Essay

Interfering with the Watchman: OLC Disruption of the Statutory Whistleblower Process

*Christine L. Coogle**

Abstract

In September 2019, the Department of Justice Office of Legal Counsel ("OLC") issued an opinion concluding that the Director of National Intelligence had the authority to withhold from Congress an intelligence-community whistleblower complaint that alleged an abuse of power by the President and misconduct on the part of several of his advisors. The opinion purported to override a determination by the independent intelligence-community inspector general, based on OLC's interpretation of the statutes that set forth the process for intelligence-community officials to disclose executive misconduct to the congressional intelligence committees. This Essay examines the relevant whistleblower statutes and demonstrates that OLC's interference in the whistleblower-disclosure process was contrary to the carefully prescribed statutory framework because it undercut the independent authority of the inspector general, which is crucial to the statutory objective of encouraging government whistleblowers. The Essay then looks to two previous OLC opinions in the whistleblower context to assess whether they provide any support for OLC's actions in 2019. Far from bolstering OLC's 2019 opinion, the earlier OLC whistleblower opinions and the congressional reactions to those opinions underscore precisely how the 2019 opinion, in light of the relevant statutory framework, was impermissible. In disregarding the independent au-

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thority of the inspector general, OLC destabilized the statutory disclosure process and directly undermined the core purpose of the intelligence-community whistleblower statute.

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INTRODUCTION

After an opinion by the Department of Justice ("DOJ") Office of Legal Counsel ("OLC") led to the withholding of an intelligence-community whistleblower complaint from Congress in late summer 2019,[1] one of the many questions that arose was whether and to what extent that OLC opinion exceeded OLC's statutory authority.[2] While the public focused on the factual details and political implications of the complaint's allegations, as gradually revealed through press reports,[3] government officials, congressmembers, and others also debated the permissibility and merits of OLC's opinion.[4] Many legal scholars took issue with OLC's statutory interpretation, and lawmakers and government officials worried about the damaging effects that OLC's interference might have on the whistleblower disclosure process.[5]

Through an examination of the applicable whistleblower statutes, this Essay illustrates why OLC's involvement in the so-called Ukraine whistleblower affair was improper and how OLC's interference in the matter undermined the principles underlying those laws.[6] This Essay then demonstrates how two previous OLC opinions in analogous contexts, which at first blush appear to provide support for OLC's Ukraine whistleblower opinion, instead shed further light on why OLC's interference was impermissible. By disrupting a statutorily protected disclosure process, OLC diminished the authority of an inde-

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1 *See* "Urgent Concern" Determination by the Inspector General of the Intelligence Community, 43 Op. O.L.C., slip op. at 1 (Sept. 3, 2019).

2 *See* Robert S. Litt, *Unpacking the Intelligence Community Whistleblower Complaint*, LAWFARE (Sept. 17, 2019, 12:37 PM), https://www.lawfareblog.com/unpacking-intelligence-community-whistleblower-complaint [https://perma.cc/89U5-SH2G].

3 *See, e.g.*, Greg Miller et al., *Trump's Communications with Foreign Leader Are Part of Whistleblower Complaint That Spurred Standoff Between Spy Chief and Congress, Former Officials Say*, WASH. POST (Sept. 18, 2019, 8:56 PM), https://www.washingtonpost.com/national-security/trumps-communications-with-foreign-leader-are-part-of-whistleblower-complaint-that-spurred-standoff-between-spy-chief-and-congress-former-officials-say/2019/09/18/df651aa2-da60-11e9-bfb1-849887369476_story.html [https://perma.cc/K7YP-RCZ9].

4 *See, e.g.*, Letter from Council of the Inspectors Gen. on Integrity & Efficiency to Steven A. Engel, Assistant Attorney Gen., U.S. Dep't of Justice (Oct. 22, 2019), https://assets.documentcloud.org/documents/6523365/CIGIE-Letter-to-OLC-Whistleblower-Disclosure.pdf [https://perma.cc/56EF-XQF8] [hereinafter CIGIE Letter].

5 *See, e.g.*, Scott R. Anderson et al., *The Hearing and the Whistleblower Complaint: L'Affaire Ukrainienne Continues*, LAWFARE (Sept. 26, 2019, 8:47 PM), https://www.lawfareblog.com/hearing-and-whistleblower-complaint-laffaire-ukrainienne-continues [https://perma.cc/SF89-DEYR]; Litt, *supra* note 2.

6 This analysis focuses on the permissibility of OLC's Ukraine whistleblower opinion under the relevant statutes only; it does not directly address the constitutional questions at issue, nor does it reach a conclusion regarding the merits of OLC's substantive determinations regarding the Ukraine whistleblower complaint.

pendent executive official and impeded the ability of future whistleblowers to divulge certain kinds of misconduct to Congress.

Over the last four decades, in recognition of the crucial role whistleblowers play in addressing government waste, fraud, and abuse, Congress has established and strengthened statutory protections and processes for disclosure of government misconduct.[7] On two occasions in the 1990s, OLC issued opinions interpreting provisions of those whistleblower statutes in response to questions from the Central Intelligence Agency ("CIA") and the Federal Aviation Authority ("FAA"), respectively.[8] In both instances, OLC narrowly interpreted the relevant provisions, exposing gaps in whistleblower protection that Congress rushed to fill through responsive legislation.[9]

And yet, far from providing historical support for OLC's action in the 2019 Ukraine whistleblower matter, the content and contexts of those earlier opinions further reveal how OLC's 2019 involvement was improper under the relevant statutory scheme in a way the earlier opinions were not. OLC's 2019 opinion did not reveal statutory gaps so much as rupture the protected avenue for lawful disclosure that the intelligence-community whistleblower statutes created, by overriding the authority of the independent inspector general and giving more political actors—specifically, the Director of National Intelligence ("DNI")—the power to prevent lawful disclosures of executive branch misconduct to Congress.

In Part I, this Essay describes the statutory frameworks for whistleblower complaints and allegations of reprisal, focusing in particular on the provisions interpreted in OLC's whistleblower opinions. Part II summarizes the events of late summer 2019 when the Ukraine whistleblower[10] alleged improper or illegal actions surrounding a July 2019 call between President Donald Trump and a foreign leader. That summary informs an explanation of the inspector general's determinations regarding that whistleblower complaint and an analysis of the OLC opinion that purported to override those determinations. Part III examines the two 1990s opinions in which OLC interpreted other

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7 *See infra* Part I.

8 *See infra* Part III.

9 *See infra* Part III.

10 The whistleblower's identity remains officially undisclosed. *See* Isaac Stanley-Becker & Craig Timberg, *Trump's Allies Turned to Online Campaign in Quest to Unmask Ukraine Whistleblower*, WASH. POST (Nov. 7, 2019, 10:41 PM), https://www.washingtonpost.com/politics/2019/11/07/trumps-allies-turned-online-campaign-quest-unmask-ukraine-whistleblower [https://perma.cc/X4XT-3LDF] ("The whistleblower's name has been kept confidential by U.S. officials, in line with federal law designed to prevent retaliation.").

federal whistleblower statutes and describes the subsequent congressional remedies for the statutory gaps those opinions exposed. Finally, Part IV analyzes how OLC's 2019 opinion, regardless of its substantive merit, improperly disrupted the relevant statutory framework and how the two earlier OLC whistleblower opinions underscore the impermissibility of the 2019 opinion.

I. The Statutory Framework for Federal Government Whistleblowers

To demonstrate how OLC's 2019 whistleblower opinion disrupted the underlying statutory framework in a way that its 1990s opinions did not, it is necessary to carefully examine the structures and contexts of the relevant statutes. Congress enacted, and subsequently strengthened, laws to protect government whistleblowers that relied on independent officials for disclosure, investigation, and review processes. To that end, statutes including the Civil Service Reform Act of 1978 ("CSRA")[11] and Whistleblower Protection Act of 1989 ("WPA")[12] established independent administrative bodies for receipt and review of allegations of reprisal against those who disclose government misconduct. Intelligence-community employees were excluded from those earlier statutory protections, but Congress later enacted the Intelligence Community Whistleblower Protection Act of 1988 ("ICWPA"),[13] which created a protected process for disclosure of government misconduct in the intelligence sphere, and the Intelligence Authorization Act ("IAA") for Fiscal Year 2010,[14] which created the independent inspector general of the intelligence community and provided an additional avenue for disclosure.

A. The Purpose of Protecting Government Whistleblowers

Federal whistleblower statutes serve the dual purpose of incentivizing federal employees to reveal when they are aware of "illegal or improper" conduct by government actors and protecting employees from retaliation for making such disclosures.[15] Congress recognizes that providing for the disclosure of such information is critical to en-

11 Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.).

12 Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified as amended in scattered sections of 5 U.S.C.).

13 Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, §§ 701–702, 112 Stat. 2396, 2413 (1998) (codified at 5 U.S.C. app. 3 § 8H (2018)).

14 50 U.S.C. § 3033 (2018).

15 S. Rep. No. 95-969, at 8 (1978).

suring that the federal government is effective[16] and "honest and efficient."[17] In recent years, it has become even more important that federal employees who know of problems are able to inform others of those problems without fearing retaliation or harassment, especially in the area of national security.[18]

Congress has increasingly emphasized the importance of protecting against institutional misconduct, based largely on public-minded justifications for whistleblower protections[19]—to protect the public welfare, reveal threats to civil liberties, and preserve the public interest against institutional misconduct.[20] The statutes achieve this largely through independent officers who process whistleblower complaints and allegations. Those officers are intended to operate without influence or control by the President or other executive branch officers—including within DOJ—whose perspectives and incentives may be at odds with whistleblowers' goals.[21]

B. The Civil Service Reform Act and Whistleblower Protection Act

Protection of federal employee whistleblowers originated with the CSRA,[22] which aimed both to encourage disclosures of "illegality, waste, and corruption" in government and to protect employees who make such disclosures from reprisal.[23] The WPA,[24] which unanimously passed in 1989, amended the CSRA to fortify existing and create new protections.[25] Those statutory protections were further strengthened in 1994[26] and again in 2012.[27]

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16 *Id.*

17 S. REP. NO. 112-155, at 1 (2012).

18 *See id.*; *see also* Open Letter from More Than 100 National Security Officials to the American People (Oct. 7, 2019), https://www.justsecurity.org/wp-content/uploads/2019/10/Updated-Whistleblower-Letter-1.pdf [https://perma.cc/8D9X-874B] ("A responsible whistleblower makes all Americans safer by ensuring that serious wrongdoing can be investigated and addressed, thus advancing the cause of national security . . . .").

19 Congress has continually sought to increase whistleblower protections to insulate individual whistleblowers from executive branch retaliation. *See infra* Section I.B.

20 *See* ROBERT C. VAUGHN, THE SUCCESSES AND FAILURES OF WHISTLEBLOWER LAWS 95 (2012).

21 *See infra* Sections I.C, III.A.

22 Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.).

23 Robert J. McCarthy, *Blowing in the Wind: Answers for Federal Whistleblowers*, 3 WM. & MARY POL'Y REV. 184, 185 (2012). *See generally* VAUGHN, *supra* note 20, at 91 (describing the CSRA).

24 Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified as amended in scattered sections of 5 U.S.C.).

25 *See* S. REP. NO. 112-155, at 3 (2012).

26 *See* Pub. L. No. 103-424, 108 Stat. 4361 (1994) (amending scattered sections of 5 U.S.C.).

The statute established two distinct, independent executive bodies tasked with protecting whistleblowers: the Office of Special Counsel ("OSC") and the quasi-judicial Merit Systems Protection Board ("MSPB").[28] When federal employees under the WPA's protection allege that they have been subjected to retaliatory personnel actions, they may report their allegations to the OSC.[29] Such retaliatory personnel actions, as defined in section 2302(a) of the WPA,[30] are prohibited when taken in reaction to an employee's disclosure of government abuse or mismanagement.[31] The law prohibits such retaliatory actions when taken against employees of most executive agencies but specifically excludes employees of intelligence agencies.[32]

The OSC is tasked with receiving and investigating employees' allegations and recommending corrective actions.[33] If the relevant agency fails to correct the prohibited action on its own, the OSC may petition the MSPB, which adjudicates those cases.[34] Ultimately, any employee who receives an unfavorable MSPB decision may seek judicial review of that decision.[35] These statutory processes for whistleblower protection rely on the independence of the protective bodies, which is achieved in part by their establishment outside of any existing executive agency.[36] This ensures that they operate without influence from, for example, agency heads, which may themselves be subject to investigation or corrective recommendations.[37]

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27 Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, § 101(b)(2)(C), 126 Stat. 1465, 1466 (2012) (amending 5 U.S.C. § 2302(f)(1)–(2)). Some of these amendments were enacted explicitly to reverse actions of the Federal Circuit where it had "wrongly accorded a narrow definition" to protected disclosures or otherwise undermined Congress's intended protections. *See, e.g.*, S. REP. NO. 112-155, at 1–2; *see also infra* text accompanying notes 205–08 (discussing McCabe v. Dep't of the Air Force, 62 F.3d 1433, No. 94-3463, 1995 WL 469464 (Fed. Cir. 1995) (per curiam) (unpublished table decision)).

28 *See* 5 U.S.C. §§ 1201–1206, 1211–1219 (2018); S. REP. NO. 95-969, at 2 (1978); *see also* 135 CONG. REC. 5032 (Mar. 21, 1989) (statement of Rep. Gerry Sikorski) (describing the OSC as "a separate, distinct, and independent entity" designed to protect executive branch employees, in particular whistleblowers, from prohibited personnel practices).

29 *See* 5 U.S.C. § 1214.

30 *See id.* § 2302(a)(2)(A) (listing several specific personnel actions and a catch-all provision to cover "any other significant change in duties, responsibilities, or working conditions").

31 *See id.* § 2302(b)(8).

32 *Id.* § 2302(a)(2)(A), (C) (excluding employees of the Federal Bureau of Investigation, CIA, Defense Intelligence Agency, National Geospatial-Intelligence Agency, National Security Agency, Office of the Director of National Intelligence, and National Reconnaissance Office).

33 *See id.* § 1214.

34 *See id.* § 1214(b)(2)(C).

35 *See id.* § 1214(c).

36 *See id.* §§ 1201, 1211; S. REP. NO. 95-969, at 6–7 (1978).

37 Both the special counsel and members of the MSPB are subject to presidential appoint-

The statute does not specify lawful recipients of disclosures, so a protected employee may blow the whistle to any member of the public or government as long as the disclosure is not otherwise prohibited by law or by executive order, for national-security or foreign-policy reasons.[38] The House reiterated this intentionally broad scope in its report on the 1994 amendments, emphasizing that a "cornerstone" of the WPA is that it "protects 'any' disclosure evidencing a reasonable belief of specified misconduct," and "'any' means '*any*.'"[39] The only limitations are for classified information or material that may not be released by law, and employees may nevertheless divulge such information as long as they do so "through confidential channels to maintain protection."[40]

C. Intelligence-Community Whistleblower Protection

When Congress enacted laws to encourage intelligence-community whistleblowers, it focused on establishing a lawful and independent process through which intelligence-community employees may divulge information, rather than on after-the-fact protection like that found in the WPA. This more narrowly construed process for disclosure is intended to incentivize employees who operate in even the most secretive corners of the executive branch to disclose misconduct without jeopardizing the nation's security.[41] A core element of this process is the independent nature of the officials vested with authority over intelligence-community whistleblower complaints—i.e., the inspectors general. That independence prevents interference by other executive branch officials and encourages employees to expose government wrongdoing, through a process for disclosure to designated members of Congress, rather than to other executive officials or the public.[42]

Two interrelated statutes establish the process by which agency employees can transmit allegations involving classified information to Congress: the ICWPA[43] and relevant provisions of the 2010 IAA.[44]

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ment and Senate confirmation, and the statute provides removal protections, which bolster their ability to operate independently. 5 U.S.C. §§ 1201, 1211. The law also requires minimum qualifications for appointment and prohibits the special counsel and MSPB members from holding another federal government office. *See id.* §§ 1201–1202, 1211.

38 *See id.* § 2302(a)(2).

39 H.R. REP. NO. 103-769, at 18 (1994) (emphasis added).

40 *Id.*; *see* 5 U.S.C. § 2302(b)(8)(B).

41 *See* Thomas Newcomb, *In from the Cold: The Intelligence Community Whistleblower Protection Act of 1998*, 53 ADMIN. L. REV. 1235, 1264–65 (2001).

42 *See id.*

43 5 U.S.C. app. 3 § 8H.

The ICWPA describes the disclosure procedure and defines the scope of its coverage.[45] The 2010 IAA provides an additional avenue for that procedure by vesting an inspector general for the whole intelligence community with the same authority over disclosures as other intelligence-agency inspectors general wield within their respective agencies.[46]

This statutory disclosure process relies on the determinations of the independent inspectors general, acting under the partial supervision of the agency heads but without interference by any executive officials.[47] Because the ICWPA and 2010 IAA, unlike the WPA, do not provide express protection for whistleblowers—aside from specifying that reprisal for whistleblowing is itself an "urgent concern" that may be lawfully disclosed—the independence of the statutory process under the inspector general's authority is crucial to achieve the goal of incentivizing intelligence-community employees to come forward with allegations.[48] As explained below, that is why, when OLC interfered with the independent inspector general's role, it collapsed the entire statutory disclosure process.[49]

1. The Intelligence Community Whistleblower Protection Act

In the ICWPA, Congress sought to strike the right balance between ensuring the secrecy necessary for national security and allowing for the disclosure of illegality or abuse that risks undermining national security.[50] Congress established the ICWPA statutory procedure, in a compromise with the executive branch,[51] to encourage intelligence-community employees to lawfully divulge information about misconduct by providing a way for those employees to report to Con-

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44 50 U.S.C. § 3033 (2018).

45 *See* 5 U.S.C. app. 3 § 8H.

46 *See* 50 U.S.C. § 3033.

47 *See id.*; 5 U.S.C. app. 3 § 8H.

48 Kel McClanahan, *Q&A on Whistleblower Complaint Being Withheld from Congressional Intelligence Committees*, JUST SECURITY (Sept. 17, 2019, 11:30 PM), https://www.justsecurity.org/66211/qa-on-whistleblower-complaint-being-withheld-from-congressional-intelligence-committees [https://perma.cc/DB6J-MNCD] ("The ICWPA holds the dubious distinction of being the only 'Whistleblower Protection Act' that doesn't actually include any whistleblower protections."); *see also* S. REP. NO. 112-155, at 2 (2012) ("[T]he lack of remedies under current law . . . for whistleblowers who face retaliation in the form of withdrawal of the employee's security clearance leaves unprotected those who are in a position to disclose wrongdoing that directly affects our national security.").

49 *See infra* Section II.B, Part IV.

50 *See* Newcomb, *supra* note 41, at 1240–66 (detailing debate between the executive and legislative branches and deliberation within Congress).

51 *See infra* Section III.D.

gress while safeguarding any classified information.[52] That statutory procedure relies on the independence of intelligence-agency inspectors general to ensure that a credible whistleblower complaint regarding an urgent concern may be swiftly transmitted to the congressional intelligence committees without undue interference from executive officials who might otherwise wish to prevent the disclosures.[53]

Under the ICWPA, an intelligence-community employee who wishes to report a matter of "urgent concern" first submits a complaint to the inspector general of the relevant intelligence agency.[54] The inspector general determines whether the complaint appears credible, and within 14 days the inspector general must transmit the complaint and the determination to the head of the agency.[55] The agency head "shall" forward that complaint, along with any additional comments, to the congressional intelligence committees (House Permanent Select Committee on Intelligence ("HPSCI") and Senate Select Committee on Intelligence) within seven days.[56]

If the inspector general does not find the complaint credible or does not accurately transmit it to the agency head, the whistleblower may then submit the complaint directly to one or both of the congressional intelligence committees.[57] Before contacting Congress, the whistleblower must first give notice to the inspector general and receive direction from the agency head regarding the direct transmission of the complaint to Congress.[58]

The statute defines "urgent concern" broadly as a "serious or flagrant problem, abuse, [or] violation" of law or regulation or a "deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information"; a "false statement to" or "willful withholding from Congress" on material issues; or any retaliatory act or threat in response to a disclosure under the statute.[59] The only matters specifically excluded are "differences of opin-

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52 Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, § 701(b)(6), 112 Stat. 2396, 2414 (1998) (codified at 5 U.S.C. app. 3 § 8H note (2018)).

53 *See* PAUL C. LIGHT, MONITORING GOVERNMENT 24–25 (1993) (explaining how agency inspectors general are "given protection against any change by the department or agency, or the [P]resident.").

54 5 U.S.C. app. 3 § 8H(h)(i)(1).

55 *Id.* § 8H(b).

56 *Id.* § 8H(c).

57 *See id.* § 8H(d)(1).

58 *Id.* § 8H(d)(2).

59 *Id.* § 8H(h)(i)(1)(A); *accord* 50 U.S.C. § 3517(d)(5)(G)(i) (2018) (applying the same definition to the CIA inspector general).

ions concerning public policy matters."[60] The definition of "urgent concern" thus encompasses a wide range of potential misconduct, aimed at ensuring that Congress receives any pertinent information requiring oversight and does not receive any false information that might hinder its oversight of the executive branch.

2. The 2010 Intelligence Authorization Act

In 2009, Congress established an intelligence-community inspector general ("ICIG") to serve as a watchman for all intelligence agencies and to receive classified whistleblower complaints from any intelligence-community employee.[61] The statute provided those whistleblowers with a new avenue for disclosure—in addition to each individual agency's inspector general—and maintained the existing disclosure process established in the ICWPA.[62]

The modern position of agency inspector general has existed for more than four decades, and inspectors general have been vested with broad statutory powers to carry out their mandate of holding the executive branch accountable to Congress and to the public.[63] Inspectors general are quasi-independent officers because they remain accountable to both Congress and the President and are appointed "solely on the basis of integrity and demonstrated ability," rather than "political affiliation."[64] Their independence and dual accountability make them an ideal medium for whistleblower disclosures—particularly those involving sensitive information—because they are designed to operate within the executive branch but without interference from other executive officials.[65] It is for that reason that Congress established and strengthened offices of inspectors general along with the statutory whistleblower protections.[66]

Although individual intelligence agencies have their own respective inspectors general, the 2010 IAA created the independent Office of the Inspector General of the Intelligence Community, embedded

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60 5 U.S.C. app. 3 § 8H(h)(1)(A).

61 *See* Intelligence Authorization Act for Fiscal Year 2010, Pub. L. No. 111-259, § 405, 124 Stat. 2654, 2709 (codified at 50 U.S.C. § 3033).

62 *See id.*; Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, § 702, 112 Stat. 2396, 2414–17.

63 LIGHT, *supra* note 53, at 23.

64 5 U.S.C. app. 3 § 3(a); *see* LIGHT, *supra* note 53, at 3, 23–24.

65 *See* LIGHT, *supra* note 53, at 3.

66 For example, the Inspector General Act of 1978 passed with the CSRA and installed inspectors general in 13 additional administrative agencies. Pub. L. No. 95-452, 92 Stat. 1101 (codified at 5 U.S.C. app. 3 § 3).

within the Office of the Director of National Intelligence ("ODNI"),[67] to "improve accountability and oversight" of the intelligence community as a whole.[68] Although the ICIG operates under the supervision of the DNI, the statute creates a clear responsibility for the ICIG "to report directly to Congress."[69] This separation from executive branch accountability reinforces the independence of the ICIG, on which the whistleblower-disclosure process relies.

The ICIG's responsibility to Congress is reflected in the statutory process for managing disputes between the ICIG and the DNI.[70] In certain instances, the ICIG is directed to immediately notify and submit a report to the congressional intelligence committees, including instances in which the ICIG and DNI are unable to resolve disagreements regarding the ICIG's responsibilities and where the ICIG is unable to acquire important documents for an investigation or review.[71] The only situation in which the DNI is permitted to prevent an ICIG investigation or review is when the DNI determines it absolutely necessary "to protect vital national security interests."[72]

The 2010 IAA process for whistleblowers to lawfully report matters of urgent concern to the ICIG is nearly identical to that of the ICWPA.[73] These two statutory avenues exist in tandem, with only two distinctions.[74] First, under the ICWPA, whistleblowers submit complaints to their respective agency inspectors general, while under the 2010 IAA, whistleblowers may submit complaints to the ICIG.[75] Second, the definition of "urgent concern" differs slightly from that in the ICWPA, in that it includes a "deficiency relating to the funding, administration, or operation of an intelligence activity *within the responsibility and authority of the Director of National Intelligence* involving classified information."[76] This distinction may reflect the difference in

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67 The ODNI was established in 2004. *See* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1011, 118 Stat. 3638, 3643, 3655–56 (codified at 50 U.S.C. § 3025 (2018)).

68 H.R. REP. NO. 111-186, at 41–42 (2009).

69 *Id.* at 43. The DNI is the "head of the intelligence community" and the "principal [intelligence] adviser to the President." 50 U.S.C. § 3023(b).

70 *See generally* MICHAEL E. DEVINE, CONG. RESEARCH SERV., R45345, INTELLIGENCE COMMUNITY WHISTLEBLOWER PROTECTIONS 5–6 (2019) (describing "means for addressing disagreements" between the ICIG and DNI).

71 50 U.S.C. § 3033(k)(3)(A).

72 *Id.* § 3033(f)(1).

73 *See id.* § 3033(k); 5 U.S.C. app. 3 § 8H (2018).

74 *See* 50 U.S.C. § 3033(k); 5 U.S.C. app. 3 § 8H.

75 *See* 50 U.S.C. § 3033(k); 5 U.S.C. app. 3 § 8H.

76 *Compare* 50 U.S.C. § 3033(k)(5)(G)(i) (emphasis on added language), *with* 5 U.S.C.

statutory focus—that the 2010 IAA relates only to the ICIG,[77] whereas the ICWPA covers all intelligence agencies[78]—but OLC focused heavily on this specification in its 2019 Ukraine whistleblower opinion narrowly interpreting the scope of "urgent concern," notwithstanding the contrary assertions of the independent ICIG.[79]

II. The Ukraine Whistleblower and OLC's "Urgent Concern" Opinion

A decade after the 2010 IAA was enacted, OLC issued an opinion that overrode the ICIG's determination that the Ukraine whistleblower's complaint was on a matter of urgent concern and thus must be transmitted to the congressional intelligence committees.[80] That complaint held explosive allegations of misconduct that led directly to the impeachment of the President and implicated high-level executive officials in multiple agencies.[81] OLC's opinion asserted that the DNI was nonetheless permitted to withhold the complaint from the congressional intelligence committees.[82] It was only through the ICIG's disclosure of the complaint's existence and the subsequent congressional pressure applied to the acting DNI that the allegations became known to Congress and the public.[83]

This politically driven process eventually brought the Ukraine whistleblower's allegations into the light, but it is far from the intended statutory process. By purporting to give the DNI the authority to supersede a decision that the ICIG had made pursuant to the statutorily prescribed procedure, OLC defied the protected disclosure process that relies on the independence of the ICIG, particularly concerning politically inconvenient allegations of misconduct.[84]

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app. 3 § 8H(h)(i)(1)(A) (defining "urgent concern" as "[a] deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information.").

77 *See* 50 U.S.C. § 3033.

78 *See* 5 U.S.C. app. 3 § 8H(a)(i)(1).

79 *See generally* "Urgent Concern" Determination by the Inspector General of the Intelligence Community, 43 Op. O.L.C., slip op. at 1 (Sept. 3, 2019).

80 *See id.*

81 *See* Nicholas Fandos & Michael D. Shear, *Trump Impeached for Abuse of Power and Obstruction of Congress*, N.Y. Times (Jan. 16, 2020), https://www.nytimes.com/2019/12/18/us/politics/trump-impeached.html [https://perma.cc/NGC4-W2EE].

82 *See "Urgent Concern" Determination*, 43 Op. O.L.C., slip op. at 1.

83 *See* Viola Gienger & Ryan Goodman, *Timeline: Trump, Giuliani, Biden, and Ukrainegate (Updated)*, Just Security (Jan. 31, 2020), https://www.justsecurity.org/66271/timeline-trump-giuliani-bidens-and-ukrainegate [https://perma.cc/8NNV-LS34].

84 *See infra* Part IV.

A. The Complaint

On August 12, 2019, an anonymous intelligence-community employee who had been on detail to the White House filed a complaint with the ICIG, Michael Atkinson, alleging misconduct by President Trump and other White House officials.[85] Among other things, the complaint alleged that on July 25, the President had "advance[d] his personal interests" on a call with the President of Ukraine, Volodymyr Zelensky, by pressuring him to take specific actions that might aid Trump's bid for reelection.[86] The complaint alleged White House efforts to restrict access to records of that call,[87] and it described various circumstances leading up to the call, including that the President had ordered the suspension of "all U.S. security assistance to Ukraine."[88] It was later reported that the President had indeed put a hold on about "$400 million in military aid for Ukraine at least a week before" the July 25 call with President Zelensky.[89]

On September 9, ICIG Atkinson formally notified HPSCI that he had received a whistleblower complaint that he had determined was credible and satisfied the statutory definition of "urgent concern."[90] He explained that the acting DNI, Joseph Maguire, had nevertheless concluded that the whistleblower's allegations did not satisfy the definition of "urgent concern" and that acting DNI Maguire was, in his own view, therefore not required to transmit the complaint to the congressional intelligence committees that would ordinarily receive such

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85 *See* Letter to Senator Richard Burr, Chairman, Senate Select Comm. on Intelligence, & Rep. Adam Schiff, Chairman, HPSCI (Aug. 12, 2019), https://assets.documentcloud.org/documents/6430349/20190812-Whistleblower-Complaint-Unclass.pdf [https://perma.cc/8DUR-PDG2] [hereinafter Ukraine Whistleblower Complaint]. In the ensuing weeks, the vast majority of the allegations in the complaint were confirmed by other sources. *See* Ryan Goodman & John T. Nelson, *Overwhelming Confirmation of Whistleblower Complaint: An Annotation*, JUST SECURITY (Oct. 7, 2019), https://www.justsecurity.org/66475/ukraine-ukrainegate-overwhelming-confirmation-of-whistleblower-complaint-an-annotation [https://perma.cc/ZPS7-BN5F].

86 Ukraine Whistleblower Complaint, *supra* note 85, at 2.

87 *See id.* at 3–4.

88 *Id.* app. at 2.

89 Karoun Demirjian et al., *Trump Ordered Hold on Military Aid Days Before Calling Ukrainian President, Officials Say*, WASH. POST (Sept. 23, 2019, 10:40 PM), https://www.washingtonpost.com/national-security/trump-ordered-hold-on-military-aid-days-before-calling-ukrainian-president-officials-say/2019/09/23/df93a6ca-de38-11e9-8dc8-498eabc129a0_story.html [https://perma.cc/HTZ9-HKDR].

90 Letter from Michael K. Atkinson, Inspector Gen. of the Intelligence Cmty., to Rep. Adam Schiff, Chairman, & Rep. Devin Nunes, Ranking Member, HPSCI (Sept. 9, 2019), https://intelligence.house.gov/uploadedfiles/20190909_-_ic_ig_letter_to_hpsci_on_whistleblower.pdf [https://perma.cc/FT73-U2TP] [hereinafter Atkinson Letter].

complaints.[91] The ICIG expressed his disagreement with the acting DNI's determination and emphasized the unprecedented nature of the acting DNI's actions.[92]

Upon receiving the ICIG's letter, HPSCI Chairman Adam Schiff swiftly served a subpoena on acting DNI Maguire to produce the complaint and testify.[93] The ODNI general counsel submitted a letter asserting that acting DNI Maguire had no statutory obligation to do so.[94] On September 19, the ICIG gave a classified briefing to HPSCI, even as major news outlets reported that the whistleblower's complaint (which was as yet unknown to the public) involved a presidential phone call and Ukraine.[95]

On September 25—one day after Speaker Nancy Pelosi announced an official impeachment inquiry on the basis of misconduct described in the complaint[96]—the White House released a memo summarizing the phone call underlying the whistleblower's complaint.[97] The following day, HPSCI received and released a redacted copy of the whistleblower's complaint,[98] and acting DNI Maguire publicly testified before the committee.[99]

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91 *See id.* at 2.

92 *See id.*

93 *See* Press Release, HSPCI, Chairman Schiff Issues Subpoena for Whistleblower Complaint Being Unlawfully Withheld by Acting DNI from Intelligence Committees (Sept. 13, 2019), https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=688 [https://perma.cc/STJ5-YBX6] [hereinafter Schiff Press Release].

94 Letter from Jason Klitenic, Gen. Counsel, ODNI, to Chairmen & Ranking Members of the Cong. Select Intelligence Comms. (Sept. 13, 2019), https://www.documentcloud.org/documents/6419391-Sept-13-Letter.html#document/p1 [https://perma.cc/6YVB-V3F2].

95 *See* Ellen Nakashima et al., *Whistleblower Complaint About President Trump Involves Ukraine, According to Two People Familiar with the Matter*, WASH. POST (Sept. 19, 2019, 8:04 PM), https://www.washingtonpost.com/national-security/whistleblower-complaint-about-president-trump-involves-ukraine-according-to-two-people-familiar-with-the-matter/2019/09/19/07e33f0a-daf6-11e9-bfb1-849887369476_story.html [https://perma.cc/H77M-CRGA].

96 *See* Rachael Bade et al., *Pelosi Announces Impeachment Inquiry, Says Trump's Courting of Foreign Political Help Is a 'Betrayal of National Security,'* WASH. POST (Sept. 24, 2019, 5:24 PM), https://www.washingtonpost.com/powerpost/pelosi-top-democrats-privately-discuss-creation-of-select-committee-for-impeachment/2019/09/24/af6f735a-dedf-11e9-b199-f638bf2c340f_story.html [https://perma.cc/Q2ND-DN7V].

97 *See* THE WHITE HOUSE, MEMORANDUM OF TELEPHONE CONVERSATION (2019), https://www.whitehouse.gov/wp-content/uploads/2019/09/Unclassified09.2019.pdf [https://perma.cc/7M5L-LRDJ].

98 *See* Quinta Jurecic, *House Intelligence Committee Releases Whistleblower Complaint*, LAWFARE (Sept. 26, 2019, 8:41 AM), https://www.lawfareblog.com/house-intelligence-committee-releases-whistleblower-complaint [https://perma.cc/6TEN-8UC3].

99 *See* Shane Harris et al., *Acting Intelligence Chief Maguire Defends His Handling of Whistleblower Complaint in Testimony Before Congress*, WASH. POST (Sept. 26, 2019, 6:02 PM), https://www.washingtonpost.com/national-security/intelligence-chief-maguire-will-testify-to-con

The acting DNI explained that, upon receiving the complaint, he had first consulted with the White House over his concern that much of the complaint would be covered by executive privilege, which he did not have the authority to waive.[100] His office had then consulted with OLC, because he disagreed with the ICIG's determination that the allegations in the complaint met the definition of "urgent concern" under the 2010 IAA.[101] OLC had determined that the definition had not been met and the acting DNI was not required to transmit the complaint to Congress, thereby disregarding the independent nature of the ICIG's role.[102] Relying on OLC's conclusions, the acting DNI had declined to transmit the complaint in light of executive-privilege concerns, but he testified that he had supported the ICIG's decision to notify the committees of the complaint's existence.[103] Acting DNI Maguire transmitted the redacted complaint to HPSCI on the morning of his public testimony only because his concerns regarding executive privilege were removed upon the White House's release of the readout of the call between President Trump and Ukrainian President Zelensky.[104]

B. The "Urgent Concern" Opinion and Its Aftermath

OLC's decision to respond to the acting DNI's request by ostensibly overriding the ICIG's urgent-concern determination with its own statutory interpretation was not only not envisioned in the statutory framework; it undermined the very purpose of the statute that had granted the independent ICIG authority over intelligence-community

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gress-about-whistleblower-complaint/2019/09/25/ee98ae7c-dfb4-11e9-b199-f638bf2c340f_story.html [https://perma.cc/WFW3-7BBB].

100 *See* OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, OPENING STATEMENT BY ACTING DNI JOSEPH MAGUIRE 6 (2019), https://www.dni.gov/files/ODNI/documents/Maguire_statement.pdf [https://perma.cc/574T-L3S5] [hereinafter Maguire Opening Statement].

101 *See id.* at 7.

102 *See id.* at 8.

103 *See id.* Setting aside the evident perils in consulting the subject of a complaint about an assertion of privilege over that complaint, it appears that acting DNI Maguire was likely right to at least consider the applicability of executive privilege. The committee report on the ICWPA briefly addressed this and stated that, "[i]nsofar as [executive] privilege is constitutionally based, the committee recognizes that [the ICWPA] cannot override it . . . ." H.R. REP. NO. 105-747 pt. 1, at 19 (1998) (quoting S. REP. NO. 95-1071, at 32 (1978)). An earlier Senate version of the bill was amended because it failed to provide any opportunity for such an assertion. *See id.* at 18–19. As stated, however, this Essay does not offer any conclusions on the merits of OLC's or the acting DNI's substantive determinations regarding the whistleblower complaint. *See supra* note 6.

104 *See* Maguire Opening Statement, *supra* note 100, at 6.

whistleblower complaints.[105] Acting DNI Maguire had presented the whistleblower complaint to OLC because he doubted the validity of the ICIG's determination that the allegations met the definition of "urgent concern."[106] If the complaint were not of an urgent concern, acting DNI Maguire could, but would not be statutorily obligated to, transmit the complaint to Congress.[107]

OLC responded in its September 3, 2019, opinion, *"Urgent Concern" Determination by the Inspector General of the Intelligence Community*, that the DNI was not required to forward the complaint to the intelligence committees.[108] The opinion concluded that the complaint did not involve an urgent concern under the 2010 IAA, because the misconduct alleged was not related to "the funding, administration, or operation of an intelligence activity" under the DNI's authority.[109] Specifically, OLC reasoned that the "urgent concern" definition was not met because the allegations in the complaint (1) did not occur in the course of a U.S. intelligence activity and (2) did not implicate any intelligence-community official.[110]

OLC defined "intelligence activities" under the statute as only those intelligence operations within the "responsibility and authority" of the DNI—that is, under the DNI's supervision.[111] The D.C. Circuit had held in *Truckers United for Safety v. Mead*[112] that a "routine agency investigation" fell outside an agency inspector general's authority, which was limited to investigations regarding administrative abuse and mismanagement.[113] Applying that principle, OLC reasoned that the ICIG could review the DNI's exercise of his responsibilities, including the DNI's actions relating to the prevention of foreign election interference, but the ICIG could not *himself* investigate such election interference.[114] In other words, "an inspector general's jurisdiction is *not* coextensive with the agency's operational author-

105 *See infra* Part IV.

106 *See* Maguire Opening Statement, *supra* note 100, at 7–8.

107 *See id.*; *supra* Section I.C.

108 *See* 43 Op. O.L.C., slip op. at 5–6 (Sept. 3, 2019). OLC acknowledged the relevant constitutional concerns but concluded that it need not consider the constitutional restrictions on congressional reporting requirements in order to answer the pertinent statutory question. *Id.*

109 *Id.* at 1 (quoting 50 U.S.C. § 3033(k)(5)(G)(i) (2018)).

110 *See id.* at 2.

111 *Id.* at 8.

112 251 F.3d 183, 189–90 (D.C. Cir. 2001).

113 *"Urgent Concern" Determination*, 43 Op. O.L.C., slip op. at 8–9 (quoting *Mead*, 251 F.3d at 189).

114 *Id.* at 9–10.

ity."[115] Furthermore, in OLC's view, because the ICIG's watchman role extends only to intelligence officials over whom the DNI has authority, the ICIG did not have a reporting responsibility regarding matters concerning "officials outside the intelligence community, let alone the President."[116] OLC did not, however, contend with the statutory context indicating that the ICIG has decisive authority over complaints alleging government misconduct discovered in the course of an intelligence-community whistleblower's work.[117] Rather, OLC equated investigating the credibility of a whistleblower's complaint with investigating the underlying circumstances—i.e., potential foreign election interference—which falls under the DNI's responsibility.[118]

Thus, OLC declared, the Ukraine whistleblower's allegations were not regarding an urgent concern because such concerns could not extend beyond the ICIG's authority, which was limited to administrative abuse and mismanagement by intelligence-community officials and in intelligence operations under the DNI's supervision.[119] The DNI was therefore not required to transmit the complaint to Congress.[120]

The ODNI general counsel adopted the urgent-concern determination set forth in OLC's opinion, based on which the acting DNI initially declined to transmit the complaint to the committees.[121] ICIG Atkinson publicly voiced strong disagreement with ODNI and OLC's interpretation of the statute.[122] He noted that, beyond the unprecedented decision to override the ICIG's urgent-concern determination, the acting DNI's decision to withhold the complaint from Congress

115 *See* Letter from Steven A. Engel, Assistant Attorney Gen., U.S. Dep't of Justice, to Michael K. Atkinson, Inspector Gen. of the Intelligence Cmty., et al. 3 (Oct. 25, 2019), https://assets.documentcloud.org/documents/6523692/OLC-Letter-to-ICIG-and-CIGIE-10-25-19.pdf [https://perma.cc/AS27-YPWW] [hereinafter Engel Letter] (citing *Mead*, 251 F.3d at 189–90, and Burlington N. R.R. Co. v. Office of Inspector Gen., 983 F.2d 631, 642–43 (5th Cir. 1993)).

116 *"Urgent Concern" Determination*, 43 Op. O.L.C., slip op. at 10. Although OLC contemplated that in some instances inspectors general would have the authority to investigate certain "external parties," it determined that the Ukraine whistleblower complaint's allegations did not fall under those exceptions. *Id.* at 10–11.

117 *See infra* Section IV.A.

118 *"Urgent Concern" Determination*, 43 Op. O.L.C., slip op. at 9.

119 *Id.* at 1.

120 *Id.* at 10 (citing 28 U.S.C. § 535 (2018)). OLC concluded, however, that it was appropriate for the ICIG to refer to DOJ any credible allegations of potential criminal activity outside the intelligence community. *Id.* The complaint and ICIG's determination were accordingly referred to the DOJ Criminal Division for review. *Id.* at 11.

121 *See* Litt, *supra* note 2.

122 *See* Atkinson Letter, *supra* note 90.

was inconsistent with past practice.[123] Previously, where the ICIG had found that complaints did not meet the statutory definition of an urgent concern, the DNI had nevertheless provided for complainants to contact the congressional intelligence committees directly, in accordance with the ICWPA and 2010 IAA.[124]

The Council of the Inspectors General on Integrity and Efficiency ("CIGIE") staunchly supported ICIG Atkinson's position.[125] In a letter to OLC, CIGIE contended that OLC had replaced the ICIG's judgment with its own, on a determination which the statute had entrusted to the independent and impartial inspector general.[126] The organization worried that OLC's interpretation of the relevant statute would damage both the independence of other agencies' inspectors general and the critical role of whistleblowers in disclosing government misconduct.[127]

In a response letter to the ICIG and CIGIE, Assistant Attorney General Steven Engel reiterated and defended OLC's position.[128] Engel clarified that OLC's interpretation stemmed from the plain language of the statute, as Congress explicitly granted to the ICIG only the authority to determine *credibility*, and not the authority to make a controlling urgent-concern determination.[129] This contention relied on the difference between the urgent-concern and credibility provisions: the statute first states that intelligence-community employees may submit complaints regarding an urgent concern to the inspector general; in the following subsection, it states that the inspector general "shall determine" whether the allegations appear credible and, if so, shall transmit them to the agency head.[130]

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123 *Id.* at 2.

124 *Id.*

125 *See* CIGIE Letter, *supra* note 4, at 1.

126 *Id.* at 4.

127 *Id.* at 1.

128 *See* Engel Letter, *supra* note 115. In addition, Engel dismissed the alarm over the potential chilling effect the opinion might have on whistleblowers, stating that OLC's role is outside the realm of policy, and its "sole responsibility is to faithfully interpret the statutes as Congress has written them." *Id.* at 1.

129 *See id.* at 3.

130 *Compare* 50 U.S.C. § 3033(k)(5)(A), (G) (2018) ("An employee of an element of the intelligence community . . . may report [a] complaint [regarding an urgent concern] to the Inspector General."), *with id.* § 3033(k)(5)(B) ("[T]he Inspector General shall determine whether the complaint or information appears credible. Upon making such a determination, the Inspector General shall transmit to the [agency head] a notice of that determination, together with the complaint or information."). *But see* Litt, *supra* note 2 ("[O]ne could argue that . . . the statute contemplates a procedure for the DNI to express any disagreements while nonetheless informing Congress of the substance of the complaint.").

Chairman Schiff and other committee members vehemently disagreed both with the acting DNI's decision to refer the Ukraine whistleblower's complaint to DOJ and with OLC's interpretation of the statute.[131] In a letter to acting DNI Maguire, Schiff wrote that Maguire had "neither the legal authority nor the discretion to overrule" an ICIG determination that the complaint constituted a credible urgent concern.[132] Rather, the DNI was merely a "conduit" under the statute, without the ability to lawfully withhold an intelligence-community employee's complaint from the congressional intelligence committees for which it was intended.[133]

III. OLC Opinions on Statutory Whistleblower Protections

There are two publicly available OLC opinions from the 1990s interpreting whistleblower statutes, which, notwithstanding their analogous contexts, help demonstrate why the 2019 "urgent concern" opinion was unprecedented and impermissible under the ICWPA and 2010 IAA.[134] Although these opinions may initially appear to lend precedential support for OLC's "urgent concern" opinion, on closer inspection they reinforce the conclusion that OLC's interference in 2019 was improper.[135] Despite their contextual similarity and generally adverse posture toward whistleblowers, the earlier opinions diverge

131 *See, e.g.*, Schiff Press Release, *supra* note 93; Letter from Rep. Adam Schiff, Chairman, HPSCI, to Joseph Maguire, Acting Dir., ODNI (Sept. 10, 2019), https://assets.documentcloud.org/documents/6409558/20190910-Chm-Schiff-Letter-to-Acting-Dni-Maguire.pdf [https://perma.cc/7N4B-T64H]; Anderson et al., *supra* note 5 ("Many [Democratic congressmembers] expressed concerns about the damage that the OLC opinion will cause to the effective functioning of the whistleblower process."); House Intelligence, *Open Hearing with Acting Director of National Intelligence on Whistleblower Complaint*, YouTube (Sept. 26, 2019), https://www.youtube.com/watch?v=G_efr_kzSZs [https://perma.cc/3PMQ-4PRQ] [hereinafter Maguire Testimony].

132 Letter from Rep. Adam Schiff, Chairman, HPSCI, to Joseph Maguire, Acting Dir., ODNI 2 (Sept. 13, 2019), https://assets.documentcloud.org/documents/6409559/20190913-Chm-Schiff-Letter-to-Acting-Dni-Re.pdf [https://perma.cc/8U32-96VW] [hereinafter Schiff Sept. 13 Letter].

133 *Id.*

134 This Essay does not examine an earlier opinion addressing the applicability of criminal statutes to DOJ whistleblowers, *see* Applicability of Criminal Statutes and "Whistleblower" Legislation to Unauthorized Employee Disclosures, 4B Op. O.L.C. 383 (1980), nor the few OLC opinions relating to private-sector whistleblowers. There exists at least one other unpublished OLC opinion relating to whistleblowers. *See* U.S. Dep't of Justice, 2005 List of Opinions 2, https://www.justice.gov/sites/default/files/pages/attachments/2014/07/11/olc-ops-1998-2013-redacted.pdf [https://perma.cc/D2KK-8KQ9].

135 *See infra* Part IV.

from the latter in both style and consequence.[136] Rather than disrupting the relevant statutory framework, these earlier opinions exposed existing gaps in statutory whistleblower protections, which Congress subsequently amended to close those gaps.[137]

To place the weight of OLC opinions in context, this Part first briefly explains OLC's authority to declare the executive branch's position on legal questions. It then examines each of the earlier OLC whistleblower opinions: the 1997 FAA opinion, assessing the authority of the OSC to investigate FAA whistleblower complaints,[138] and the 1996 Nuccio opinion, discussing the revocation of a Department of State whistleblower's security clearance.[139] Finally, it explains how Congress quickly filled the statutory gaps that the circumstances of each of those OLC opinions had exposed.

A. OLC Authority to Interpret Statutes

OLC today largely carries out the Attorney General's responsibility of preparing formal legal opinions and providing general legal advice to executive branch officers and employees,[140] especially on questions of constitutional law.[141] OLC's legal opinions are understood to be binding across the executive branch[142] and accordingly have significant influence across the federal government.[143] Based on various executive orders, OLC generally asserts the authority to issue such binding opinions, beyond the attorney general's statutory obligation, both upon requests from executive department heads on questions of law and to resolve legal disputes between agencies, except where federal law specifically vests the responsibility for a resolution elsewhere.[144] OLC only makes its opinions publicly available when it

136 *See infra* Part IV.

137 *See infra* Part IV.

138 Authority to Investigate Federal Aviation Administration Employee Complaints Alleging Reprisal for Whistleblowing, 21 Op. O.L.C. 178 (1997).

139 *See* Access to Classified Information, 20 Op. O.L.C. 402 (1996).

140 *See* Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 439–40 n.6 (1993); *see also* Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 ALB. L. REV. 217, 238 (2013) ("The exclusive authority held by the OLC to determine the interpretation of the law for the executive branch is based on the authority historically and statutorily bestowed upon the Attorney General . . . .").

141 *See Developments in the Law—Presidential Authority*, 125 HARV. L. REV. 2057, 2092 (2012).

142 *See* Garrison, *supra* note 140, at 242–44.

143 *See Developments in the Law—Presidential Authority*, *supra* note 141, at 2090 & n.8.

144 *See* Garrison, *supra* note 140, at 238–40 (citing Exec. Order No. 2,877 (May 31, 1918) and Exec. Order No. 12,146, 3 C.F.R. § 409 (1979)).

can do so without violating the executive's interests in confidentiality.[145]

OLC is intended to act independently to provide impartial advice and manage its competing priorities of protecting executive power and ensuring faithfulness to the law.[146] But OLC's independence has diminished in recent years due to political pressure by the White House, a larger and more influential White House counsel's office, and the institutional inclination to achieve a President's goals by any means, particularly in the area of national security.[147] This waning of OLC impartiality has sometimes led to "flawed opinions that improperly expand presidential power"—most notably, the infamous 2002 OLC memo endorsing the use of torture on suspected terrorists.[148]

As a creature of the executive branch, DOJ—and by extension OLC—may execute, but not create, the law. This includes interpreting statutes; indeed, "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."[149] As such, statutory interpretation has featured in much of OLC's work.[150] Where a statute is clear, OLC has no authority to override enacted law. Rather, as acting DNI Maguire testified before HPSCI, OLC "passes legal opinion for those of us who are in the executive branch and the . . . legal opinion is binding to everyone within the executive branch."[151]

B. The 1997 FAA Opinion: Authority to Investigate Federal Aviation Administration Employee Complaints Alleging Reprisal for Whistleblowing

In 1997, OLC issued an opinion concluding that the OSC did not have the authority to receive and investigate allegations of reprisal for

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145 *See* Memorandum from David J. Barron, Assistant Attorney Gen., U.S. Dep't of Justice, to Attorneys of the Office of Legal Counsel, Re: Best Practices for OLC Legal Advice and Written Opinions 5–6 (July 16, 2010), https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf [https://perma.cc/X7WA-7FJV].

146 *Developments in the Law—Presidential Authority*, *supra* note 141, at 2090–91.

147 *See id.* at 2091.

148 *See id.* at 2091 & n.11; Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), https://www.justice.gov/olc/file/886061/download [https://perma.cc/B9G3-HL5E].

149 Bowsher v. Synar, 478 U.S. 714, 733 (1986).

150 *See* John O. McGinnis, *Executive Branch Interpretation of the Law: Introduction*, 15 CARDOZO L. REV. 21, 28 (1993).

151 Maguire Testimony, *supra* note 131 (beginning at 2:00:45).

FAA whistleblowing.[152] OLC's conclusion that OSC procedures did not apply to FAA employees was based on a thorough analysis that involved multiple methods of statutory interpretation, an explanation of its use of those methods, and a discussion of the practical consequences of OLC's interpretation.

The underlying statute was the 1996 Department of Transportation ("DOT") Appropriations Act, in which Congress established a special personnel management system for the FAA, according to the "unique demands" of that agency's workforce.[153] The law specified that title 5 of the U.S. Code, which contains the WPA among other provisions, would not apply to the new FAA personnel system, with specific exceptions, including section 2302(b), "relating to whistleblower protection."[154] Section 2302(b) lists the circumstances under which certain personnel actions are prohibited, including when such actions are taken in retaliation for disclosing misconduct.[155] Although that section references the special counsel as an avenue for complaints, the provision that establishes the OSC's authority to review and investigate allegations is located elsewhere, in section 1214 of title 5.[156]

Based on the incorporation of section 2302(b) into the FAA personnel management system, the OSC asserted its authority to receive and investigate FAA whistleblower complaints and enforce protections.[157] The FAA, on the other hand, argued that the statute incorporated *only* the substantive whistleblower protections in section 2302(b) and not the OSC's investigation and enforcement authorities.[158] The agencies took their disagreement to OLC, which concluded that the FAA was correct and the OSC lacked the authority to investigate whistleblower allegations of reprisal by FAA employees.[159]

OLC's opinion presented two possible theories for incorporating the OSC procedures of section 1214 into the DOT Appropriation Act's application of section 2302(b): (1) the text of section 2302(b) alone sufficiently incorporated the OSC procedures, or (2) the OSC

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152 Authority to Investigate Federal Aviation Administration Employee Complaints Alleging Reprisal for Whistleblowing, 21 Op. O.L.C. 178 (1997).

153 Department of Transportation and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-50, § 347, 109 Stat. 436, 460 (1995).

154 *Id.*

155 5 U.S.C. § 2302(b) (2018); *see supra* Section I.B (describing the statutory context).

156 *See* 5 U.S.C. § 1214.

157 *See Authority to Investigate FAA Complaints*, 21 Op. O.L.C. at 180.

158 *See id.*

159 *See id.* at 178.

procedures were so essential to the section 2302(b) substantive protections that they were implicitly included in the application of the substantive provisions to FAA employees.[160] OLC explained its answers in four parts: first, it examined the plain language and statutory context; second, it assessed the legislative history of the CSRA and WPA and whether those statutes indicated a special role for the OSC; third, it explained the statutory interpretation tools OLC used in its analysis; and finally, it described the remaining procedural protections available to FAA whistleblowers.

First, regarding the plain language, OLC observed that the only reference to the special counsel in section 2302(b) occurred where the provision created a protection against reprisal for any disclosure made to the special counsel, inspector general, or other designated employee.[161] OLC determined that this brief mention only reflected Congress's intention to allow a broad universe of officials to receive protected disclosures.[162] That reference created no independent authorization for those officials' investigative and enforcement powers.[163] Thus, OLC concluded, the textual reference to the special counsel alone did not incorporate the OSC's procedural authorities in the application of section 2302(b) procedures to FAA employees.[164]

Second, OLC looked at the legislative history behind the OSC's claim that Congress had granted it a "special role" in protecting whistleblowers, such that any statutory protections are ineffectual without OSC jurisdiction over claims of reprisal.[165] This contention rested in part on the Senate report on the CSRA, explaining the role of the new special counsel and MSPB in protecting employees, especially whistleblowers.[166] Although OLC did not repudiate the validity of the contention that Congress generally intended the OSC to enforce the whistleblower protections in title 5, it concluded that this did not mean that Congress believed whistleblower protections would be "inherently meaningless" without enforcement by the OSC.[167] The OSC may play a special role, but that role is embedded within the

160 *Id.* at 180.

161 5 U.S.C. § 2302(b)(8)(B); *Authority to Investigate FAA Complaints*, 21 Op. O.L.C. at 180–81.

162 *Authority to Investigate FAA Complaints*, 21 Op. O.L.C. at 181.

163 *See id.*

164 *See id.*

165 *Id.*

166 *See id.* at 181–82; S. REP. NO. 95-969, at 8 (1978).

167 *Authority to Investigate FAA Complaints*, 21 Op. O.L.C. at 182–83.

personnel management structure embodied in title 5, which Congress explicitly rejected for the FAA.[168]

Third, OLC thoroughly explained the canons of statutory construction that guided its analysis. Principally, OLC applied the canon *expressio unius est exclusio alterius*: "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied . . . ."[169] While recognizing that this canon should be applied cautiously, OLC asserted that Congress's inclusion of *only* the substantive prohibition against whistleblower reprisal—to the exclusion of the separate title 5 provisions granting the OSC and MSPB enforcement powers—was exactly the kind of exception for which this canon was intended.[170]

Moreover, OLC argued, if Congress had intended to incorporate the OSC's whistleblower enforcement authorities into the DOT Appropriations Act, it could easily have done so by including the relevant provision in the "deliberate[ly] selectiv[e]" list of exceptions.[171] In contrast, for example, in the statutory provisions for the Panama Canal Commission, Congress explicitly provided for "*all*" relevant title 5 provisions for whistleblower protection to apply.[172] This statutory comparison reaffirmed OLC's conclusion that Congress did not intend to apply the OSC's enforcement powers to FAA personnel.[173]

Finally, OLC noted that FAA whistleblowers were not without "meaningful protection."[174] Under the FAA personnel management system, an employee suffering reprisal could receive an evidentiary hearing before an FAA arbitration panel, the decision of which would be further subject to judicial review.[175]

C. The 1996 Nuccio Opinion: Access to Classified Information

The year before the FAA opinion, OLC issued an opinion for the CIA General Counsel that governed whether the CIA could retaliate against an individual whistleblower for disclosing CIA misconduct to a Member of Congress.[176] The questions that the CIA posed pertained

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168 *See id.* at 183.

169 *Id.* (alteration in original) (quoting Andrus v. Glover Constr. Co., 446 U.S. 608, 616–17 (1980)).

170 *See id.*

171 *Id.* at 184.

172 *Id.* (quoting 22 U.S.C.A. § 3664(3) (West Supp. 1997)).

173 *See id.* at 184–85.

174 *Id.* at 185.

175 *See id.* at 185–86.

176 Access to Classified Information, 20 Op. O.L.C. 402, 402 (1996).

to whether a Department of State official should retain his security clearance after having revealed classified information—involving serious allegations of CIA misconduct—to a congressmember.[177]

Dr. Richard Nuccio was a career official working as a senior foreign policy advisor in the Bureau of Inter-American Affairs.[178] In October 1994, Nuccio discovered evidence of CIA involvement in the 1992 death of a Guatemalan guerilla leader, Efraín Bámaca Velásquez, and murder of U.S. citizen Michael Devine.[179] Nuccio subsequently met with multiple CIA officials, but they refused to provide more information until January 1995, when a CIA report revealed that a longstanding CIA asset, Colonel Julio Roberto Alpirez, had killed Bámaca and was implicated in Devine's murder.[180]

Because the CIA had failed to inform Congress, and Nuccio had earlier testified to Congress that the United States was in no way involved in the Guatemalan military's illegal activities, Nuccio feared being personally implicated in a cover-up.[181] But because the ICWPA did not yet exist and disclosure of classified information is not always protected under the WPA,[182] Nuccio did not have a clear, protected avenue for lawful disclosure of the classified report. Nevertheless, on March 17, 1995, Nuccio informed then-Representative Robert Torricelli of what he had discovered.[183]

On March 22, 1995, Torricelli wrote an "irate" letter to President Clinton about the matter, and the next day the *New York Times* ran the headline, *Guatemalan Agent of C.I.A. Tied to Killing of American*.[184] This fueled a massive scandal for the CIA that led to a significant review of the agency's relationship with human rights violators and a shift in U.S. policy in Latin America.[185]

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177 *Id.*

178 KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 158 (2001); SUSAN J. TOLCHIN & MARTIN TOLCHIN , GLASS HOUSES: CONGRESSIONAL ETHICS AND THE POLITICS OF VENOM 110 (2004).

179 *See* MAYER, *supra* note 178, at 158; TOLCHIN & TOLCHIN, *supra* note 178, at 110.

180 *See* Judith A. Truelson, *Whistleblower Protection and the Judiciary*, *in* HANDBOOK OF ADMINISTRATIVE ETHICS 407, 422–23 (Terry L. Cooper ed., 2d ed. 2001).

181 *See id.* at 423; MAYER, *supra* note 178, at 158.

182 *See supra* note 40 and accompanying text.

183 *See* MAYER, *supra* note 178, at 158. Nuccio chose Representative Torricelli because he had previously worked for him. *See* TOLCHIN & TOLCHIN, *supra* note 178, at 110.

184 Truelson, *supra* note 180, at 422–23; *see* Tim Weiner, *Guatemalan Agent of C.I.A. Tied to Killing of American*, N.Y. TIMES (Mar. 23, 1995), https://www.nytimes.com/1995/03/23/world/guatemalan-agent-of-cia-tied-to-killing-of-american.html?searchResultPosition=20 [https://perma.cc/N2DN-3GGP].

185 *See* TOLCHIN & TOLCHIN, *supra* note 178, at 111–12.

While Torricelli sailed into a Senate seat the following year, Nuccio endured—and ultimately lost his fight against—a three-year CIA campaign against his career.[186] Nuccio's security clearance was initially put on probationary status, and DOJ opened a criminal investigation into whether Nuccio had unlawfully revealed the identity of a "covert agent."[187] Although Nuccio was eventually exonerated of any criminal wrongdoing, the CIA viewed the State Department's reprisal as insufficient and revoked Nuccio's security clearance altogether.[188] Unable to carry out his job without a clearance, Nuccio reluctantly resigned on February 25, 1997.[189]

Prior to withdrawing Nuccio's security clearance, the CIA director had appointed a panel to decide whether to do so.[190] That panel, through the CIA general counsel, requested OLC's advice on several legal questions.[191] OLC's responding opinion, vaguely entitled *Access to Classified Information*, in part addressed two categories of questions from the CIA panel, pertaining to (1) rules and practices relating to executive branch employees' disclosure of classified information to members of Congress, and (2) the applicability of the WPA to Nuccio.[192] OLC expressly declined to offer any view on the "ultimate question" of whether the CIA should revoke Nuccio's security clearance.[193]

As to the first category, OLC examined two federal statutes regarding legal disclosure of classified information to members of Congress, as well as Executive Order 12,356,[194] which sets out guidelines for protecting classified information.[195] The first statute, the Lloyd-La-Follette Act,[196] provides that government employees have a right to give information directly to members of Congress, which others may

186 *Id.* at 110.

187 MAYER, *supra* note, 178, at 158.

188 *Id.*; *see* Editorial, *The Vilification of Richard Nuccio*, N.Y. TIMES, Dec. 18, 1996, at A26.

189 *Aide Who Leaked Guatemala-CIA Story Resigns Post*, CHI. TRIBUNE (Feb. 26, 1997), https://www.chicagotribune.com/news/ct-xpm-1997-02-26-9702260114-story.html [https://perma.cc/AG79-TV8Z]; Peter Kornbluh, *Empire Strikes Back: How the CIA Got Its Man*, CONSORTIUM (1997), http://www.consortiumnews.com/archive/story27.html [https://perma.cc/EWA5-ZYNX].

190 *See* Access to Classified Information, 20 Op. O.L.C. 402, 402 (1996).

191 *See id.*

192 *See id.* A third category addressed the applicability of Executive Order 12,674. *See id.* (citing Exec. Order No. 12,674, 3 C.F.R. 215 (1990)).

193 *Id.*

194 Exec. Order No. 12,356, 3 C.F.R. 166 (1982).

195 *See id.*; *Access to Classified Information*, 20 Op. O.L.C. at 402.

196 5 U.S.C. § 7211 (2018).

not interfere with or deny.[197] The second statute states that congressional appropriations may not be used to implement or enforce any nondisclosure policy or agreement that is inconsistent with the Lloyd-LaFollette Act or the WPA.[198]

In rejecting any contention that either statute might offer protection to an executive branch employee who reveals classified information to Congress, OLC heavily relied on a 1989 DOJ Supreme Court brief.[199] That brief elucidated DOJ's view that any statutory interpretation that would strip the President of his exclusive control over national security information in the executive branch—by, for example, conferring a right on executive branch employees to disclose information to Congress—would be unconstitutional.[200] Based on that view, OLC concluded that the two statutes at issue could not be interpreted to vest agency employees such as Nuccio with any right of classified information disclosure to a member of Congress.[201]

As to Executive Order 12,356, OLC explained that the order created a two-part requirement for sharing classified information: (1) trustworthiness of the recipients and (2) a "need to know" such information.[202] OLC determined that, although members of Congress are "presumed to be trustworthy," they are not presumed to have a need to know.[203] That need-to-know determination could not be made by individual executive branch employees on their own, OLC declared, but could only be made "through established decisionmaking channels at each agency."[204]

On the question of the applicability of the WPA, OLC concluded that the denial or withdrawal of a security clearance "is not a person-

197 *Access to Classified Information*, 20 Op. O.L.C. at 403; *see* 5 U.S.C. § 7211. *See generally* H. PERMANENT SELECT COMM. ON INTELLIGENCE, 106TH CONG., RECORD OF PROCEEDINGS ON H.R. 3829, THE INTELLIGENCE COMMUNITY WHISTLEBLOWER PROTECTION ACT 172 (Comm. Print 1999) [hereinafter ICWPA COMM. RECORD] (statement of Frederick M. Kaiser, Specialist in Am. Nat'l Gov't, Cong. Research Serv.).

198 *Access to Classified Information*, 20 Op. O.L.C. at 403 (citing Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, § 625, 110 Stat. 3009-359 (1996)).

199 *See Access to Classified Information*, 20 Op. O.L.C. at 403–04 (citing Brief for the Appellees, Am. Foreign Serv. Ass'n v. Garfinkel, 488 U.S. 923 (1988) (mem.) (No. 87-2127)). In *Garfinkel*, on subsequent appeal, the Supreme Court did not reach a judgment on the merits but dismissed the appeal and so did not rule on the relevant constitutional question. *See id.* at 404 n.5 (citing Am. Foreign Serv. Ass'n v. Garfinkel, 490 U.S. 153, 160–61 (1989)).

200 Brief for the Appellees at 48, *Garfinkel*, 488 U.S. 923 (No. 87-2127).

201 *See Access to Classified Information*, 20 Op. O.L.C. at 405.

202 *Id.* at 405–06.

203 *Id.* at 406.

204 *Id.* at 406–07.

nel action within the meaning of the WPA,"[205] based on a 1995 Federal Circuit opinion, *McCabe v. Department of the Air Force*.[206] In *McCabe*, the court had held that, although the definition of "personnel action" is broad,[207] Congress did not intend it to include agency decisions on security-clearance status.[208] OLC observed that, even if the withdrawal of a security clearance based on unauthorized classified-information disclosure were a personnel action, it would still not be prohibited under the WPA, which excludes disclosure of classified information from the reprisal protection.[209] OLC rejected Nuccio's argument that Congress intended to prohibit adverse actions against employees who divulge classified information specifically to members of Congress, because Congress did not create that affirmative exception in the statute.[210] Rather, OLC determined, the provision of the WPA stating that the statute "shall not be construed" to allow information to be withheld from Congress—or to allow any personnel action to be taken in retribution for disclosing information to Congress[211]—does not create "an affirmative right to make such disclosures."[212]

D. Congressional Responses to OLC's Interpretations of Whistleblower Statutes

Both of the 1990s OLC whistleblower opinions identified gaps in the existing statutory whistleblower protections and capitalized on those gaps to the disadvantage of the whistleblowers. Following both opinions, Congress swiftly amended the relevant statutes to close the identified gaps and preclude narrow interpretations. The legislative remedy in response to the 1997 FAA opinion was straightforward: after OLC interpreted the FAA statute as excluding OSC procedures for FAA whistleblowers, Congress overrode that opinion by explicitly

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205 *Id.* at 407. Nuccio was otherwise a covered employee under the WPA, as he worked for the Department of State, not an excluded intelligence agency. *See* MAYER, *supra* note 178, at 158.

206 62 F.3d 1433, No. 94-3463, 1995 WL 469464, at *2 (Fed. Cir. 1995) (per curiam) (unpublished table decision).

207 *See* 5 U.S.C. § 2302(a)(2) (2018).

208 *McCabe*, 1995 WL 469464, at *2.

209 *Access to Classified Information*, 20 Op. O.L.C. at 407 n.8.

210 *Id.* at 408.

211 5 U.S.C. § 2302(b).

212 *Access to Classified Information*, 20 Op. O.L.C. at 408 (quoting Brief for the Appellees at 50 n.43, American Foreign Serv. Ass'n v. Garfinkel, 488 U.S. 923 (1989) (mem.) (No. 87-2127)).

incorporating those procedures into the FAA statute.[213] The statute has since provided that title 5 provisions do not apply to the FAA, except "section 2302(b), relating to whistleblower protection, *including the provisions for investigation and enforcement as provided in chapter 12 of title 5*."[214]

Congress's reaction to the 1996 Nuccio opinion was even more significant: the CIA's withdrawal of Nuccio's security clearance, based on the legal position articulated by OLC, directly led to the passage of the ICWPA.[215] The exclusion of intelligence agencies and classified disclosures from the WPA's protections had reflected the constitutional sensitivity surrounding Congress's and the executive's shared power over national security.[216] Congressional efforts to prevent another Nuccio—and to encourage future whistleblowers wielding classified information—led to a contentious back-and-forth between the political branches based on their differing stances on each other's control over matters of national security.[217] The statutory procedure established in the ICWPA was a hard-fought but effective compromise: as a DOJ attorney (and previous HPSCI counsel) declared two years later, the process "actually works."[218] But that process only works when the inspector general is able to wield his or her statutory authority over whistleblower complaints without interference from other actors in the executive branch.[219]

This legislative history makes clear that OLC's statutory interpretations in the 1996 and 1997 whistleblower opinions revealed to Congress gaps or defects in the statutory frameworks for FAA whistleblower protections and classified disclosures to Congress, respectively, and Congress quickly closed those gaps. In contrast, OLC's 2019 statutory interpretation disrupted the entire statutory framework

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213 *See* Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, § 307(a), 114 Stat. 61, 124–26 (2000) (codified in scattered sections of 49 U.S.C.).

214 49 U.S.C. § 40122(g)(2)(A) (2018) (emphasis on added language).

215 *See* Newcomb, *supra* note 41, at 1238–66; Jeff Gerth, *Criticism of C.I.A. Analyst's Dismissal Bolsters a Fight for Whistle-Blower Protections*, N.Y. TIMES (July 20, 1997), https://www.nytimes.com/1997/07/20/us/criticism-cia-analyst-s-dismissal-bolsters-fight-for-whistle-blower-protections.html [https://perma.cc/C8GF-HX52].

216 *See, e.g.*, ICWPA COMM. RECORD, *supra* note 197, at 182–83 (statement of Kate Martin, Dir., Ctr. for Nat'l Security Studies); *see also* Deborah Pearlstein, *Foreign Policy Isn't Just Up to Trump*, ATLANTIC: THE BATTLE FOR THE CONSTITUTION (Nov. 23, 2019), https://www.theatlantic.com/ideas/archive/2019/11/congresss-constitutional-role-us-foreign-policy/602485 [https://perma.cc/PFC6-J6CR] (arguing that the Constitution intended Congress "to play a central role" in "matters at the core of American national security").

217 *See* Newcomb, *supra* note 41, at 1240–66.

218 *Id.* at 1267.

219 *See infra* Section IV.A.

that created a process for intelligence-community whistleblowers to lawfully disclose misconduct through an independent actor within the executive branch.

IV. The Impermissibility of OLC's "Urgent Concern" Opinion

OLC's 2019 "urgent concern" opinion purported to supersede an ICIG determination that was central to a whistleblower-disclosure process over which the ICIG holds nearly exclusive statutory authority.[220] A full understanding of the text and the purposes of the underlying statutes demonstrates that OLC's interference with the independent inspector general's authority was neither envisioned nor allowed under the statutory framework.

The 1996 Nuccio opinion and 1997 FAA opinion may initially appear to provide support for OLC's 2019 interference, because they also involve statutory interpretations that hold negative implications for government whistleblowers, either on an individual or an agency-wide level. But a close comparison of OLC's 2019 opinion with those 1990s opinions in their statutory and historical contexts further reveals the faults of the 2019 opinion, irrespective of the merits of its substantive urgent-concern conclusions. In both of the earlier instances, OLC's involvement was statutorily permissible: OLC was performing its regular responsibility to interpret statutes in response to questions from executive agencies, rendering advice to the executive officials vested with the statutory authority to act on that advice.[221]

OLC's "urgent concern" opinion, on the other hand—regardless of the correctness of its substantive determination concerning whether the whistleblower complaint constituted an "urgent concern"—failed to acknowledge that OLC (and the DNI) did not have the statutory authority to make that determination in the first place. At bottom, OLC's view allows the DNI to obstruct an intelligence-community whistleblower disclosure to Congress even where the 2010 IAA otherwise requires its transmission.

A. The "Urgent Concern" Opinion Undermines the Statutory Disclosure Process

OLC's interference in the Ukraine whistleblower disclosure process, through its "urgent concern" opinion, contravened the text and undercut the goals of the applicable statutes—namely, the 2010 IAA

220 *See supra* Section II.B.

221 *See supra* Section III.A.

and the ICWPA. The 2010 IAA places control over the intelligence-community whistleblower disclosure process in the hands of an independent entity—the ICIG—to protect the individuals who come forward with allegations and to prevent interference by other executive branch officials.[222] Preventing such interference is crucial to ensuring that credible allegations of government misconduct are transmitted, through the agency head, to the congressional intelligence committees.

OLC's "urgent concern" opinion was inconsistent with the text of the 2010 IAA (again, setting aside the merits of its urgent-concern determination) because it failed to acknowledge or contend with the fact that, as a nonindependent executive branch entity, it could not permissibly make the very determination that it purported to make.[223] Nor could the DNI make that determination, because the 2010 IAA gives the independent ICIG near-total authority over the process.[224]

Assistant Attorney General Engel attempted to overcome this in his subsequent letter, by distinguishing between the credibility determination and the urgent-concern determination and asserting that the ICIG has statutory authority only over the former.[225] But to conclude that Congress gave the independent ICIG only the authority to determine the credibility of a whistleblower compliant, while implicitly granting the politically appointed DNI the authority to determine whether it is on a matter of "urgent concern" requiring notification to Congress, would allow for the very kind of interference the statute was designed to avoid.[226] The role of the DNI in the statutory framework is merely that of a "conduit."[227] In fact, the statute provides a specific "holdback" provision stipulating the *only* circumstances under which the DNI may permissibly interfere with an ICIG action.[228] That exception only exists where it "is necessary to protect vital national security interests of the United States."[229] Neither OLC's opinion nor

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222 *See* 50 U.S.C. § 3033(k) (2018).

223 *See* "Urgent Concern" Determination by the Inspector General of the Intelligence Community, 43 Op. O.L.C., slip op. at 1 (2019).

224 *See* 50 U.S.C. § 3033(k)(5).

225 Engel Letter, *supra* note 115, at 3.

226 *See supra* Part I.

227 Schiff Sept. 13 Letter, *supra* note 132, at 2; *see* 50 U.S.C. § 3033(k)(5)(C) ("Upon receipt of a transmittal from the [ICIG] . . . , the [DNI] *shall*, within 7 calendar days of such receipt, forward such transmittal to the congressional intelligence committees, together with any comments the [DNI] considers appropriate." (emphasis added)).

228 *See* 50 U.S.C. § 3033(f)(1).

229 *Id.*

Engel's letter assert that this exception was applicable to the transmission of the Ukraine whistleblower complaint.

OLC's disregard for the ICIG's authority is also contrary to the purposes of the 2010 IAA and ICWPA: to encourage government whistleblowers and protect those who disclose.[230] Inspectors general are designated recipients for whistleblower complaints because of their independence and their accountability to Congress; potential whistleblowers must trust that their allegations will be handled impartially and without retribution.[231] Congress recognized this even in the earliest government whistleblower protections, when it created two independent entities to handle whistleblower allegations (the OSC and MSPB), and it has consistently given independent entities such as inspectors general authority over whistleblower processes for this reason.[232]

Here again Assistant Attorney General Engel advanced a defensive argument in his subsequent letter: "[i]t is for Congress," not OLC, "to balance the relevant polic[y]" concerns, such as "the importance of whistleblowers" and inspector-general independence.[233] But this does not mean that OLC may ignore the statutory structure that Congress created as a result of its consideration of those policy concerns.[234] Here, the foundation of that structure is the independent operation of the inspector general, and OLC disregarded the statutory content and context that reveal that foundation.

The foremost goal of whistleblower statutes such as the ICWPA is to incentivize agency employees to come forward with allegations of government wrongdoing, which leads to a more honest and effective government.[235] That goal cannot be met when government entities susceptible to political influence or motivation, such as OLC and the DNI, can prevent the allegations of misconduct from reaching the relevant congressional oversight committees.

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230 *See supra* Section I.A.

231 *See supra* Sections I.A, I.C.2.

232 *See supra* Part I.

233 Engel Letter, *supra* note 115, at 1.

234 *See generally supra* Section III.D (discussing Congress's legislative enactments intended to address concerns about insufficient whistleblower protections); *supra* note 50 and accompanying text (recounting the policy considerations in creating the ICWPA).

235 *See supra* Section I.A.

B. The 1997 FAA Opinion Provides No Support for the "Urgent Concern" Opinion

The 1997 FAA opinion narrowed the scope of the independent OSC's authority in a limited way: by excluding from the OSC process a narrow subset of executive branch employees for whom Congress had created a separate personnel system.[236] But it did not alter that OSC process nor interfere with any substantive determination that the OSC made according to its statutory mandate.[237] According to OLC, the exemption of FAA employees from all of title 5 except the substantive whistleblower protections meant that the OSC review process necessarily did not apply to FAA employees, who must seek other statutory and regulatory means of protection.[238] Regardless of the substantive merit of that conclusion, the statutory interpretation resulting in a slight narrowing of the application of OSC procedures was a wholly appropriate OLC exercise, unlike the 2019 "urgent concern" opinion's interference with the ICIG authority at the heart of the intelligence-community whistleblower process.

In resolving the conflicting interpretations of two administrative agencies—a common OLC task—OLC referred to the arguments with which it was presented and, in parts, styled the opinion as a response to those assertions, as a judicial opinion might respond to the advocates' arguments.[239] In contrast, the 2019 opinion was in response to the acting DNI's request for OLC's input on a determination that the ICIG—not the DNI—had made, and the opinion did not refer to, let alone engage with, the ICIG's analysis.[240]

Like the independence of agency inspectors general, the independence of the OSC from executive control is critical to allow it to effectively investigate and address whistleblowers' complaints and to prevent partisan political influence within that process.[241] The FAA opinion did not interfere that independence; the special counsel was still able to act in accordance with its statutory purpose regarding every other administrative agency under its jurisdiction, without un-

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236 *See* Authority to Investigate Federal Aviation Administration Employee Complaints Alleging Reprisal for Whistleblowing, 21 Op. O.L.C. 178, 180 (1997).

237 *See id.*

238 *See id.* at 183.

239 *See id.* at 182–83 (noting that OSC "assert[ed] that Congress generally believed that the whistleblower protections provided under title 5 should be enforced by OSC" and explaining why OLC was "not persuaded").

240 *See* "Urgent Concern" Determination by the Inspector General of the Intelligence Community, 43 Op. O.L.C., slip op. at 1 (2019).

241 *See* VAUGHN, *supra* note 20, at 169.

due interference. In fact, OLC's FAA opinion analyzed the role that the OSC is designed to play within the broader administrative law structure and concluded that the OSC was a distinct element of the personnel management system that Congress had specifically rejected for the FAA.[242] Further, as OLC noted, not allowing the OSC to enforce protections against FAA whistleblower reprisal did not preclude those whistleblowers from making such allegations; rather, it channeled them elsewhere, unsatisfactory though some of the other avenues for protection may be.[243] Those other avenues include the relevant agency inspector general, who operates as an independent entity suitable for receiving and investigating whistleblower allegations with minimal interference from other executive officials.[244]

The 2019 "urgent concern" opinion did not note the absence of any other avenues for intelligence-community whistleblowers to lawfully disclose misconduct, in contrast to the other channels available to FAA whistleblowers. Nor did the 2019 opinion assess the special role of the ICIG; if it had, it could not have faithfully reached the same conclusion as the FAA opinion reached on the OSC's role. The ICIG is not borrowed from another statute or personnel system for purposes of the 2010 IAA: it is *the* core element of the intelligence-community whistleblower process.[245] Without that independent administrative entity, operating free from executive branch interference, there exists no statutory process by which intelligence employees can reveal allegations of government misconduct to Congress.

Just as Congress did not intend for its FAA whistleblower protection to be so narrowly construed—as evidenced by its subsequent amendment to the FAA statute[246]—it does not appear to have intended for the ICIG's authority to be restrained in the way that OLC determined. The idea that Congress envisioned another executive official—whether the DNI, OLC, or the President himself—overriding a determination of the ICIG such that government misconduct could not be disclosed to the relevant congressional committees is wholly inconsistent with the foundational principles underlying the statutory procedure that Congress created.[247]

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242 *See Authority to Investigate FAA Employee Complaints*, 21 Op. O.L.C. at 181–83; *supra* text accompanying notes 165–68.

243 *See Authority to Investigate FAA Complaints*, 21 Op. O.L.C. at 185–86.

244 *See* 5 U.S.C. § 2302(b)(8)(B) (2018); *see also supra* text accompanying notes 63–69 (explaining the role of modern agency inspectors general).

245 *See supra* Section I.C.

246 *See supra* Section III.D.

247 *See* McClanahan, *supra* note 48 ("It seems that while Congress foresaw the possibility of

C. *The 1996 Nuccio Opinion Provides No Support for the "Urgent Concern" Opinion*

Although it effectively approved CIA retaliation against a whistleblower employed by a different agency, the 1996 Nuccio opinion did not undermine the purpose of a statute the way the "urgent concern" opinion did, in part because it found there was no applicable statute.[248] Nuccio was arguably excluded from substantive WPA protection because that statute explicitly excluded classified disclosures, and Nuccio could not have followed a statutory procedure for lawful disclosure because at the time there was none.[249] The Lloyd-LaFollette Act declared that executive branch employees had a "right" to divulge classified information to Congress, but OLC advanced a constitutional argument that such a right cannot exist without official executive branch authorization.[250] OLC declaring the executive branch's view of constitutional authorities is squarely within its prerogative; but that is entirely unlike OLC asserting its views on a statutory question that it cannot permissibly answer under the given statute.

The ICWPA serves as a compromise between the legislature's and executive's diverging constitutional views, by creating a process through which an independent executive branch official can authorize disclosure of classified information to certain congressional committees.[251] In light of this compromise, the absence of any constitutional argument in the "urgent concern" opinion, unlike the Nuccio opinion, is notable.[252] The Ukraine whistleblower followed the carefully prescribed statutory process to ensure that the congressional intelligence committees would receive the pertinent information.[253] Rather than advance any constitutional arguments to justify its interference, OLC's "urgent concern" opinion relied on an untenable view of the statutory process that weakened the independent actor in favor of the political actor.

Moreover, the Nuccio opinion explicitly declined to weigh in on the "ultimate question" facing the CIA panel of whether the CIA should revoke Nuccio's security clearance.[254] Through the "urgent

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an inspector general making a decision with which a whistleblower disagreed, it did not envision an agency head obstructing the process.").

248 *See supra* Section III.C.

249 *See supra* text accompanying notes 209–10.

250 *See supra* text accompanying notes 194–201.

251 *See supra* Section I.C.1.

252 *See supra* note 108.

253 *See supra* Section II.A.

254 Access to Classified Information, 20 Op. O.L.C. 402, 402 (1996).

concern" opinion, in contrast, OLC usurped the ICIG's authority to determine the "ultimate question" of whether to transmit the Ukraine whistleblower's complaint to Congress, leaving that determination to the acting DNI's discretion, relying on OLC's advice.[255] This grant of discretionary authority undercut the independence of the ICIG and defied the statutory goal of encouraging and protecting intelligence-community whistleblowers. Crucially, as Congress recognized, executive officials cannot effectively be held accountable by whistleblower disclosures when they can control those disclosures.[256]

The fallout from OLC's 1996 Nuccio opinion and the CIA's subsequent retaliation is further revealing. Nuccio had divulged information that damaged the CIA's reputation but led to critical reforms,[257] which is a key objective of laws incentivizing whistleblowers to reveal government fraud, waste, and abuse.[258] Congress was concerned with encouraging whistleblowing, and the high-profile Nuccio affair would serve to discourage any future classified-information disclosures of misconduct.[259] Congress passed the ICWPA to ensure that it could receive such disclosures and that whistleblowers would be able to safely make those disclosure.[260]

It is not necessary to conclude that the 1996 Nuccio opinion was constitutionally proper to demonstrate why OLC's 2019 "urgent concern" interference was statutorily wrong. On the contrary, the strong congressional reaction to the 1996 opinion—not only in reasserting Congress's constitutional right to receive information from executive officials but also in creating a specific statutory process for such disclosures—illustrates why OLC's 2019 involvement was invalid under that very statutory process. The "urgent concern" opinion did not just fail to contend with this legislative context and statutory purpose: it actively ignored it and destabilized the entire statutory whistleblower process by eroding the ICIG's independence.

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255 *See, e.g.*, CIGIE Letter, *supra* note 4, at 4.

256 Imagine the ICWPA had existed when Nuccio decided to blow the whistle to Congress and that Nuccio followed the statutory process, like the Ukraine whistleblower did. Based on OLC's "urgent concern" interpretation, the head of the relevant agency (there, the CIA) could have prevented Nuccio's disclosure from ever reaching Congress, by concluding that it did not meet the statutory definition of an urgent concern, no matter the CIA inspector general's conclusion, and by refusing to provide Nuccio with the instruction he would require, under the statute, to go directly to Congress. Congress created the ICWPA process to avoid precisely this kind of interference. *See supra* Section I.C.1.

257 *See supra* text accompanying note 185.

258 *See supra* Section I.A.

259 *See* Newcomb, *supra* note 41.

260 *See supra* Section I.C.1.

Conclusion

OLC's "urgent concern" opinion opened the door for political interference into intelligence-community whistleblower disclosures, contrary to the prescribed statutory process and in defiance of the statutory goal to encourage and support such disclosures. At first glance, the two previous published OLC opinions interpreting statutory whistleblower protections might seem to support OLC's 2019 "urgent concern" interference, but the above analysis demonstrates that those opinions further reveal how OLC went wrong. Whether or not OLC's determination was substantively correct—that is, whether the Ukraine whistleblower complaint involved a matter of urgent concern under the statute—OLC's presumption that the DNI (and, accordingly, OLC) could replace the ICIG's determination with its own was incorrect in light of the carefully designed statutory framework for disclosure.

The Ukraine whistleblower complaint was ultimately revealed to Congress and the public through immense political pressure, and it directly led to the third presidential impeachment in U.S. history.[261] But the next potential intelligence-community whistleblower might act differently, recognizing that, under OLC's interpretation, the power the DNI holds over the ICIG's determinations could thwart the intended disclosure. This hindrance of future whistleblowing, which might otherwise increase the honesty and efficiency of intelligence agencies, is to the detriment of congressional oversight, the public, and the agencies themselves.

261 *See* Fandos & Shear, *supra* note 81.