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## United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

October 4, 2013

### Via Electronic Transmission

The Honorable James R. Clapper  
Director of National Intelligence  
Washington, DC 20511

Dear Director Clapper:

I write today to follow up on your recent testimony to the Senate Judiciary Committee concerning the effects of the partial government shutdown on the Intelligence Community ("IC").

During your testimony, you asserted that the legal standard governing whether personnel are engaged in excepted activities under the Antideficiency Act, and therefore may continue to work in the absence of appropriations, is whether their activity is "necessary to protect against imminent threat to life or property."<sup>1</sup> As a result of the furloughs affecting the IC, you stated that you could not guarantee that the Nation remains as safe as it was before the shutdown began. "As each day goes by," you maintained, "the impact and jeopardy to the safety and security of this country will increase."

Respectfully, for the reasons stated below, your testimony appears to reflect both a misreading of the law and a failure of leadership.

There is longstanding authority for the proposition that the necessary national security functions of the federal government are excepted under the Antideficiency Act as "authorized by law,"<sup>2</sup> even if their suspension does not imminently threaten the safety of human life or the protection of property.<sup>3</sup> Indeed, a previous Attorney General concluded that the President has the inherent authority to obligate funds to carry out specific powers granted to him by the Constitution, such as those related to national security, on this basis.<sup>4</sup> As far back as 1981, executive departments and agencies were advised that excepted activities include those that "[p]rovide for the national security."<sup>5</sup> The non-partisan Congressional Research Service has concluded that "[n]ational security-related activities, may, then, be among those for which obligations in advance of appropriations are considered to be 'authorized by law' . . . and are permitted independently of

<sup>1</sup> The Antideficiency Act is codified at 31 U.S.C. §§ 1341 & 1342.

<sup>2</sup> 31 U.S.C. § 1341 (a)(1)(B).

<sup>3</sup> 31 U.S.C. § 1342.

<sup>4</sup> See Opinion by Attorney General Benjamin Civiletti, January 16, 1981, p. 7-10.

<sup>5</sup> Office of Management, Director, Memorandum for Heads of Executive Departments and Agencies, "Agency Operations in the Absence of Appropriations," November 17, 1981, available at [http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment\\_a-4.pdf](http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment_a-4.pdf).

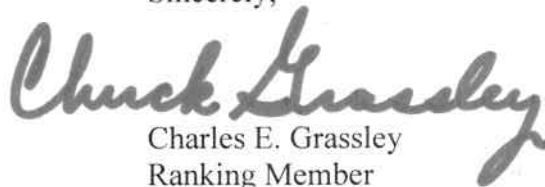
... whether or not they protect [against imminent threats to] life or property.”<sup>6</sup>

Guidance documents prepared by the Administration relating to the current shutdown appear to reflect this common sense interpretation of the law. The furlough notice reportedly received by NSA employees on October 1, 2013 listed as excepted functions “[a]ctivities required for national security,” including – but not limited to – those involving “the safety of human life or the protection of property.”<sup>7</sup> In addition, the contingency plan guidance issued in September 2013 by the Deputy Secretary of Defense, on which you were copied, lists the following as excepted activities: “[c]ommand, control, communications, computer, intelligence, surveillance, and reconnaissance activities required to support national or military requirements necessary for national security.”<sup>8</sup>

In light of the above authority and guidance, there appears to be no reason why the fundamental national security of the Nation should be compromised during the partial government shutdown.<sup>9</sup> In fact, it is your role as Director of National Intelligence to ensure that the work the IC performs that is necessary for the Nation’s security continues uninterrupted. You asserted during your testimony that you were considering recalling certain employees from furlough status. However, under the law, those IC employees necessary to maintain our national security should never have been furloughed in the first place.

In any event, if for whatever reason you believe that the shutdown is interfering with the necessary national security functions of the IC, it is incumbent upon you, as the leader of the IC, to press the President and Congress to work together to pass emergency legislation to adequately fund the IC during the shutdown without delay.

Sincerely,

  
Charles E. Grassley  
Ranking Member

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<sup>6</sup> Pat Towell & Amy Belasco, “Government Shutdown: Operations of the Department of Defense During A Lapse In Appropriations,” Congressional Research Service, R41745, October 1, 2013, p. 13.

<sup>7</sup> Andy Greenberg, “Here’s The Letter Telling NSA Staff To Go Home For The Government Shutdown,” Forbes.com, October 2, 2013, available at <http://www.forbes.com/sites/andygreenberg/2013/10/02/heres-the-letter-telling-nsa-staff-to-go-home-for-the-government-shutdown/>.

<sup>8</sup> Contingency Plan Guidance for Continuation of Essential Operations in the Absence of Available Appropriations, September 2013, p. 4, available at [http://www.defense.gov/home/features/2013/0913\\_govtshutdown/Contingency-Plan-Guidance-Attachment.pdf](http://www.defense.gov/home/features/2013/0913_govtshutdown/Contingency-Plan-Guidance-Attachment.pdf).

<sup>9</sup> Even assuming, as you suggested, that the excepted activity of the IC was limited to situations involving imminent threats to the safety of human lives or the protection of property, the yearly Worldwide Threat Assessment prepared by your office makes clear that the Nation faces such imminent threats on a daily basis from around the world.