

**DEPARTMENT OF HOMELAND SECURITY
OFFICE OF INSPECTOR GENERAL**

In the Matter of

MURPHY, BRIAN
PRINCIPAL DEPUTY UNDER SECRETARY
DEPARTMENT OF HOMELAND SECURITY
OFFICE OF INTELLIGENCE & ANALYSIS

Complainant.

Whistleblower Reprisal Complaint

September 8, 2020

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INTRODUCTION

This complaint concerns retaliatory actions taken or threatened to be taken against a long-time public servant, Brian Murphy (“Mr. Murphy”). The retaliatory actions were taken and/or threatened to be taken in light of at least five sets of protected disclosures made by Mr. Murphy between March 2018 and August 2020. The protected disclosures that prompted the retaliatory personnel actions at issue primarily focused on the compilation of intelligence reports and threat assessments that conflicted with policy objectives set forth by the White House and senior Department of Homeland Security (“DHS”) personnel.

As set forth below, the identified protected communications were made through Mr. Murphy’s chain of command, as well as to the DHS Office of Inspector General (“OIG”). Notably, Mr. Murphy made protected communications to his immediate supervisor and some of the very Responsible Management Officials (“RMOs”) who ultimately took (or threatened to take) retaliatory action against Mr. Murphy.

A thorough investigation will establish that the actions taken or threatened to be taken against Mr. Murphy were done in reprisal for his protected disclosures. Therefore, we respectfully request that DHS OIG promptly institute the required investigation. The relief requested is set forth below.

JURISDICTION

As a Senior Executive Service employee within DHS, Mr. Murphy is protected by the implementing regulations of PPD-19, as well as the Whistleblower Protection Enhancement Act of 2012 and the National Defense Authorization Act of 2013. DHS OIG possesses clear jurisdiction over these matters.

ELEMENTS OF STANDARDS OF PROOF

The elements of reprisal are the following: (1) the information at issue is that which the individual reasonably believes is evidence of a violation of law, rule or regulation, or is an abuse of authority; (2) the individual made a protected disclosure regarding this information, namely to the OIG or an authorized official at DHS; (3) a personnel action is taken, threatened or withheld in reprisal for the protected disclosure; and (4) a causal connection exists between the protected communication and the personnel action. The elements must be established by a preponderance of the evidence for a complaint to be deemed substantiated. Mr. Murphy's complaint satisfies all four elements. The burden is on DHS officials to prove that the same adverse personnel actions (whether taken or threatened to be taken) would have occurred even if there had been no protected communications. *See, e.g., Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012); *Figueroa v. Nielsen*, 423 F. Supp. 3d 21 (S.D.N.Y. 2019); *Miller v. Dep't of Justice*, 842 F.3d 1252 (Fed. Cir. 2016)(once complainant establishes *prima facie* case, burden of proof shifts to U.S. Government to establish personnel actions taken, threatened, or withheld would have occurred absent protected communication).

BACKGROUND OF THE COMPLAINANT

From March 2018, until July 31, 2020, Mr. Murphy held the DHS position of Principal Deputy Under Secretary in the Office of Intelligence and Analysis ("DHS I&A"). Effective August 1, 2020, however, he was retaliatorily demoted to the role of Assistant to the Deputy Under Secretary for the DHS Management Division.

In his DHS I&A position, Mr. Murphy was responsible for all intelligence activities in DHS and was the principal advisor to the Secretary for Homeland Security and the Director of National Security. Mr. Murphy's primary mission sets included Counterterrorism, Cyber,

Transnational Organized Crime, Counterintelligence, Economic Security, Support to State and Local Officials, and Training.

Prior to joining DHS, Mr. Murphy had more than two decades' worth of public service experience. He served on active duty in the United States Marine Corps ("USMC") from 1994 until 1998, and received an honorable discharge with the rank of 1st Lieutenant. He joined the Federal Bureau of Investigation ("FBI") on August 15, 1998, and served as a Special Agent, where he worked on a variety of criminal and national security matters, including assignment to the New York Field Office on September 11, 2001, when our country was attacked by terrorists. With a Master's degree in Islamic Studies almost completed, Mr. Murphy volunteered to be reactivated by the USMC and subsequently served for six months in Iraq in 2004, where he saw extensive combat and received the Combat Action Ribbon. He returned to the FBI in March 2005, completed his Master's degree in May of 2005, and served without incident at the Bureau until his transition to DHS on March 5, 2018. His final title at the FBI was that of Section Chief for Partner Engagement in the Intelligence Division.

As part of his effort to better his academic understanding of the Russian threat to our constitutional republic, Mr. Murphy also began pursuing his doctorate at Georgetown University. He is approximately 75% complete with his doctoral program, and his concentration is on the Executive Branch's responsibility in combating Russian disinformation efforts within the United States.

Mr. Murphy is, put simply, a dedicated public servant who has had a laudable career prior to the recent events that have led to the submission of this package to the OIG. Prior to his current circumstances, he had never had so much as a negative fitness report in his professional career with the U.S. Government.

FACTS OF THE CASE

Mr. Murphy's protected disclosures involve violations of federal law and regulations, as well as abuses of authority. The disclosures principally concerned actions taken by three RMOs: (1) former DHS Secretary Kirstjen Nielsen ("Secretary Nielsen"); (2) Chad Wolf ("Mr. Wolf"), the Senior Official currently serving as Acting DHS Secretary; and (3) Kenneth Cuccinelli ("Mr. Cuccinelli"), the Senior Official serving as Deputy DHS Secretary. Other relevant RMOs who had peripheral roles in the underlying events and were involved in reprisal actions (whether threatened or actual) include former Deputy Chief of Staff Miles Taylor ("Mr. Taylor") and Counselor Kristen Marquadt ("Ms. Marquadt"). At least two relevant fact witnesses are former I&A Under Secretary David Glawe ("Mr. Glawe") and Mr. Glawe's Chief of Staff, Matthew Hanna ("Mr. Hanna").

Mr. Murphy's disclosures have resulted in clear and explicit retaliatory actions, as well as threatened retaliatory actions. The disclosures themselves, along with the corresponding reprisal action(s), are outlined below in five separate tranches.

A. Perjured Testimony before Congress regarding the Border Wall

Mr. Murphy made protected disclosures through the submission of two anonymous OIG reports on November 2, 2018,¹ and May 13, 2019, respectively. Those anonymous reports outlined potential violations of federal law, including perjured testimony before Congress, as well as abuses of authority and improper administration of an intelligence program. The relevant

¹ This OIG complaint was originally submitted to the Office of Director for National Intelligence's Office of Inspector General. It was then referred to DHS OIG.

officials regarding whom Mr. Murphy was complaining were Secretary Nielsen, Mr. Wolf, Mr. Taylor, Ms. Marquadt, and then-Acting Deputy Secretary Clare Grady (“Ms. Grady”).²

From October 2018 through March 2019, Mr. Murphy was involved in discussions with Secretary Nielsen, Mr. Wolf, Mr. Taylor, and Ms. Marquadt regarding the information DHS would provide to Congress regarding construction of the border wall along the southwest border. Their discussions were particularly focused on the issue of known or suspected terrorists (“KSTs”) entering the United States through the southwest border. It was Mr. Murphy’s responsibility to provide to Secretary Nielsen the relevant intelligence assessments on behalf of DHS I&A.

On or about October 29, 2018, Mr. Glawe informed Mr. Murphy that instructions from Mr. Taylor and Ms. Marquadt had been issued for Mr. Murphy to ensure the intelligence assessments he produced for Secretary Nielsen’s review supported the policy argument that large numbers of KSTs were entering the United States through the southwest border. Mr. Murphy declined to censor or manipulate the intelligence information, viewing it as an improper administration of an intelligence program, and stated to Mr. Glawe that doing what was being requested would constitute a felony. Mr. Glawe agreed with Mr. Murphy’s assessment. When Mr. Murphy would provide the intelligence information for Secretary Nielsen’s review, there subsequently would be e-mail or phone calls from Mr. Taylor and/or Ms. Marquadt to Mr. Glawe seeking to have the underlying intelligence data reinterpreted to fit the White House’s policy

² It is unclear what, if anything, ultimately occurred with respect to either of these anonymous OIG complaints. Mr. Murphy has no knowledge of the extent to which formal investigations were conducted and/or reports of investigation issued. Mr. Murphy was never interviewed by DHS OIG with respect to the allegations outlined in either OIG complaint, nor is he aware that any investigation occurred in response to either complaint.

argument. Each time, Mr. Glawe declined, presumably based at least in part on the cautionary guidance Mr. Murphy had provided.

Prior to Secretary Nielsen's testimony before the House Judiciary Committee on December 20, 2018, Mr. Murphy attended a preparation session that went over the information within the proposed testimony. During that session, Mr. Murphy sought to clarify for Secretary Nielsen the distinction between a KST and a Special Interest Alien ("SIA"). An SIA is a term of art created by U.S. Customs and Border Protection meant to describe a category of migrants who come from countries where there is a significant terrorism threat but regarding whom there is no individualized basis for suspecting the person is themselves a terrorist. An SIA does not constitute a KST.

Notwithstanding the clarification provided by Mr. Murphy, he has a good faith belief that the testimony Secretary Nielsen subsequently provided on December 20, 2018, regarding KSTs constituted a knowing and deliberate submission of false material information. This assessment formed the basis of the anonymous OIG complaint Mr. Murphy submitted on November 2, 2018. On January 9, 2019, without consulting with Messrs. Glawe or Murphy, DHS issued a document – apparently crafted by Messrs. Wolf and Taylor, and Ms. Marquadt – entitled "Myth/Fact: Known and Suspected Terrorists/Special Interest Aliens". The document contained erroneous information regarding the number of KSTs and SIAs encountered along the southwest border.

On March 5, 2019, Mr. Murphy participated in another preparation session with Secretary Nielsen, this time in advance of her testimony before the House Committee on Homeland Security. Messrs. Wolf and Taylor were also present. During the session, Mr. Murphy provided Secretary Nielsen with documentation reflecting that the number of documented KSTs crossing the southwest border only consisted of no more than three individuals, not 3,755 individuals as

she had previously attested to in her testimony on December 20, 2018.³ Mr. Wolf and Mr. Taylor responded by saying Secretary Nielsen should claim the details were classified, state any KST crossing was one too many and deflect away from addressing the significant discrepancy in the data. Mr. Murphy advised Secretary Nielsen that he did not believe that was appropriate, and noted that the few “known” KSTs who were apprehended were derivative contacts, in so much as they merely had a name or phone number of a person who was known to be in contact with a terrorist. At that point, Mr. Murphy was removed from the meeting by Mr. Wolf. He then informed Messrs. Glawe and Hanna what transpired that evening.

It is Mr. Murphy’s good faith belief that the testimony Secretary Nielsen delivered on March 6, 2019, regarding KSTs again constituted a knowing and deliberate submission of false material information. Mr. Murphy outlined that assessment in his anonymous May 13, 2019, OIG complaint.

On more than one occasion overlapping with the submission of the first anonymous OIG complaints, as well as Mr. Murphy’s refusal to engage in what he viewed as illegal and/or improper actions both before and after the submission of the first anonymous OIG complaint, Mr. Murphy learned – whether through colleagues or directly from Mr. Glawe – that disciplinary action in the form of termination of employment was being pursued against him (Mr. Murphy). Shortly after the release of the January 9, 2019, “Myth/Fact” sheet, Mr. Murphy began to hear from colleagues that Ms. Grady had been inquiring regarding whether Mr. Murphy’s employment could be terminated. Mr. Glawe actually informed Mr. Murphy that he (Mr. Glawe)

³ It is Mr. Murphy’s good faith belief and understanding that the 3,755 number Secretary Nielsen listed in her testimony included individuals who had applied for visas, as well as those who had been stopped at an airport or other entry points. The figure was not an accurate representation of the number of documented KSTs coming across the southwest border.

had been instructed by Messrs. Wolf and Taylor, as well as Ms. Marquadt and Ms. Grady to terminate Mr. Murphy's employment.

On January 31, 2019, Mr. Taylor sent Mr. Murphy an e-mail asking to meet with him. Mr. Murphy informed Mr. Glawe about the e-mail: Mr. Glawe intervened, and later informed Mr. Murphy that Mr. Taylor had intended to seek Mr. Murphy's termination as a result of his declination to provide intelligence assessments regarding KSTs that Mr. Murphy felt were inconsistent with the underlying intelligence data.

Mr. Murphy reasonably believes in good faith that the relevant RMOs –Messrs. Wolf and Taylor and Ms. Grady, in particular – were not only aware of the details of Mr. Murphy's refusal to engage in what he viewed as manipulation and improper administration of an intelligence program, but also that Mr. Murphy was the individual who had filed the first OIG complaint alleging perjured testimony had been delivered by Secretary Nielsen.⁴ The basis for Mr. Murphy's reasonable belief is premised on the fact there were a limited number of witnesses who would have been present in the meetings where the information was discussed that underlay the allegations in the first OIG complaint. Both Mr. Glawe and Mr. Hanna are aware Mr. Murphy was the individual who submitted the two anonymous OIG complaints, as Mr. Murphy informed them of that fact.

⁴ In May 2020, after Mr. Glawe's retirement, Mr. Wolf told Mr. Murphy he was "willing to give him a chance and let the past be the past". Mr. Murphy interpreted this remark to suggest Mr. Wolf also suspected – if not knew – that Mr. Murphy had been the one who submitted at least one, if not both, of the two anonymous OIG complaints.

B. Improper Administration of an Intelligence Program and Abuse of Authority by Mr. Cuccinelli

Mr. Murphy made a protected disclosure to Mr. Glawe in December 2019, regarding an attempted abuse of authority and improper administration of an intelligence program by Mr. Cuccinelli.

In December 2019, Mr. Murphy attended a meeting with Messrs. Cuccinelli and Glawe to discuss intelligence reports regarding conditions in Guatemala, Honduras, and El Salvador. The intelligence reports were designed to help asylum officers render better determinations regarding their legal standards. Mr. Murphy's team at DHS I&A completed the intelligence reports and he presented them to Mr. Cuccinelli in the meeting. Mr. Murphy defended the work in the reports, but Mr. Cuccinelli stated he wanted changes to the information outlining high levels of corruption, violence, and poor economic conditions in the three respective countries. Mr. Cuccinelli expressed frustration with the intelligence reports, and he accused unknown "deep state intelligence analysts" of compiling the intelligence information to undermine President Donald J. Trump's ("President Trump") policy objectives with respect to asylum. Notwithstanding Mr. Murphy's response that the intelligence reports' assessments were consistent with past assessments made for several years, Mr. Cuccinelli ordered Messrs. Murphy and Glawe to identify the names of the "deep state" individuals who compiled the intelligence reports and to either fire or reassign them immediately.

After the meeting, Mr. Murphy informed Mr. Glawe that Mr. Cuccinelli's instructions were illegal, as well as constituted an abuse of authority and improper administration of an intelligence program. Mr. Murphy also informed Mr. Glawe he would not comply with the instruction to fire or reassign the alleged "deep state" officials based on nothing more than perceived political differences, and that Mr. Murphy would report the matter to DHS OIG if

improper actions were taken to do so. Mr. Glawe concurred with Mr. Murphy's assessment and Mr. Cuccinelli's instructions were never implemented.

C. Improper Administration of an Intelligence Program and Abuse of Authority regarding Russian Influence

Mr. Murphy made several protected disclosures between March 2018 and August 2020 regarding a repeated pattern of abuse of authority, attempted censorship of intelligence analysis and improper administration of an intelligence program related to Russian efforts to influence and undermine United States interests. The relevant officials at issue were Secretary Nielsen and Messrs. Wolf, Cuccinelli, Taylor, and Acting Deputy Director for the Office of the Director of National Intelligence, Kash Patel ("Mr. Patel"). The majority of the information underlying these protected disclosures is classified and cannot be provided in this unclassified submission. However, Mr. Murphy is more than amenable to making a classified presentation on this information – whether verbally or in writing – if provided with the requisite authorization to do so and a secure means to provide the information to DHS OIG.

Mr. Murphy made several protected disclosures on this subject to Mr. Glawe in particular between March 2018 and May 2020, at which time Mr. Glawe retired. Mr. Murphy does not recall each specific instance in which he made a protected disclosure to Mr. Glawe on this matter, but he does recall that Mr. Glawe was initially supportive of Mr. Murphy's concerns.

In approximately September 2018, Mr. Glawe testified in front of the House Committee on Homeland Security. Mr. Murphy was not present during the testimony. Immediately following that hearing, Mr. Glawe informed Mr. Murphy that he had been "challenged" by Republican members of the Committee regarding Mr. Glawe's confirmation of Russian interference in the 2016 elections. Mr. Glawe was subsequently summoned to the White House a few days after his testimony. Mr. Glawe informed Mr. Murphy that Secretary Nielsen had warned him that

President Trump had demanded Mr. Glawe be fired. However, Secretary Nielsen and White House Chief of Staff, John Kelly, had convinced President Trump to “give Glawe another chance”. After that meeting at the White House, Mr. Glawe informed Mr. Murphy that while he (Mr. Glawe) would continue to support him on most matters he (Mr. Murphy) was on his own when it came to election interference assessments.

On October 16, 2018, Mr. Murphy made a classified protected disclosure to then-Principal Deputy for the ODNI, Sue Gordon, on this subject. The details of the protected disclosure cannot be provided in this unclassified submission beyond stating that the concern raised pertained to improper administration of an intelligence program.

On or about May 28, 2019, Mr. Murphy made a classified protected disclosure to Assistant Deputy National Security Advisor Sarah Tinsley on this subject. The details of the protected disclosure cannot be provided in this unclassified information beyond stating that the concern raised pertained to improper administration of an intelligence program.

On or about March 3, 2020, March 7, 2020, March 23, 2020, March 24, 2020, April 10, 2020 and April 14, 2020, Mr. Murphy made classified protected disclosures to Mr. Patel on this subject. The details of the protected disclosure cannot be provided in this unclassified information beyond stating that the concern raised pertained to improper administration of an intelligence program with respect to Russian disinformation efforts within the United States.

On April 15, 2020, Mr. Murphy made classified protected disclosures to Mr. Cuccinelli and Mr. Wolf on this subject. The details of the protected disclosure cannot be provided in this unclassified information beyond stating that the concern raised pertained to improper administration of an intelligence program.

In mid-May 2020, Mr. Wolf instructed Mr. Murphy to cease providing intelligence assessments on the threat of Russian interference in the United States, and instead start reporting on interference activities by China and Iran. Mr. Wolf stated that these instructions specifically originated from White House National Security Advisor Robert O'Brien. Mr. Murphy informed Mr. Wolf he would not comply with these instructions, as doing so would put the country in substantial and specific danger.

In late May 2020, Mr. Murphy made a classified protected disclosure to Mr. Cuccinelli on this subject. The details of the protected disclosure cannot be provided in this unclassified information beyond stating that the concern raised pertained to abuse of authority.

After a late May 2020 meeting of the NSC Deputies Committee on Election Security, Mr. Murphy made an additional classified protected disclosure to Mr. Cuccinelli on this subject. The details of the protected disclosure cannot be provided in this unclassified information beyond stating that the concern raised pertained to abuse of authority, willfully withholding intelligence information from Congress, and the improper administration of an intelligence program.

On July 7, 2020, DHS Chief of Staff John Gountanis ("Mr. Gountanis") sent an e-mail to Mr. Murphy directing him to cease any dissemination of an intelligence notification regarding Russian disinformation efforts until Mr. Murphy had spoken with Mr. Wolf. The two men met on July 8, 2020, at which time Mr. Wolf stated to Mr. Murphy the intelligence notification should be "held" because it "made the President look bad". Mr. Murphy objected, stating that it was improper to hold a vetted intelligence product for reasons for political embarrassment. In response, Mr. Wolf took steps to exclude Mr. Murphy from relevant future meetings on the subject. The draft product was eventually completed without Mr. Murphy's involvement and was made public in a leak to the media by unknown individuals. It is Mr. Murphy's assessment that

the analysis in the leaked “completed draft” attempts to place the actions of Russia on par with those of Iran and China in a manner that is misleading and inconsistent with the actual intelligence data.

D. Improper Administration of an Intelligence Program with respect to the Homeland Threat Assessment

Mr. Murphy made protected disclosures in March 2020 and April 2020, to his supervisor, Mr. Glawe. The protected disclosures concerned an abuse of authority and improper administration of an intelligence program. The relevant officials at issue were Messrs. Wolf, Cuccinelli and Gountanis.

In March 2020, Mr. Murphy’s team at DHS I&A completed a Homeland Treat Assessment (“HTA”). Completion of the HTA was a requirement set forth by Acting Secretary Kevin McCleenan prior to his departure from DHS. Mr. Murphy was intimately involved in the editing and crafting of the HTA. Following its completion, the HTA was distributed by Mr. Glawe to Messrs. Wolf, Cuccinelli, and Gountanis. Shortly after the distribution, Mr. Glawe was informed that further distribution of the HTA was prohibited due to concerns raised by Messrs. Wolf and Cuccinelli regarding how the HTA would reflect upon President Trump. Two sections were specifically labeled as concerns: White Supremacy and Russian influence in the United States. Mr. Murphy stated to Mr. Glawe that this constituted an abuse of authority by Messrs. Wolf and Cuccinelli, and Mr. Glawe concurred with that assessment.

In May 2020, Mr. Glawe retired, and Mr. Murphy assumed the role of Acting Under Secretary. In May 2020 and June 2020, Mr. Murphy had several meetings with Mr. Cuccinelli regarding the status of the HTA. Mr. Cuccinelli stated that Mr. Murphy needed to specifically modify the section on White Supremacy in a manner that made the threat appear less severe, as well as include information on the prominence of violent “left-wing” groups. Mr. Murphy

declined to make the requested modifications, and informed Mr. Cuccinelli that it would constitute censorship of analysis and the improper administration of an intelligence program.

On July 8, 2020, Mr. Murphy attended a meeting with Mr. Wolf and his Deputy Chief of Staff, Scott Erickson (“Mr. Erickson”). Mr. Murphy asked Mr. Wolf about the status of the HTA. Mr. Wolf relayed the concerns previously outlined by Mr. Cuccinelli regarding the sections on White Supremacy and Russian influence. Mr. Wolf asked for a copy of the HTA so it could be reviewed by policy officials, and so that information regarding the ongoing unrest in Portland, Oregon, could be added into the HTA. Mr. Wolf asked Mr. Murphy if he would accept his edits. Mr. Murphy responded that he would not concur with any edits that altered the underlying intelligence in the HTA, as any such action would constitute an abuse of authority and improper administration of an intelligence program.

Completion of the HTA was subsequently handled by other DHS officials without consultation with Mr. Murphy. Another draft of the HTA was completed in August 2020: Mr. Murphy did not work on that version of the HTA. On September 3, 2020, Mr. Murphy learned the new draft was provided to Mr. Wolf, who had ordered the HTA to be redesigned with the policy office completing the revisions. It is Mr. Murphy’s assessment that the final version of the HTA will more closely resemble a policy document with references to ANTIFA and “anarchist” groups than an intelligence document as originally formulated by DHS I&A.

E. Improper Administration of an Intelligence Program regarding ANTIFA

During multiple meetings between the end of May 2020 and July 31, 2020, Mr. Murphy made protected disclosures to Messrs. Wolf and Cuccinelli regarding abuse of authority and improper administration of an intelligence program with respect to intelligence information on ANTIFA and “anarchist” groups operating throughout the United States. On each occasion,

Mr. Murphy was instructed by Mr. Wolf and/or Mr. Cuccinelli to modify intelligence assessments to ensure they matched up with the public comments by President Trump on the subject of ANTIFA and “anarchist” groups. Mr. Murphy declined to modify any of the intelligence assessments based upon political rhetoric, and advised both officials he would only report accurate intelligence information as collected by DHS I&A.

On July 31, 2020, Mr. Wolf informed Mr. Murphy he was considering reassigning him to the DHS Management Division. Prior to that meeting, there had been significant media attention alleging that DHS I&A had been engaged in illicit intelligence information collection with respect to journalists. To be unequivocally clear, the press reporting was significantly flawed and, in many instances, contained completely erroneous assertions. For example, DHS I&A *never* knowingly or deliberately collected information on journalists, at least as far as Mr. Murphy is aware or ever authorized. There were, to be sure, efforts to track publicly available media reporting that included information that had been leaked from the U.S. Government, including publicly-accessible posts by journalists on social media, but DHS I&A did not seek authorization to and was not engaging in surveillance of journalists’ private data. Furthermore, any intelligence information gathered regarding the protests that were ongoing at the time in places like Portland was done in strict compliance with existing legal guidance. Any type of intelligence collection on individual protestors required evidence those individuals were associated with violence or national security threats. To the best of Mr. Murphy’s knowledge, DHS I&A *never* collected intelligence information on strictly peaceful protestors. Mr. Murphy denies he would have been willing to authorize such conduct even if requested to do so.

Mr. Wolf stated to Mr. Murphy that although he knew there was no merit to the press allegations, the removal and reassignment of Mr. Murphy would be politically good for

Mr. Wolf, who wanted to be officially nominated as the DHS Secretary. Mr. Murphy stated that such a reassignment for political gain would constitute an abuse of authority by Mr. Wolf.

Nevertheless, Mr. Murphy was reassigned to the Management Division on August 1, 2020. The reassignment is set to last for up to 120 days. The detailed position at the Management Division constitutes a de facto demotion: Mr. Murphy went from serving as the Acting Secretary and Principal Deputy Under Secretary at DHS I&A to now working as the Assistant to the Deputy Under Secretary for the DHS Management Division.⁵

REPRISAL ANALYSIS

A. Mr. Murphy's Protected Disclosures Suffice as a Matter of Law

5 U.S.C. § 2302(a)(2)(D)(i-ii) describes a protected disclosure as a formal or information communication or transmission of information regarding which the employee reasonably believes evidences a violation of law, rule or regulation, or evidences gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. Any protected disclosure within an employee's supervisory chain of command or to an Inspector General of the employee's agency is protected under 5 U.S.C. § 2302(b)(8).

A belief is reasonable if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the disclosed information implicates one of the statutory categories of wrongdoing. As long as his or her belief is reasonable, the employee need not be right about the underlying allegation. Here, the allegations were reasonable and more than likely correct.

Each of the disclosures outlined above were protected for purposes of § 2302(b)(8).

⁵ For what it is worth, Mr. Murphy has continued to perform his work responsibilities without complaint or incident since his reassignment.

- The submission of OIG complaints on November 2, 2018, and May 13, 2019, clearly qualify as protected disclosures as a matter of law. The communications were made to the OIG (whether ODNI or DHS), which is a covered disclosure channel under the law. Moreover, the disclosures concerned a reasonable belief that Secretary Nielsen had provided false material information in two separate Congressional hearings, as well as abuses of authority and improper administration of an intelligence program;
- The discussion between Mr. Murphy and Mr. Glawe regarding the instructions from Mr. Cuccinelli to fire or reassign “deep state” officials also qualifies as a protected disclosure as a matter of law. The communications were made by Mr. Murphy to his immediate supervisor, Mr. Glawe, a protected disclosure channel under law. Furthermore, the communications concerned what Mr. Murphy reasonably perceived as an order to undertake illegal actions (i.e., engage in a prohibited personnel action), as well as an abuse of authority and improper administration of an intelligence program by Mr. Cuccinelli;
- The classified disclosures Mr. Murphy made to Messrs. Wolf, Cuccinelli and Glawe between March 2018 and August 2020, all qualify as protected disclosures as a matter of law. The communications were made by Mr. Murphy to three individuals who are all within his supervisory chain of command. Furthermore, the communications concerned what Mr. Murphy reasonably concluded in good faith was a pattern of abuse of authority, attempted censorship of intelligence analysis and improper administration of an intelligence program related to Russian interference activities;
- The communications made by Mr. Murphy to Messrs. Wolf and Glawe regarding the HTA qualify as protected disclosures as a matter of law. The communications were made by Mr. Murphy to two individuals within his supervisory chain of command. Furthermore, the communications concerned what Mr. Murphy reasonably perceived as an abuse of authority and improper administration of an intelligence program; and,
- Finally, the discussions Mr. Murphy had between May 2020 and July 2020, with Messrs. Wolf and Cuccinelli regarding the intelligence reports concerning ANTIFA qualify as protected disclosures as a matter of law. The communications were made by Mr. Murphy to two individuals within his supervisory chain of command. The communications themselves concerned what Mr. Murphy reasonably perceived as an abuse of authority and improper administration of an intelligence program.

Mr. Murphy has more than sufficiently demonstrated that his disclosures satisfy the first two criteria of the legal analysis.

B. Mr. Murphy was Subjected to Threatened and Actual Unfavorable Personnel Actions by RMOs who Knew or were Reasonably Likely to Know about the Protected Disclosures by Mr. Murphy

Federal law defines a “personnel action” as encompassing, among other things, a “detail, transfer, or reassignment”, as well as “any other significant change in duties, responsibilities, or working conditions.” *See* 5 U.S.C. § 2302(a)(2)(iv), (xii); *see also Savage v. Dep’t of the Army*, 122 M.S.P.R. 612, P 23 (2015)(noting phrase “any other significant change in duties, responsibilities or working conditions” should be construed broadly).

As a matter of law, it is sufficient to qualify as reprisal if even the mere threat to take a qualifying personnel action is made, to say nothing of the actual qualifying personnel action being implemented as a result of the protected disclosure having been made. *See* 5 U.S.C. § 2302(b)(8)(A)-(B).

The factual record is abundantly clear that as a result of his protected disclosures retaliatory personnel actions were threatened against Mr. Murphy and, ultimately, were taken against him by RMOs who knew or were reasonably likely to know of Mr. Murphy’s protected disclosures. Specifically, the following meet the legal threshold:

- Mr. Murphy was informed by Mr. Glawe of efforts by several RMOs – namely, Mr. Wolf, Mr. Taylor, Ms. Marquadt and Ms. Grady – to terminate Mr. Murphy’s employment in 2018 and 2019. These efforts to terminate Mr. Murphy’s employment occurred in the context of Mr. Murphy’s protected disclosures to some of these same RMOs regarding his concern that Secretary Nielsen’s Congressional testimony contained false material information, as well as being pursued in the wake of Mr. Murphy’s submission of the first anonymous OIG complaint;
- Reformulation and completion of the HTA in August 2020 was done without consultation with Mr. Murphy or his team at DHS I&A, despite the fact that the first draft of the HTA had been handled specifically by Mr. Murphy’s team. This significant change in responsibilities was implemented by Mr. Wolf. It occurred in the wake of Mr. Murphy’s protected disclosures to Messrs. Glawe, Wolf and Cuccinelli in which Mr. Murphy made clear he would decline to manipulate intelligence for political reasons; and,

- On August 1, 2020, Mr. Murphy was reassigned by Mr. Wolf to a reduced role at the DHS Management Division. This demotion and reassignment occurred in the immediate aftermath of protected disclosures Mr. Murphy had made to Messrs. Wolf and Cuccinelli regarding his concerns that he was being ordered to manipulate intelligence for political reasons, and that the orders to do so constituted an abuse of authority and improper administration of an intelligence program.

All of these actions, jointly and severally, qualify as reviewable personnel actions within the meaning of § 2302.

C. The Unfavorable Personnel Actions Would Not Have Been Taken Absent the Protected Communications

To determine the answer to the “causation” question, the investigation must analyze what bearing, if any, the protected communications had on the decisions to take, threaten, or withhold the personnel actions. For each personnel action, the investigation must analyze the following factors and then weigh them together to determine whether the personnel action would have been taken absent the protected communication:

- Reason stated by responsible management officials for taking, withholding, or threatening the personnel action;
- Timing between the protected communications and personnel actions;
- Motive on the part of the responsible management officials to reprise; and,
- Disparate treatment of the complainant as compared to other similarly situated individuals who did not make protected communications.

The burden of proof, during this phase of the investigation, shifts to the U.S. Government.

See e.g., Whitmore v. Dep't of Labor, 680 F.3d 1353, 1367 (Fed. Cir. 2012); *Figueroa v. Nielsen*, 423 F. Supp. 3d 21 (S.D.N.Y. 2019); *Miller v. Dep't of Justice*, 842 F.3d 1252 (Fed. Cir. 2016) (once the complainant establishes a *prima facie* case, the burden of proof shifts to the U.S. Government to establish that the personnel actions taken, threatened, or withheld would have occurred absent the protected communication).

In analyzing the actions that have been taken against Mr. Murphy, there is no independent basis for those actions other than his protected activity. In fact, had Mr. Murphy simply acquiesced and engaged in the conduct he reasonably perceived as evidencing violations of law and abuses of authority, no adverse personnel actions would have taken place at all.

We are aware of no evidence that any of the adverse actions Mr. Murphy experienced would have occurred absent his protected disclosures. The burden is on the RMOs to come forward with that evidence. If they have any, we intend to refute it. If they fail or refuse to cooperate in the investigation, an adverse inference should be drawn.

RELIEF REQUESTED

For the foregoing reasons, the OIG should recommend the following relief:

- (a) Mr. Murphy should be immediately reinstated to his position at DHS I&A;
- (b) Mr. Murphy's reassignment (demotion) should be expunged from his Official Personnel File and a continuity report substituted for it;
- (c) Each existing officer or employee of the government who retaliated or threatened to retaliate against Mr. Murphy for his protected activities should be reprimanded in writing, such writing to be made a part of his or her permanent official personnel record, or otherwise subjected to appropriate corrective or disciplinary action;
- (d) Payment of reasonable attorney's fees; and,
- (e) Such other and further relief as may in the circumstances be just and proper.

Respectfully submitted,

/s/ Mark S. Zaid

/s/ Andrew P. Bakaj

/s/ Bradley P. Moss

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Copies sent to:

Senate Select Committee on Intelligence

Acting Chairman & Vice Chairman

Senate Committee on Homeland Security & Governmental Affairs

Chairman & Ranking Member

House Permanent Select Committee on Intelligence


Chairman & Ranking Member

House Committee on Homeland Security

Chairman & Ranking Member

Verification

I declare under penalty of perjury that the facts stated in the foregoing Whistleblower Reprisal Complaint are true and correct.



Brian Murphy