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Defense Appropriations Subcommittee
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Chairman Visclosky, Ranking Member Calvert, and members of the Defense Appropriations Subcommittee, thank you for the opportunity to submit this written testimony.

The Government Accountability Office plays a critical role in Congressional oversight of the Executive Branch. Unfortunately, that role may be stymied when it comes to the Intelligence Community (“IC”). Despite the fact that, by statute, GAO already has the purview to conduct oversight of *all* federal agencies¹ and has since its creation in 1921,² the IC has, with a few exceptions, insisted that it is not subject to such audits since its inception. **This effectively deprives Congress of one of the most effective tools in its arsenal, especially at a time when the activities of the IC present some of the most pressing needs for robust oversight in the Executive Branch.** I respectfully recommend that Congress take steps to conclusively validate GAO’s jurisdiction in such matters.

In response to the IC’s recalcitrance, some Members of Congress have periodically attempted to resolve the matter over the past few decades. For instance, then-Congressman Leon Panetta introduced a bill in 1987 called the CIA Accountability Act to officially clarify GAO’s authority vis-à-vis the Central Intelligence Agency (“CIA”) and the IC as a whole.³ Unfortunately, it was not enacted. In 1988, GAO attempted to conduct an investigation “[i]n order to evaluate whether ‘information about illegal activities by high level officials of other nations may not be adequately considered in U.S. foreign policy decisions,’” leading the National Security Council to request an opinion from the Department of Justice Office of Legal Counsel which has been cited ever since:

We therefore conclude based on the nature of the GAO request that the subject of the GAO investigation is the Executive’s discharge of its constitutional foreign policy responsibilities, not its statutory responsibilities. The subject is thus not “a program or activity the Government carries out under existing law,” and it is beyond GAO’s authority under 31 U.S.C. § 717(b). . . .

In addition to the infirmity in GAO’s statutory authority to pursue this investigation, we believe that GAO is specifically precluded by statute from access to intelligence information. In establishing by law the oversight relationship between the intelligence committees and the executive branch, Congress indicated that such oversight would be the exclusive means for

¹ See 31 U.S.C. §§ 712, 717, 3523(a) (GAO has authority to investigate each “department, agency, or instrumentality of the United States Government.”).

² Budget and Accounting Act, Pub. L. 67-13, 42 Stat. 26, June 10, 1921 (“All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them.”).

³ H.R. 3603, available at <https://fas.org/irp/eprint/panetta-1987.pdf>.

Congress to gain access to confidential intelligence information in the possession of the executive branch.

This intelligence oversight system has been codified at 50 U.S.C. § 413. That section sets forth requirements for the Director of Central Intelligence, the heads of all other federal agencies involved in intelligence activities, and the President to inform the Congress through the intelligence committees (and in some circumstances the Speaker and minority leader of the House of Representatives and the majority and minority leaders of the Senate) of intelligence activities.⁴

Over two decades later, this fight was still underway. When an amendment to the FY2010 Intelligence Authorization Act (“IAA”) sought to reaffirm GAO authority, it prompted a veto threat in the form of a letter from Director of the Office of Management and Budget Peter Orszag,⁵ which Acting Comptroller General Gene Dodaro thoroughly refuted, demonstrating that “[n]either the language of section 413 nor its legislative history provides support for this position” and that **the IC’s resistance “has greatly impeded GAO’s work for the intelligence committees and also jeopardizes some of GAO’s work for other committees of jurisdiction, including Armed Services, Appropriations, Judiciary, and Foreign Relations, among others.”**⁶

Despite Mr. Dodaro’s testimony, the enacted law took a middle-of-the-road approach, stating that clarification was necessary but deferring to the Executive for that clarification, instructing the Director of National Intelligence (“DNI”) to “issue a written directive governing the access of the Comptroller General to information in the possession of an element of the intelligence community.”⁷ The DNI, for his part, issued Intelligence Community Directive 114 the following year, which reluctantly admitted that GAO had *some* authority to investigate the IC, but adopted a severely restrictive interpretation of the scope of that authority:

Information that falls within the purview of the congressional intelligence oversight committees generally shall not be made available to GAO to support a GAO audit or review of core national intelligence capabilities and activities, which include intelligence collection operations, intelligence analyses and analytical techniques, counterintelligence operations, and intelligence funding. IC elements may on a case-by-case basis provide information in response to any

⁴ *Investigative Authority of the General Accounting Office*, 12 Op. Off. Legal Counsel 171 (1988).

⁵ Letter from Orszag to Feinstein of 3/15/10, available at <https://fas.org/irp/news/2010/03/omb031610.pdf>.

⁶ Letter from Dodaro to Feinstein of 3/18/10, available at <http://www.pogoarchives.org/m/co/dodaro-letter-to-intel-committees-20100318.pdf>. Mr. Dodaro concluded that reaffirming GAO’s authority in this area “would prove beneficial both to the conduct of oversight by the intelligence committees and to the efficiency and effectiveness of IC operations.”

⁷ 50 U.S.C. § 3308.

GAO requests not related to GAO audits or reviews of core national intelligence capabilities and activities.⁸

In other words, GAO can investigate anything involving the IC that the Intelligence Committees cannot, which amounts to basically nothing. Moreover, this is not an academic dispute: in response to a question about this matter from Congressman Yoder in 2018, Mr. Dodaro explained that this remained an ongoing controversy, although the situation is minimally better than it was before 2010:

Mr. YODER. Do you need additional support from Congress—

Mr. DODARO. Yes.

Mr. YODER [continuing]. Or direction to the intel agencies to make sure they are aware that this is an authority you have?

Mr. DODARO. Yes, that would be helpful.⁹

When Mr. Dodaro testified before the Legislative Branch Subcommittee last year regarding GAO's FY2020 budget, Congressman Ryan again asked him about this matter, and Mr. Dodaro again remarked that GAO needs "the cooperation of the Intelligence Community" because GAO "ha[s] more difficulties when the request comes from non-intelligence committees," concluding, **"I think we could do more, particularly in the management area, and in the investments that are made, in that area, whether there's good return on the investments in all cases."**¹⁰ And in his most recent testimony before that Subcommittee this year, Mr. Dodaro testified, **"It's the same status as it was last year.** Congress could work with the Intelligence Committees to provide better direction to the intelligence agencies to cooperate with us."¹¹

In fact, however, even the involvement of the Intelligence Committees is not sufficient to overcome the IC's reliance on ICD 114 to obstruct meaningful GAO access. In a meeting last year with staffers from this Subcommittee and the Legislative Branch Subcommittee, a member of this Subcommittee's staff dismissed the need for reform, arguing that IC components do not refuse GAO requests for information if GAO was acting pursuant to an Intelligence Committee request. That presumption is unfortunately false. One need only consider the example of AR 13-5, the internal CIA regulation which implements ICD 114. This regulation directly addresses the question of how the Agency should respond to a GAO request for information when GAO is acting under the direction of an Intelligence Committee:

As a general rule, if GAO makes a request on behalf of or to obtain information responsive to a tasking by an intelligence oversight committee, the [Point of

⁸ ICD 114(D)(4)(b), available at https://www.dni.gov/files/documents/ICD/ICD_114.pdf.

⁹ *Legislative Branch Appropriations for 2019: Part 2, Fiscal Year 2019 Legislative Branch Appropriations Requests, Hearings before the Subcomm. on the Legislative Branch of the House Comm. on Appropriations*, 115th Cong., 2d Sess. 310 (Apr. 25, 2018) (testimony of Comp. Gen. Gene Dodaro) (testifying that GAO has been able to investigate peripheral matters in the IC such as "a facilities area" and contract management in the last few years).

¹⁰ Available at <https://www.youtube.com/watch?v=G3WU2uZMlyk>.

¹¹ Available at <https://www.youtube.com/watch?v=uaRnD62qun4>.

Contact (“POC”)] will ensure that the CIA response to GAO does not contain information prohibited in paragraph b.(2)(c)(3) above.¹² The response to GAO shall indicate that information responsive to the tasking, but not authorized for release to GAO under the provisions of ICD 114, shall be made directly available to the requesting intelligence oversight committee. The POC shall prepare an additional response for the intelligence oversight committee that contains information responsive to the committee request, but not authorized for GAO access.¹³

In other words, if GAO asks CIA for any information which would fall under the jurisdiction of an Intelligence Committee, CIA will simply refuse to cooperate, but if an Intelligence Committee tasks GAO to make the request, CIA will still refuse to provide the information to GAO, but instead will send the information directly to the relevant Intelligence Committee. In neither situation does GAO receive the requested information.

GAO possesses significantly more resources and institutional expertise in certain kinds of Executive Branch investigations than even the most robust committee staff, and there is frankly no reason for this arbitrary restriction on its authority. Congress gave the Executive Branch a chance to establish reasonable limitations which balanced the Executive’s legitimate interests with one of the most important functions of Congress—effective oversight. **Instead of crafting a reasonable policy, the DNI memorialized the IC’s original hard-line position.**

I recommend this Subcommittee include language to remove any doubt concerning GAO’s audit power over the IC by advancing a measure that restates Section 335 of the FY2010 IAA, as engrossed by the House of Representatives in February 2010.¹⁴

Not only would taking such a measure resolve a longstanding problem, but **it would be revenue neutral**, since it would not require GAO to take on any more responsibilities than it already has; it would only open the universe of matters it *may* investigate. When one considers the fact that the number of GAO employees with Top Secret/Sensitive Compartmented Information (“TS/SCI”) clearances is higher than the combined number of staffers employed by both Intelligence Committees, **it is clear that these artificial restrictions on GAO’s authority are causing Congress to expend more financial and manpower resources to accomplish less oversight over a significant portion of the Executive Branch.** In a time of crisis, when

¹² That paragraph reads:

Information that falls within the purview of the congressional intelligence oversight committees generally shall not be made available to GAO to support an audit or review of intelligence collection operations; covert action; intelligence capabilities related to national intelligence activities; counterintelligence operations; intelligence analysis and analytical techniques; intelligence sources and methods; or intelligence budgets or funding; (including records or expenditures made under the authority of 22 U.S.C. 2396(a)(8) or 10 U.S.C. 127, 7231 and 50 U.S.C. 403j(b)).

¹³ CIA, AR 13-5: *Comptroller General Access to Information in the Possession of the CIA*, § (b)(3) (copy attached). I was unable to provide this information last year because I only recently obtained this regulation through litigation.

¹⁴ Available at <https://www.gpo.gov/fdsys/pkg/BILLS-111hr2701eh/pdf/BILLS-111hr2701eh.pdf>.

agencies across the Government are spending vast amounts of time, money, and resources to combat a once-in-a-century threat, it is more important than ever that GAO be able to investigate allegations of governmental waste, fraud, abuse, and violations of law wherever they may be found. **It is time for Congress to assert its prerogatives to protect its oversight capabilities over *all* agencies.**

Kel McClanahan Biography

Kel McClanahan is the Executive Director of National Security Counselors, a Washington-area non-profit public interest law firm which specializes in national security law and information and privacy law. Before chartering National Security Counselors with his fellow directors, he served as Director of FOIA Operations for the James Madison Project and Of Counsel to the Law Office of Mark S. Zaid, PC. He is an adjunct professor at the George Washington University Law School and the American University Washington College of Law, where he teaches various topics in national security law. He sits on the Board of Directors of the National Military Intelligence Foundation, the Board of Directors of the Bar Association of the District of Columbia, and the Steering Committee of the Make It Safe Coalition, and he is a charter member of the Security Clearance Lawyers Association.

He received his Master of Arts cum laude in Security Studies from the Georgetown University Edmund A. Walsh School of Foreign Service, his Juris Doctorate from the American University Washington College of Law, and his Master of Laws in National Security Law from the Georgetown University Law Center.

He belongs to the bars of New York, the District of Columbia, the U.S. Supreme Court, and several other federal courts.