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Whistleblowers: The New "Insider Threat"

Patrick Eddington

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Thanks to information recently released by the Senate Judiciary Committee, we now have fresh, incontrovertible evidence that elements of the Intelligence Community (IC) have monitored the communications of employees or contractors seeking to report waste, fraud, abuse or potential criminal conduct by IC agencies—including communications to House and Senate committees charged with oversight of the IC.

And based on the available public evidence, we also know that nobody in the IC responsible for such domestic spying has lost their job or faced a criminal referral to the Justice Department. The implications of this are multiple and chilling, but first, some background.

On November 1, Sen. Chuck Grassley (R-Iowa), chairman of the Senate Judiciary Committee, issued a press release announcing that the CIA had monitored communications between whistleblowers and congressional staff in 2014. Grassley said it took him more than four years to get the incidents declassified—itself a statement about the anemic state of congressional oversight of the IC.

Newly installed IC Inspector General Michael Atkinson finally provided Grassley with the two original congressional notifications of the incidents, which were originally sent on March 28 and March 31, 2014, respectively. The targets of the monitoring included IC whistleblowers and Dan Meyer, the person in the office of the IC Inspector General (IC IG) charged with taking their complaints and trying to shield them from retaliation. His title at the time was executive director of whistleblowing and source protection. Apparently, Meyer's communications with congressional investigators were also monitored.

In his March 28, 2014 notification to the House and Senate Intelligence Committee leadership (the notifications only went to the chairs and ranking members of the committees), then-IC IG Charles McCullough III stated that:

"On 19 March 2014, Central Intelligence Agency (CIA) security notified me that they had conducted an inquiry prompted by routine counterintelligence (CI) monitoring of Government computer systems. As a result of this inquiry, CIA CI personnel obtained emails between our Executive Director of Whistleblowing and Source Protection and Congressional staff."

McCullough described the monitoring as "lawful and justified for CI purposes"—an assertion he did not back up with any statutory citation.

In his March 28 notification to HPSCI and SSCI leadership, McCullough admitted he was "concerned about the potential compromise to whistleblower confidentiality and the consequent 'chilling effect' that the present CI monitoring system might have on Intelligence Community whistleblowing." But he did not ask the Intelligence Committees to provide any additional legislative protection for such communications. Interestingly, there was already a law on the books that likely made the monitoring illegal.

My dear friend and long-time counsel at the Government Accountability Project (GAP), Tom Devine, is one of the key whistleblower advocates in Washington, D.C. In 2014, Tom and others in the government transparency and whistleblower protection community helped draft Section 713 of the 2015 Consolidated and Continuing Further Appropriations Act (Public Law 113-235). It's a potentially powerful oversight and accountability tool, because it cuts off the salary for any federal employee or official who:

prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee

The legislation containing this provision was signed into law nine months after McCullough sent his two notifications to the House and Senate intelligence committees. Grassley clearly knew about the notifications for years, which raises the question: Why didn't he use this section of the law to go after the CIA officials responsible for what appears to be illegal monitoring of Meyer's communications with Congress? Why didn't he call out McCullough for ignoring the law itself?

IC officials have been gunning for Meyer for years. In late 2017, Meyer was placed on administrative leave "with no explanation." When that became public earlier this year, Grassley told GovExec.com that if Meyer was facing retaliation for communicating with Congress, it would be "unacceptable." But Grassley appears to have accepted it. Meyer was officially fired by the IC IG in March 2018, just months after he filed his own whistleblower complaint.

Grassley is hardly the only member of Congress to take a less-than-aggressive approach to Meyer's case, specifically, and the threats to IC whistleblowers more generally.

As Jenna McLaughlin reported earlier this year, Senators Mark Warner (D-Va.), Ron Wyden (D-Ore.), Susan Collins (R-Maine) and Grassley asked the Government Accountability Office (GAO) to conduct "a far-reaching review" of IC whistleblower protections. Yet just months before the Senate quartet made the request to GAO, the agency published a damning assessment of the state of the Defense Department's IG office—the very office where Meyer had worked—and been retaliated against—years earlier.

GAO found that between fiscal years 2013 and 2015, the DoD IG closed without investigation 1,094 of 1,197 whistleblower complaints it received—a whopping 91 percent of them. In commenting on GAO's findings, the Project on Government Oversight (POGO) noted that the

report raised “questions about whether the office can fairly and appropriately handle those who come forward with allegations of misconduct.”

That’s something of an understatement, given what I’ve found in my own investigation of how the DoD IG has handled previous IC (specifically NSA) whistleblower complaints.

Why has Warner, ranking member on the Senate Intelligence Committee—who is clearly aware of the gravity of these issues—not prioritized them like he has the Russia investigation? Why did Grassley dither for years in the Meyer case when he had a legal sledgehammer to cut off the salaries of out-of-control CIA bureaucrats spying on whistleblowers trying to convey their concerns to Congress?

As Loch Johnson, a former senior staffer on the Church Committee, told me years ago, “There’s no substitute for member engagement.” I worked for an engaged House member, so I knew what Johnson meant—introducing and pushing for passage of legislation, getting agency or department heads on record in writing about problems and their optimal solutions, and in the Senate, using the power to hold up nominations to force key executive branch documents out into the open. But there’s a world of difference between the kind of feckless, press-cycle “oversight” practiced by Grassley and Warner and the kind of accountability-driven action that should be the hallmark of the committees on which both serve.

Grassley, Warner, and their Senate and House colleagues have, thanks to the country’s founders, ample Article I power to aggressively protect IC whistleblowers and punish their bureaucrat retaliators. That they choose not to is precisely why the fraud, waste, corruption and criminal conduct in the IC continues apace.

Patrick Eddington

Policy Analyst in Homeland Security and Civil Liberties at the Cato Institute and Former Senior Policy Advisor to Rep. Rush Holt (D-N.J.). You can follow him on Twitter (@PGEddington).