, including IC whistleblowers with concerns regarding privacy and civil liberties, employed by the Central Intelligence Agency (CIA), National Security Agency (NSA), and Federal Bureau of Investigation (FBI). NSA whistleblowers and GAP clients Thomas Drake, J. Kirk Wiebe, and William Binney have submitted written comments to PCLOB in connection with PCLOB's investigation of NSA surveillance programs.[2]

Statement as to the Board's Statutory Power to Review Whistleblower Protection

By statute, the Board's purpose is to "analyze and review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties" and to "ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the Nation against terrorism."[3] To achieve these objectives, the Board has authority to –

[1] Sunshine Act Notice of Meeting, 79 Fed. Reg. 38999 (July 9, 2014); *available at* https://www.federalregister.gov/articles/2014/07/09/2014-16155/sunshine-act-meetings?utm_campaign=subscription+mailing+list&utm_medium=email&utm_source=federalregister.gov
[2] *See* PCLOB-2013-0005-0103, PCLOB-2013-0005-0053
[3] 42 U.S.C. § 2000ee(c)

"interview, take statements from, or take public testimony from personnel of any department, agency, or element of the executive branch, or any Federal officer or employee of any such department, agency, or element…."[4] Agency heads have a mandatory duty to cooperate with the Board's activities to develop the record.[5]

In order to maximize the effectiveness of protected disclosures from whistleblowers policies and procedures regarding disclosures and oversight must be strengthened. Presently, whistleblower protection available to IC employees is significantly circumscribed by law, regulation, policy, and executive action. The lack of effective internal channels and meaningful protection from reprisal for IC whistleblowers impedes the protection of civil liberties and privacy by suppressing disclosure (both internally and to the public) of programs and policies that threaten privacy and civil liberties. The lack of meaningful protection threatens the privacy rights of whistleblowers themselves, who have no meaningful remedy when the government conducts retaliatory surveillance or investigation. Therefore, review of IC whistleblower protection is well within the Board's statutory mission and the Board may examine whether withholding whistleblower rights is balanced with the need to protect both privacy and civil liberties.

GAP Recommendation: Take Action to Make the Board a Legally Recognized Whistleblowing Channel

Pursuant to the Board's inherent authority, the Board should clarify to the public that it is a lawful outlet for classified or non-classified whistleblowing disclosures. Providing an independent outlet for disclosures would end the institutional conflict of interest that has created a chilling effect on intelligence and other national security whistleblowers. That conflict of interest is the primary factor driving them to media leaks as the safest way to avoid cover-ups of government misconduct. In GAP's experience, retaliation has been the rule, rather than the rare exception, for those who work within internal agency channels.

[4] 42 USC 2000ee(g)(1)(B)
[5] 42 USC 2000ee(g)(4)

Independence from institutional conflict of interest is necessary, but not sufficient to protect IC whistleblowers. As recognized at the last public forum, the Board's inherent authority permits it to issue rules protecting its witnesses. We recommend that the Board issue regulations that implement the following principles:

1) Any witness has the right to contribute information to the Board that is relevant to its mission without incurring retaliation. The Board should have secure procedures for receipt of classified or otherwise privileged information.

2) If a witness alleges retaliation, the Board should sponsor an independent, shared cost, consensus selection binding arbitration to resolve alleged retaliation. The arbitration should be governed by the legal burdens of proof in the Whistleblower Protection Act of 1989, with remedies that make the whistleblower whole if the arbitrator concludes that retaliation occurred.

3) If an agency is found guilty of retaliation, refuses to participate in the arbitration or refuses to comply with the arbitrator's orders, the Board shall inform the President, congressional leadership, the Senate and House Select Committees on Intelligence, and any relevant authorizing or appropriations committees in Congress.

GAP Recommendation: Investigate Existing Whistleblower Channels

1) Examine Whether Intelligence Community Whistleblower Channels are an Effective Means of Bringing Reform to Programs that Threaten Privacy and Civil Liberties

Clear and effective internal whistleblower channels are essential for ensuring transparency and accountability in any government organization. GAP clients such as Drake, Binney, and J. Kirk Wiebe have experienced that the channels made available to IC whistleblowers are not an effective means of reporting threats to privacy and civil liberties. In their cases, using internal channels exposed them to retaliation, both professional and in unfounded criminal investigations, and failed to correct the underlying government malfeasance. The Board should examine whether the current channels available to IC whistleblowers are effective in providing the proper oversight entities – such as the Board itself – with the information necessary to protect privacy and civil liberties.

As part of this review, the Board should consider whether, how often, and under what circumstances any non-public, internal whistleblowing activity has been effective against alleged fraud, waste or abuse of authority.

2) Investigate Whether IC Inspectors General (IGs) Engage In Retaliation Against Whistleblowers, Including by Referring Them to the Justice Department for Prosecution

GAP clients Mr. Binney, Mr. Drake, Mr. Wiebe, and Mr. Edward Loomis submitted an internal complaint to the Department of Defense (DOD) Inspector General regarding an NSA program known as TRAILBLAZER.[6] After the *New York Times* published an article exposing an unrelated surveillance program, FBI agents simultaneously raided the houses of all the signatories to the IG complaint.[7] None of these whistleblowers had anything to do with the *New York Times* story. Rather, they were targeted for speaking out about TRAILBLAZER.[8] Drake was ultimately indicted under the Espionage Act for alleged retention of secret information, until the case against him collapsed under the weight of the truth. The PCLOB should investigate whether IC Inspectors General engage in retaliation against those who submit complaints. The Board should use the abovementioned DOD IG report as a starting point for this investigation.

3) Investigate Whether IC Agencies are More Responsive to Privacy and Civil Liberties Concerns When Those Concerns are Publicly Disclosed Rather than Privately Disclosed

Since Edward Snowden's whistleblowing disclosures to the press, there has been substantial debate as to whether public disclosures are more or less effective than private disclosures of privacy and

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[6] Unclassified, redacted version: *available at* http://www.whistleblower.org/storage/documents/IGR.pdf DOD hotline case number 85671, (January 29, 2003). The IG report issued is titled Requirements of the
[6]TRAILBLAZER And THINTHREAD SYSTEM, Intel Report 05-Intel-03,
[6](December 15, 2004).

[7] *See* Jane Mayer, *The Secret Sharer*, The New Yorker, (May 23, 2011), *available at* http://www.newyorker.com/magazine/2011/05/23/the-secret-sharer#ixzz1MXdUFeE9. They also raided Drake's house several months later. Drake had submitted a separate IG complaint.

[8] *Id.* ("I had the sense that N.S.A. was egging the F.B.I. on...I'd gotten the N.S.A. so many times—they were going to get me. The N.S.A. hated me.") ("It was retribution for our filing the Inspector General complaint.")

civil liberties abuses. The Board should examine whether IC agencies and their overseers are more responsive to internal or externally disclosed complaints.

4) Investigate Whether the Office of the Director of National Intelligence (ODNI) Memos Purporting to Limit the Speech of Current and Former IC Employees Have a Chilling Effect on Whistleblowing

On April 21, 2014, Director of National James Clapper issued Intelligence Community Directive 119 (ICD 119) to the IC in regard to employee contact with the media.[9] It states that, "No substantive information should be provided to the media regarding covered matters in the case of unplanned or unintentional contacts." According to the Directive, "covered matters" is defined as "intelligence-related information, including intelligence sources, methods, activities, and judgments." Contact with the media includes "support to projects such as books, television programs, documentaries, motion pictures, and similar works." The Directive has been criticized for overbreadth and unconstitutionality.[10]

Pursuant to the Board's statutory authority, GAP recommends that the Board consider whether these limitations infringe on the civil liberties of IC employees by limiting their free speech and whether there is a chilling effect as a result of the Directives that will deter IC whistleblowers and decrease government transparency on privacy and civil liberties issues.

5) Investigate Whether There Is a Double Standard for "Official" Leaks of Classified Information As Opposed to Unauthorized Whistleblowing Leaks

The US government has vigorously pursued whistleblowers who disclose allegedly classified information that embarrasses the government or exposes government misconduct However, high-ranking

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[9]Intelligence Community Directive 119, *available at* http://www.dni.gov/files/documents/ICD/ICD%20119.pdf

[10] Jack Goldsmith, *The Latest Obama Administration Anti-Leak Initiative*, Lawfare, (May 9, 2014), http://www.lawfareblog.com/2014/05/the-latest-obama-administration-anti-leak-initiative/ (calling both policies "overbroad to the point of practically unenforcable, perhaps by design."); Chris Donesa, *On the New ODNI Media Guidelines*, Lawfare, (April 29, 2014), http://www.lawfareblog.com/2014/04/on-the-new-odni-media-guidelines/ ("ICD 119 is flawed and will likely have little meaningful impact on the real world of intelligence leaking"); Steven Aftergood, *IC Media Policy Should be Revised, Sen. Wyden Says*, Secrecy News, (June 20, 2014), http://fas.org/blogs/secrecy/2014/06/ic-media-wyden/.

officials of the US Government routinely leak classified information in order to control the media narrative. These leaks are almost never investigated and the perpetrators are thus never prosecuted. For example:

a.) On September 21, 2009, *The Washington Post* published the core findings of Stanley McChrystal's report on the state of the Afghanistan war after someone leaked the entire 66 page document to Bob Woodward.[11] Only 20 copies of the report had been made, and no electronic copies were circulated, meaning that discovering the identity of the leaker would require little investigation.[12] The leak was widely believed to have originated from the Pentagon, under the theory that leaking the military's recommendations would box in Obama and force him to accept their proposals.[13] No one was ever held accountable.

b.) On August 7, 2013, *The Daily Beast* reported that US intelligence officers had intercepted an "al-Qaeda conference call"[14] The story revealed that "Al Qaeda leaders had assumed the conference calls, which give Zawahiri the ability to manage his organization from a remote location, were secure."[15] This story had obvious operation security implications--it revealed sources and methods--yet none of the "three U.S. officials familiar with the intelligence" have been apprehended, and there is no indication that an investigation is taking place.

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[11] Bob Woodward, *McChrystal: More Forces or 'Mission Failure'*, The Washington Post, (September 21, 2009), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/09/20/AR2009092002920.html.
[12] Peter Baker, *How Obama Came to Plan for 'Surge' in Afghanistan*, The New York Times, (December 5, 2009), *available at* http://www.nytimes.com/2009/12/06/world/asia/06reconstruct.html?pagewanted=all&_r=0 ("[T]here were no electronic versions and barely 20 copies in all").
[13] Ben Smith, *A D.C. whodunit: Who leaked and why?*, Politico, (September 22, 2009), ("The simplest theory — and one most administration officials Monday were endorsing — is that a military or civilian Pentagon official who supports McChrystal's policy put it out in an attempt to pressure Obama to follow McChrystal's suggestion and increase troop levels in Afghanistan.")
[14] Eli Lake, *Exclusive: U.S. Intercepted Al Qaeda's 'Legion of Doom' Conference Call*, The Daily Beast, (August 7, 2013), http://www.thedailybeast.com/articles/2013/08/07/al-qaeda-conference-call-intercepted-by-u-s-officials-sparked-alerts.html
[15] *Id.*

c.) On May 4, 2014, *The Daily Beast* published an article revealing that the CIA was withdrawing its irregular counterterror forces from Afghanistan just before the beginning of the fighting season.[16] The story was sourced to "senior U.S. officials" and Aimal Faizi, a spokesman for Afghan President Karzai. Each of these stories involved the disclosure of classified information by a savvy, senior official with a sectarian agenda. In each case, there has been no sign of any sort of leak investigation, much less a prosecution. The Obama administration's record-setting number of Espionage Act prosecutions only occurred against individuals – usually whistleblowers - who expose government abuses or reveal information that embarrasses high level government officials.

As stated above in the "Statement as to the Board's Statutory Power to Review Whistleblower Protection," whistleblowers act as an important check against privacy and civil liberties abuses. Therefore, it is within the Board's mission to investigate whether whistleblowers are being unfairly, unequally, or disproportionately targeted under the Espionage Act. GAP has extensive experience drafting and monitoring implementation of whistleblower laws and policies, and would be pleased to assist in action on any of the above recommendations.

Respectfully Submitted,

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[16] Kimberly Dozier, *Exclusive: CIA Falls Back in Afghanistan*, The Daily Beast, (May 4, 2014), http://www.thedailybeast.com/articles/2014/05/04/exclusive-cia-falls-back-in-afghanistan.html.