

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION, NEW YORK CIVIL
LIBERTIES UNION, and NEW YORK CIVIL
LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

JAMES R. CLAPPER, in his official capacity as
Director of National Intelligence; KEITH B.
ALEXANDER, in his official capacity as
Director of the National Security Agency and
Chief of the Central Security Service;
CHARLES T. HAGEL, in his official capacity
as the Secretary of Defense; ERIC H.
HOLDER, in his official capacity as Attorney
General of the United States; and ROBERT S.
MUELLER III, in his official capacity as the
Director of the Federal Bureau of Investigation,

Defendants.

Case No. 13-cv-03994 (WHP)

ECF Case

DECLARATION OF MICHAEL GERMAN

I, Michael German, hereby declare and state as follows:

1. I am a resident of the Commonwealth of Virginia over the age of 18 and am principally employed in the District of Columbia. I have personal knowledge of the facts stated in this declaration.

2. I am a Senior Policy Counsel on National Security, Immigration, and Privacy at the American Civil Liberties Union (“ACLU”), where I have worked since 2006. In my work at the ACLU, I am an advocate on issues related to national security and government transparency,

and I am the ACLU's principal advocate on issues related to "whistleblowers," or individuals inside of government who wish to expose government wrongdoing (including illegality, waste, fraud, or abuse) through appropriate and legal channels. I have expertise in this area in part because I am a former federal whistleblower myself.

3. The ACLU is dedicated to defending the rights guaranteed in the Constitution and Bill of Rights, including the free-speech rights of government employees and the public's right to government information produced for public benefit and at public expense. Often, government employees and contractors are the only people in positions to disclose government waste, fraud, abuse, and illegality, and they therefore must be empowered to responsibly report these matters to the appropriate oversight officials within the executive branch—as well as to Congress, the courts and the public—without fear of reprisal. This is particularly true in the national-security context, where inappropriate or excessive use of classification can be used to hide government activities from congressional, judicial, and public oversight, and where the laws protecting whistleblowers from reprisal are weakest.

4. The ACLU lobbies in Congress and directly to executive-branch agencies to strengthen the legal protections for whistleblowers, and to provide effective due-process mechanisms for adjudicating government employees' and contractors' complaints of reprisal for having reporting waste, fraud, abuse, and illegality. The ACLU supported the Whistleblower Protections Enhancement Act of 2012, and encouraged the executive branch to promulgate Presidential Police Directive 19, which is designed to expand protections for employees of the intelligence agencies.

5. Because the ACLU is a prominent organization working on these issues, whistleblowers often contact the ACLU directly, seeking advice, representation, or both.

Because of my background as a whistleblower, many whistleblowers contact me directly to seek my guidance. In these cases, I assist prospective whistleblowers in obtaining legal advice from ACLU litigators or from public-interest groups outside the ACLU, such as the National Whistleblower Center, the Project on Government Oversight, the James Madison Project, and the Government Accountability Project, among others. I may also introduce them to congressional staff, or give them advice on which committees or members of Congress work on the issues they are concerned about or oversee the agencies in which they work. Many times I ask them if they are willing to lose their jobs in the process of bringing a problem to light. If they say “no,” I often advise them that the legal protections existing today are insufficient to protect them from retaliation and they should carefully consider their decision. In some cases they do not report the misconduct as a result.

6. I sought assistance from the ACLU when I left the FBI and reported problems in the FBI counterterrorism program to Congress and the public. The ACLU also represented former FBI linguist Sibel Edmunds, who was improperly fired by the FBI after reporting problems in the agency’s translation program. The ACLU of Southern California represented Federal Air Marshal Frank Terreri, who was suspended after raising concerns about policy changes that made it easier to identify Federal Air Marshals while on duty protecting air traffic. The ACLU has also assisted many other whistleblowers who have never been publicly identified.

PERSONAL WHISTLEBLOWING HISTORY

7. In June 1988, after graduating from Northwestern University Law School, I entered on duty as a Special Agent at the Federal Bureau of Investigation (“FBI”). During my career at the FBI, I had a clean disciplinary record and a consistent record of superior performance appraisals, and I received a Medal of Valor from the Los Angeles Federal Bar

Association, and a First African Methodist Episcopal Church FAME Award. In addition, through my work as an undercover agent, I successfully infiltrated domestic terrorist organizations, recovered dozens of illegal firearms and explosive devices, successfully investigated unsolved bombings, prevented acts of terrorism, and helped win criminal conviction against terrorists.

8. In 2002, I made a protected disclosure through my chain of command about management failures and violations of law in an FBI counterterrorism investigation. In particular, I learned in August 2002 that part of a meeting between subjects of an FBI investigation in which I was involved had been illegally recorded, in violation of Title III wiretap laws, by an FBI cooperating witness. On September 10, 2002, I sent a letter documenting the illegality of which I was aware up my chain of command. Almost immediately, I suffered retaliation from superior officers; later, I learned that retaliatory investigations, which were shown to be meritless, had been initiated against me because of the misconduct I reported. In November 2002, I reported the entirety of the matter to the Office of the Inspector General (“OIG”) in the Department of Justice (“DOJ”). In 2004, I resigned from the FBI as a result of the retaliation I suffered after reporting the misconduct.

9. After two years of attempting to have the misconduct and deficiencies that I witnessed addressed within the FBI and DOJ, I chose to report the matter to Congress. As a result of the efforts of Senators Chuck Grassley, Arlen Specter, and Patrick Leahy, among others, the OIG ultimately released a report documenting the investigation precipitated by the illegality I reported within the FBI. The report confirms many of the allegations in my original complaint. In 2008, I testified before the House Judiciary Committee’s Subcommittee on Crime, Terrorism, and Homeland Security about my whistleblowing experience within the FBI.

EXPERIENCE WITH WHISTLEBLOWERS AS ACLU POLICY COUNSEL

10. Since joining the ACLU in 2006, I have specialized in advocacy related to federal law enforcement. The primary focus of my work is the role of whistleblowers in exposing government wrongdoing, waste, fraud, and abuse. I estimate that 15 to 25 percent of my professional time is spent on this focus.

11. According to a May 2009 report by the DOJ Office of the Inspector General, *Review of the Federal Bureau of Investigation's Disciplinary System*, a survey of FBI employees indicated that 18 percent of respondents said that they "never" reported incidents of possible misconduct of which they had been made aware. Additionally, 28 percent of respondents in non-supervisory positions (GS-13 grade level or below) indicated that they "never" reported incidents of possible misconduct of which they had been made aware. The report indicated that the second-most-common reason for FBI employees failing to report misconduct incidents was fear of professional retaliation.

12. In my professional capacity, I regularly receive calls from government employees seeking advice on how to "blow the whistle" appropriately, safely, and effectively within different government agencies. In general, my relationships with these individuals are not confined to a single contact, but consist of continuing and ongoing discussions about various attempts to report misconduct and avoid retaliation that may last years at a time. The potential whistleblowers typically do not know their rights under the law, or the proper methods to report waste, fraud, abuse, or illegality within their agencies. They often do not know the responsibilities of the Inspectors General of their agencies, or how to report a complaint to those officials. Finally, they often do not know how they may bring the matter to the attention of members of Congress, and need assistance in identifying the proper committee or member to which they can report their concerns. Even after reporting through these avenues, however,

whistleblowers often need continuing assistance if, for example, the Inspectors General or congressional staff do not properly follow up to investigate the matters. Additionally, after initial reporting, whistleblowers often begin to suffer retaliation as a result of their protected disclosures. I often work with congressional staff and with staff of the Inspector General offices to address the concerns presented by federal whistleblowing.

13. In addition, sometimes individuals within the government contact me about government misconduct but cannot explain themselves fully because doing so would reveal classified information. These individuals usually are seeking safe avenues for communicating and reporting information that may be classified without committing a crime. In my experience, most of these individuals contact me because they are unaware of avenues within the government for reporting misconduct related to classified matters without exposure to adverse retaliation. In my professional experience, less than ten percent of federal-government whistleblowing involves classified information.

14. In most cases, my role in advising potential whistleblowers is to provide guidance about the available avenues for reporting government misconduct, waste, fraud, or abuse, based on my experience and expertise, as well as to assist individuals in retaining legal counsel should the individual desire it.

15. In my experience, government employees who have witnessed possible incidents of misconduct fear that they will suffer professional retaliation if they report those incidents through administrative channels.

16. In the context of whistleblowing, I am aware of various forms of professional retaliation that have occurred in the past and that commonly dissuade individuals from coming forward with information about possible government misconduct, waste, fraud, or abuse. Such

retaliation includes, but is not limited to: harassment; retaliatory investigations; internal disciplinary actions; adverse change of job duties or responsibilities; physical-location transfers; termination; and filing of criminal charges.

17. Additionally, individuals who hold security clearances from the federal government risk losing their clearance status by reporting misconduct. I am aware of numerous cases in which whistleblowers lost security clearances after reporting incidents of misconduct, or had their security clearances threatened. Employees and contractors of the FBI and intelligence agencies have little ability to defend themselves against security-clearance retaliation, and in most cases cannot maintain employment with these agencies without a clearance.

18. In my experience, one of the most dissuasive acts of professional retaliation that potential whistleblowers fear is the threat of administrative investigation. I am aware of numerous instances in which government employees chose not to report misconduct because they feared being subjected to investigations unrelated to the subject of their potential reporting. I have often heard potential whistleblowers express the concern that “no one is administratively pure,” which means that no federal employee believes him- or herself to be immune to retaliatory actions if he or she were to report misconduct.

19. Typically, individuals who contact me seeking information about how to safely and legally report government misconduct are fearful that their efforts will be exposed before they decide on a course of action, and are afraid of retaliation that could damage or end their careers. Often, potential whistleblowers are perplexed and frustrated that attempts to report incidents internally are met with resistance and inaction. Many indicate that they believe there are few (and sometimes no) avenues for open communication, advice, or resources about how to

report government misconduct without exposing themselves to adverse employment consequences.

20. When contacted by individuals interested in reporting government misconduct through official channels, I regularly inform them that, based on my personal and professional experiences, simply reporting misconduct commonly leads to dismissal and other serious professional retaliation, and that they must be prepared for those potential consequences.

21. In my experience, most government whistleblowers are dedicated federal employees who have rarely found themselves in a position to challenge the government previously. Not uncommonly, individuals who contact me about potential avenues for whistleblowing are contacting the ACLU for the first time. Many times, such individuals have said to me that contacting me and my employer were actions of “last resort,” because they feel that they have nowhere else to turn for guidance.

22. Many of the whistleblowers who contact me expect that their initial report of waste, fraud, abuse, or illegality will be appreciated and addressed appropriately by agency management. They are often shocked to find that they have become targets of retaliation instead, and need to report both the original complaint and a complaint of retaliation outside their agency to an Inspector General to seek protection. Unfortunately, going outside the agencies often intensifies the retaliation, and the Inspectors General are unable, and sometimes unwilling, to protect whistleblowers or properly investigate their allegations. This stage of the whistleblower process is often the most difficult for the individuals that I advise. Whistleblowers are mostly dedicated public servants who expect that the agencies they work for share their interest in serving the public welfare with honesty and integrity, and they are deeply disappointed when they find otherwise. Whistleblowers are also often ostracized by their peers, who fear that

assisting, sympathizing or even just associating with whistleblowers will harm their own careers. Whistleblowers tend to expect that their members of Congress will be interested in their stories, but often they cannot even get congressional staff to meet with them or respond to their emails. The few that do ultimately receive some public recognition for their efforts have likely already lost their jobs or their status within the agencies and, if they are members of the intelligence community, are treated as persona non grata, making them unemployable even by private contractors. Whistleblowers who choose to fight retaliation are often forced to endure years and years of litigation, at great personal expense and with little likelihood of success. These are dedicated public servants who are willing to put themselves at great risk to ensure all government agencies are held to account, but this dedication to the public interest often takes an incredible personal toll.

23. Almost universally, potential whistleblowers seeking advice from me are seeking confidentiality as to both the fact and substance of our communications. Often, individuals will contact me using personal phone numbers or email addresses in order to avoid revealing the fact of conversations with me to colleagues or superior officials within the government. Most potential whistleblowers have already raised their concerns internally, and thus understand that any public advocacy based on their accounts will be easily identified with them and could lead to adverse professional consequences.

24. My role as an advocate on whistleblower issues depends on the use of the telephone to communicate with potential whistleblowers, as opposed to other available mediums, such as email. Many of the people considering whistleblowing are extremely conflicted about the course of action to take because of their desire to serve their country by ensuring that the law is upheld, combined with their personal fears over the consequences of reporting actions that they

believe to be wrong. These conversations are emotional and difficult, and their inherent intimacy often makes them ill-suited to be conducted through electronic means. In addition, because of the sensitivity of the subject matter, most individuals who contact me about becoming a whistleblower seek to avoid creating an electronic record of their concerns and conflicts before they make the ultimate decision to come forward to report what they know.

25. In my opinion, many individuals fear that they will be discovered reaching outside a government agency to seek advice about exposing wrongdoing. These individuals are extraordinarily sensitive to the risks involved in reporting misconduct and the possibility of retaliation should they be identified as whistleblowers. As a result, I estimate that the vast majority of federal-government wrongdoing is not reported, and that most federal employees who have witnessed wrongdoing choose to “suffer in silence” as a result.

JUDGMENTS ABOUT THE EFFECT OF SECTION 215 CALL TRACKING ON THE WILLINGNESS OF FEDERAL WHISTLEBLOWERS TO CONTACT THE ACLU

26. Through news reporting and professional discussions, I am familiar with the U.S. government’s bulk collection of telephony metadata under Section 215 of the Patriot Act directed at customers of Verizon Business Network Services (“Verizon”).

27. I have personally reviewed a contract between the ACLU and Verizon for telephone services. From my review, I understand that Verizon is the phone-service provider for my Washington, D.C. office phone and for my cellular telephone, which is provided by my employer, the ACLU.

28. Knowledge of the frequency, duration, and timing of calls from government employees to me, or vice versa, would reveal the substance of our relationship because it would indicate that they were considering reporting government misconduct and seeking advice from me and my colleagues about how to legally go about that course of action. A small pattern of

calls between me and a federal employee would lead to a reasonable inference that the individual had knowledge of government wrongdoing, irrespective of whether the content of those calls was known.

29. Because of the professional sensitivity and risks involved for federal employees who are considering becoming whistleblowers, it is my judgment that the Section 215 call-tracking program will cause some individuals to remain silent rather than contact me or the ACLU in order to discuss their options in reporting violations. Knowledge that all of their communications with me or the ACLU are being logged by the government would present a substantial reason for individuals who are undecided about reporting violations but fearful of retaliation from reaching out for advice.

30. As a result, some individuals may decide not to seek advice from me or the ACLU about how to safely and legally report government wrongdoing, and some instances of government wrongdoing will likely go unreported.

31. Without direct contact with whistleblowers, my ability to advocate for greater protections for those who report waste, fraud, abuse, and illegality would be severely hampered. In order to design reforms that protect those conscientious employees and contractor who choose to report government wrongdoing, knowledge of how the system works, or doesn't work, is critical. Since the FBI and intelligence agencies are exempted from the Whistleblower Protection Act, internal executive-branch procedures are the only protection for employees of those agencies. As the agency mechanisms to protect whistleblowers are in a constant state of adjustment, being able to determine which practices provide relief and which create a false promise of security only comes from observing how they work for actual whistleblowers. My work for the ACLU in other national-security fields, including intelligence oversight and

classification reform, would also be severely damaged by whistleblowers' reluctance to contact me. Finally, that reluctance would hamper the ACLU's pursuit of its core missions of protecting individual victims of government misconduct and ensuring that the public receives information about that misconduct from those who have witnessed it.

32. In sum, the Section 215 call-tracking program compromises my ability to gather information and give advice that is relevant and necessary to my role and the ACLU's mission of assisting whistleblowers in safely and legally reporting government misconduct, waste, fraud, or abuse.

* * *

33. Pursuant to 28 U.S.C. § 1746, I hereby declare and state under the penalty of perjury that the foregoing is true and correct.

Date: August 26, 2013



MICHAEL GERMAN