

# **ODNI GC KLITENIC: PRESIDENT HAS SOLE AUTHORITY OVER SECURITY CLEARANCES, BUT IS NOT MEMBER OF INTELLIGENCE COMMUNITY**

*Jim here again.*

I want to go all the way back to September 13 in the Ukraine whistleblower saga. Recall that at this time, we strongly suspected but did not yet know that the complaint centered on President Trump. Congress was clamoring for the report from the Inspector General of the Intelligence Community to be released and for testimony from ICIIG Michael Atkinson and/or Acting Director of National Intelligence Joseph Maguire. In response to those Congressional demands, the General Counsel of the Office of the Director of National Intelligence, Jason Klitenic, issued a letter in which he provided the rationale for his decision that Atkinson was not required to pass the complaint along to Congress even though Atkinson had come to the conclusion that the report was credible and represented an urgent concern that merited sharing with Congress. Because Trump eventually relented on the issue of the report and released it, the narrative has moved quickly beyond Klitenic's actions. But let's look at his primary justification for ruling that this report should not be disclosed:

(U//FOUO) In this instance, the ICIG transmitted to the DNI a complaint, that he viewed as an urgent concern, and we reviewed that report immediately upon receipt. Because there were serious questions about whether the complaint met the statutory definition of an "urgent concern" under 50 U.S.C. § 3033(k)(5), we consulted with DOJ concerning the appropriate way to handle the complaint. We also included the ICIG in those consultations to make sure that he had the opportunity to provide his views.

(U//FOUO) Based on those consultations, we determined that the allegations did not fall within the statutory definition of an "urgent concern" and that the statute did not require the complaint to be transmitted to the intelligence committees. The statutory definition of "urgent concern" requires the reporting of a serious allegation involving classified information relating to "the funding, administration, or operation of an intelligence activity within the responsibility and authority of the Director of National Intelligence." 50 U.S.C. § 3033(k)(5)(G)(i). This complaint, however, concerned conduct by someone outside the Intelligence Community and did not relate to any "intelligence activity within the responsibility and authority of the DNI." The complaint therefore did not fall within the statutory framework governing reporting matters of "urgent concern" to Congress.

Yesterday, Marcy went into the details of what transpired within DOJ in the Office of Legal Counsel during these deliberations, but here I want to concentrate just on how Klitenic relied on OLC's interpretation to come to the conclusion that one of the two most important determining factors in stating that Atkinson could not forward the complaint to Congress was that it applied to "someone outside the Intelligence Community". Knowing as we do now that the complaint did indeed focus on Trump's words and actions, Klitenic is stating clearly that the President is outside the Intelligence Community. This is really rich coming from Klitenic, because just about two weeks before the Trump-Zelensky phone call, Klitenic had helped to shut down the Congressional investigation of the scandal surrounding the issuance of security clearances within the Trump White House.

I've not yet found Klitenic's letter of July 10, 2019 that was sent in response to a letter from Senators Warner, Feinstein, Menendez and Reed on March 8, 2019 demanding that then-Director of National Intelligence Dan Coats and Atkinson "review compliance by the Executive Office of the President (EOP) with policies and procedures governing security clearances and access to secure compartmented information (SCI)". Note that Klitenic's response is well past the 60 day window the Senators granted for a response. Here is Atkinson on July 22, where he cites Klitenic's letter and interpretation:

However, as the General Counsel for the Office of the Director of National Intelligence (ODNI), Jason Klitenic, stated in his letter dated July 10, 2019, on behalf of the DNI, the authority over access to classified information ultimately rests with the President of the United States. Mr. Klitenic explained that, as a legal matter, the DNI does not have the authority to conduct the review requested in your letter, absent Presidential direction to do so. The ICIG agrees with the ODNI's interpretation of the law in this area. It is well-established that the President of the United States has broad latitude concerning the process through which security clearances are granted, transferred, or revoked,<sup>1</sup> as well as broad flexibility in determining whom to choose as his advisors and to what extent those advisors may gain access to information, including national security

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<sup>1</sup> See U.S. Const. art. II, § 2; see also *Dept. of the Navy v. Egan*, 484 U.S. 518 (1988).

information.<sup>2</sup> The Executive branch also has significant discretion when determining whether to grant security clearances and whether a particular person may have access to information.<sup>3</sup>

So, on July 10, 2019, Klitenic ruled that the President alone has authority of who is granted a security clearance and even who gets access to SCI. Recall that one of the central figures of this security clearance scandal was none other than Jared Kushner. His clearance was originally denied and Trump overruled the denial. One whistleblower on the security clearances, Tricia Newbold, was so incensed over Trump's actions that she went public, as noted in this April 1 article in the Washington Post.

Lucky for Kushner that he still has SCI access since it appears that records of Trump conversation's with Jared's BFF Mohammad bin Salman have been stashed at that level of classification. It is even more lucky for Kushner that although his father-in-law is not a member of the Intelligence Community, many of his most important conversations live well-buried within it.

Finally, many of you know that I am a diehard fan of college baseball. So of course when I looked at Klitenic's biography, I couldn't help noticing that he claims to have been an All-American baseball pitcher in college. That claim does indeed check out, although in true trash talk fashion I would add the asterisk that Johns Hopkins competes in Division III in baseball. One can't help wondering at this point when Chief Justice John Roberts, who at his confirmation stated his job is to "call balls and strikes" will be ruling on pitches made by Klitenic.