February 14, 2006

Hold for Release
Expected 1:00 p.m.

Statement
of
Mr. Thomas F. Gimble
Acting Inspector General
Department of Defense

before the

Subcommittee on National Security, Emerging Threats,
and International Relations
House Committee on Government Reform

on

National Security Whistleblower Protection

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to appear this morning to discuss whistleblower protections available to members of the military personnel, Department of Defense (DoD) civilian employees, and employees of DoD contractors. Accompanying me are Ms. Jane Deese, Director of Military Reprisal Investigations, and Mr. Dan Meyer, Director of Civilian Reprisal Investigations.

My comments address three general areas I believe to be of interest to the Subcommittee:

1. Personnel actions involving an individual's security clearance;

2. The general availability of whistleblower protection, and

3. Our procedures for investigating complaints of reprisal for whistleblowing.

The hearing invitation letter stated that the Subcommittee wanted to discuss "revocation of an employee's national security clearance as a method of retaliation against those who attempt to point out wrongdoing in security agencies."

In preparation for this testimony we reviewed our Defense Hotline records. Based on this review, I can say that reprisal complaints involving security access/clearance decisions are rare. We identified 19 cases submitted to the Hotline during the past fifteen years that included allegations involving abuses of security clearances. The allegations were either not substantiated or were closed after a preliminary inquiry determined there was insufficient evidence to warrant a full investigation.

I. Personnel Actions Involving Security Clearances

One reason why so few whistleblower reprisal allegations involve the suspension or revocation of security access or clearance may be due to the significant due process protections provided to personnel holding security clearances. Additionally, most security adjudications are conducted by individuals external to the immediate environment where the alleged reprisal occurred.

Due to the significance an unfavorable personnel security decision can have on an employee's career, the DoD has established due process and appeal procedures in DoD regulation 5200.2-R, "Personnel Security Program," dated January 1987.

This regulation implements Executive Order No. 12968, "Access to Classified Information" (August 4, 1995) which prescribes a government-wide uniform system for determining eligibility for access to classified information. DoD Regulation 5200.2-R provides that no unfavorable administrative action may be taken against an employee unless the employee is provided a written statement of the reasons as to why the unfavorable administrative action is being taken. The statement of the reasons is to be as comprehensive and detailed as privacy and national security concerns permit and should contain the following information:

(1) A summary of the security concerns and supporting adverse information,

(2) Instructions for responding to the statement of reasons, and

(3) Copies of the relevant security guidelines.

An agency representative is assigned to ensure that the employee understands the consequences of the proposed action and the necessity to respond in a timely fashion. The employee is advised how to obtain time extensions, how to procure copies of investigative records, and how to file a rebuttal to the statement of the reasons. The employee is further advised that he or she can obtain legal counsel or other assistance at his or her own expense.

The most critical protection provided the employee is that the supervisor recommending any unfavorable action against an employee's security clearance is not part of the adjudication process. Instead, security clearance decisions are adjudicated by experienced security specialists who work in the eight Central Adjudication Facilities (CAFs) that DoD has established in the Departments of the Army, Navy, and Air Force, and the Washington Headquarters Services (WHS), the Defense Office of Hearings and Appeals (DOHA), the Joint Chiefs of Staff, the Defense Intelligence Agency (DIA), and the National Security Agency (NSA).

The chief of each CAF has the authority to act on behalf of the head of the component regarding personnel security determinations. CAFs are tasked to ensure uniform application of security determinations and to ensure that DoD personnel security determinations are made consistent with existing statutes and Executive orders.

The CAF must provide a written response to an employee's rebuttal stating the reason(s) for any final unfavorable administrative decision. The CAF's response must be as specific as privacy and national security considerations permit. The CAF's response, known as the Letter of Denial (LOD), may be appealed with or without personal appearance to the DoD Component Personnel Security Appeals Board (PSAB). Personal appearances are heard before a Defense Office of Hearings and Appeals (DOHA) Administrative Judge (AJ).

After review of the employees appeal package and/or the Administrative Judge's recommendation, the PSAB must provide a final written decision including its rationale for the final disposition of the appeal.

These due process and appeal procedures provide reasonable assurance that an unfavorable personnel security decision was made for proper reasons in an objective fashion, and not as a form of reprisal.

II. General Availability of Whistleblower Protection

The Office of Inspector General (OIG) has the authority to investigate adverse security clearance and access decisions as part of its broad responsibility for investigating allegations that individuals suffered reprisal for making disclosures of fraud, waste and abuse to certain authorities.

These responsibilities derive from both the Inspector General Act of 1978 and various statutory provisions applicable to specific classes of individuals. These laws were enacted and amended various times since 1978, and while similar in many respects they are not uniform in the protections they afford. However, they do provide a quilt of legislative provisions organized by the status of individual alleging they were reprised against as a result of their protected activity. A brief description of the protections available to whistleblowers follows.

Military Whistleblower Protection Act

Public Laws 100-456, 102-190, and 103-337 (codified in Title 10, United States Code, Section 1034 (10 U.S.C. 1034) and implemented by DoD Directive 7050.6, "Military Whistleblower Protection," June 23, 2000) provide protections to members of the Armed Forces who make or prepare to make a lawful communication to a Member of Congress, an Inspector General, or any member of a DoD audit, inspection, investigative or law enforcement organization, and any other person or organization (including any person or organization in the chain of command) designated under Component regulations or other established administrative procedures for such communications concerning a violation of law or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public safety.

Employees of Nonappropriated Fund Instrumentalities (NAFI)

Title 10, United States Code, Section 1587 (10 U.S.C. 1587), "Employees of Nonappropriated Fund Instrumentalities: Reprisals," prohibits the taking or withholding of a personnel action as reprisal for disclosure of information that a NAFI employee or applicant reasonably believes evidences a violation of law, rule, or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. Section 1587 requires that the Secretary of Defense prescribe regulations to carry out that Statute. Those regulations are set forth as DoD Directive 1401.3, "Reprisal Protection for Nonappropriated Fund Instrumentality Employees/Applicants."

Employees of Defense Contractors

Title 10, United States Code, Section 2409 (10 U.S.C. 2409), "Contractor Employees: Protection from Reprisal for Disclosure of Certain Information," as implemented by Title 48, Code of Federal Regulations, Subpart 3.9, "Whistleblower Protections for Contractor Employees," provides that an employee of a Defense contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress or an authorized official of an agency or the Department of Justice information relating to a substantial violation of law related to a contract.

U.S. Office of Special Counsel (OSC)

Pursuant to 5 U.S.C. § 1214, the U.S. Office of Special Counsel (OSC) has jurisdiction over prohibited personnel practices committed against most employees or applicants for employment in Executive Branch agencies including the Department of Defense. Current and former federal employees and applicants for federal employment may report suspected prohibited personnel practices to the OSC. The matter will be investigated, and if there is sufficient evidence to prove a violation, the OSC can seek corrective action, disciplinary action, or both. OSC has determined that a federal employee or applicant for employment engages in whistleblowing when the individual discloses to the Special Counsel or an Inspector General or comparable agency official (or to others, except when disclosure is barred by law, or by Executive Order to avoid harm to the national defense or foreign affairs) information which the individual reasonably believes evidences the following types of wrongdoing: a violation of law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

While OSC has broad jurisdiction, it has no jurisdiction over prohibited personnel practices (including reprisal for whistleblowing) committed against employees of the Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, and certain other intelligence agencies excluded by the President, (see 5 U.S.C. §2302(a)(2)(C)(ii)).

Protections Available for Intelligence and Counterintelligence Personnel

For civilian employees of intelligence agencies who are exempted from OSC jurisdiction, Title 5 states that the heads of agencies should implement internal policies regarding merit systems principles and whistleblower reprisal protections. Specifically, these agencies are required to use existing authorities to take any action, "including the issuance of rules, regulations, or directives; which is consistent with the provisions of [title 5] and which the President or the head of the agency ... determines is necessary to ensure that personnel management is based on and embodies the merit system principles." (5 U.S.C. 2301(c))

DoD Regulation 5240.1-R, "Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons" (December 11, 1982), requires that the heads of DoD agencies that contain intelligence components shall ensure that no adverse action is taken against employees that report a "questionable activity" (defined as "any conduct that constitutes, or is related to, an intelligence activity that may violate the law, any Executive order or Presidential directive . . . or applicable DoD policy.") [See, DoD Regulation 5240.1-R, Procedure 14, "Employee Conduct," and Procedure 15 "Identifying, Investigating and Reporting Questionable Activities."]

The Assistant to the Secretary of Defense for Intelligence Oversight (ATSD I/O) administers this regulation. In discussions with the staff of the ATSD I/O, we were informed that very few of the complaints filed by DoD employees involved in intelligence and counterintelligence activities have included allegations of reprisal for whistleblowing activities.

Intelligence Community Whistleblower Protection Act of 1998

One statute that is often confused as providing protection from reprisal for whistleblowing is the Intelligence Community Whistleblower Protection Act of 1998 (ICWPA), enacted as part of the Intelligence Authorization Act for FY 1999 and which amended the Inspector General Act of 1978, 5 U.S.C. App. § 8H .

Despite its title, the ICWPA does not provide statutory protection from reprisal for whistleblowing for employees of the intelligence community. The name "Intelligence Community Whistleblower Protection

Act" is a misnomer; more properly, the ICWPA is a statute protecting communications of classified information to the Congress from executive branch employees engaged in intelligence and counterintelligence activity.

ICWPA applies only to employees of, and military personnel assigned to, the four DoD intelligence agencies: the Defense Intelligence Agency (DIA), National Geospatial-Intelligence Agency (NGA), the National Reconnaissance Office (NRO) and the National Security Agency (NSA). The ICWPA does not apply to intelligence or counterintelligence activities of the Military Services, Unified Commands or the Office of the Secretary of Defense. As an example, an intelligence analyst working for the Department of the Army would not have recourse to this statute.

The ICWPA may be used when an employee wants to communicate with the Congress, and:

- The complaint/information involves classified material;
- The employee does not want agency management to know the source of classified complaint/information or does not believe management will transmit it to Congress.

Not all disclosures are germane to the ICWPA. It is limited to complaints of "urgent concern." While the ICWPA has no "whistleblower protection" clause, it does define as an "urgent concern," instances of violation of Section 7(c) of the IG Act which prohibits the act or threat of reprisal against those who complain/disclose information to an IG. OIG DoD will conduct an appropriate inquiry in these instances to ensure that Section 7(c) was not violated. Only three complaints filed under the auspices of the ICWPA have been made to our office since 1998, and none involved the suspension or revocation of a security clearance.

III. Investigation of Complaints of Reprisal For Whistleblowing

Currently, within the DoD OIG, two Directorates are responsible for conducting and overseeing investigations of complaints that military personnel or civilian employees suffered reprisal for making a disclosure protected by applicable statute. The Military Reprisal Investigations

Directorate has conducted such investigations for over twenty years. Additionally, in 2003 we established a separate Civilian Reprisal Investigations Directorate to examine the role the DoD OIG should play in investigating allegations of reprisal made by civilian appropriated fund employees. Establishing the proper role and appropriate staffing for the Directorate is an ongoing process as we seek to determine the best utilization of limited resources. A brief description of each Directorate follows.

Military Reprisal Investigations Directorate (MRI)

The Military Reprisal Investigations (MRI) Directorate conducts and oversees investigations of reprisal complaints submitted under three whistleblower protection statutes. For over 20 years, the DoD OIG has addressed complaints of whistleblower reprisal submitted by members of the Armed Forces, nonappropriated fund employees (employees of the military exchanges, recreational facilities, etc.) and employees of Defense contractors. Although the Military Department IGs receive and investigate about 75% of reprisal complaints made by military members, MRI has the statutory responsibility to oversee these investigations and approve the findings. In addition, MRI investigates all reprisal complaints submitted by NAF and Defense contractor employees. The number of reprisal complaints received from military members, NAF and Defense contractor employees has steadily increased from under 20 complaints in FY 1991 to 552 complaints in FY 2005. Currently MRI has a staff of 17 administrative investigators.

MRI has developed efficient procedures to conduct preliminary inquiries and investigations to ensure that all whistleblower reprisal complaints are thoroughly addressed, and in a timely manner. The Military IGs have established similar procedures. MRI works closely with the Military IGs on all aspects of the investigative process.

The preliminary inquiry entails an in-depth interview with the complainant, followed by fact-finding and analysis of available documents and evidence. The investigator determines whether the allegations meet the criteria for protection under the governing statue. The investigator then writes a Report of Preliminary Inquiry that documents the answers to the following three questions:

- Did the complainant make a communication protected by statute?

- Was an unfavorable action subsequently taken or withheld?

- Was the management official aware of the communication before taking the action against the complainant?

The investigator presents the results of the preliminary inquiry to a Complaint Review Committee, comprised of the five senior MRI managers. If the MRI Complaint Review Committee determines that sufficient evidence exists to pursue a full investigation of the reprisal allegations, MRI will conduct an on-site investigation that includes sworn interviews with the complainant, the management officials responsible for the unfavorable personnel actions taken, and any other witnesses with relevant knowledge.

In a full investigation, a fourth question must be answered: Would the responsible management official have taken the same action absent the complainant's protected communication? We analyze the evidence and form a conclusion based on a preponderance of the evidence.

Civilian Reprisal Investigations Directorate (CRI)

Under the Inspector General Act of 1978 (as amended by Public Law 97-252), the DoD OIG is given broad authority to investigate complaints by DoD employees concerning violations of law, rules, or regulations, or concerning mismanagement, gross waste of funds, or abuse of authority (see §7(a), IG Act). Congress also mandated that DoD employee shall not take reprisal action against an employee who makes such a complaint (see §7(c), IG Act). Under this broad grant of authority, the DoD OIG has authority to investigate allegations of reprisal for whistleblowing received from civilian appropriated fund employees, both employees covered by OSC's protections and those excluded from such coverage (i.e., members of intelligence community).

CRI was established in 2003 to provide an alternate means by which DoD civilian appropriated fund employees could seek protection from reprisal. This is done in coordination with the U.S. Special Counsel. CRI was established with the goal of providing limited protection for DoD

appropriated fund employees, who also have recourse to OSC, and DoD intelligence and counterintelligence employees, who do not.

There are several areas where CRI has assisted DoD appropriated fund employees. First, CRI provides the information and assistance for employees who seek to file a complaint for alleged reprisal or a disclosure of a violation of law, rule and/or regulation. Second, CRI is available to assist DoD intelligence and counterintelligence employees who seek redress for alleged reprisal, where OSC has no jurisdiction. Third, CRI is assists the Inspector General in completing his statutory obligations under the ICWPA to inform Congress of matters of "urgent concern," (see §8H, IG Act). Additionally, CRI is our in-house advocate for the Section 2302(c) Certification Program administered by OSC.

CRI supports all categories of DoD civilian appropriated fund employees alleging reprisal for making a disclosure by statute or internal regulation. Since its establishment, CRI's efforts have concentrated in advising whistleblowers seeking protection from the Office of Special Counsel and aiding whistleblowers in making a disclosure alleging a violation of law, rule and/or regulation. CRI has also investigated select complaints under the authority of Sections 7(a) and (c) of the IG Act.

Proposed DoD Civilian Whistleblower Instruction

The creation of CRI allows the DoD OIG to further publicize the message that whistleblowers will be protected from reprisal. Additionally, it currently provides resources to investigate a limited number of individual claims of reprisal for whistleblowing. Last month, I submitted a Department of Defense Instruction for formal coordination within DoD. This instruction will govern the operations of CRI and formalize the procedures by which CRI can assist DoD employees claiming reprisal for whistleblowing activities. Significantly, this instruction will extend whistleblower protections to employees of the DoD intelligence community who are not provided statutory protection by OSC.

With regards to protection for employees in intelligence or counter-intelligence positions, who are not protected by OSC, CRI chose as its first investigation a matter involving a protected disclosure into alleged intelligence activity against the United States at the Defense Intelligence Agency. This was a joint investigation by CRI and the Office of the

Inspector General at the National Security Agency (NSA). The effort provides a model for close cooperation between the DoD intelligence community and the DoD IG.

This concludes my statement. Ms. Deese, Mr. Meyer and I would be happy to respond to your questions.

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